

## **CHAPTER 10**

### **ADMINISTRATIVE ADJUDICATIONS**

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## CHAPTER 10

### ADMINISTRATIVE ADJUDICATIONS

**10.1 Scope of this Chapter.** Arizona's Administrative Procedure Act (APA), A.R.S. §§ 41-1001 to -1092.12, establishes the minimum procedures that must be followed for two important functions of most departments, boards and agencies - administrative adjudications and rule-making. This Chapter addresses only administrative adjudications. Chapter 11 discusses the rule making provisions of the APA.

Specifically, this Chapter describes the procedures that state administrative agencies follow in adjudicating “contested cases” or “appealable agency actions,” which are defined in the APA as actions that affect “the legal rights, duties, and privileges” of individual parties. A.R.S. § 41-1001(5)(defining contested case); A.R.S. § 41-1092(3)(defining appealable agency action). When appropriate, these procedures are referred to generically throughout this Chapter as “administrative adjudications.”

Every agency must follow the statutory scheme in either Article 6 of the APA, A.R.S. §§ 41-1061 through -1067 (titled “Adjudicative Proceedings”), or Article 10 of the APA, A.R.S. §§ 41-1092 through -1092.12 (titled “Uniform Administrative Hearing Procedures”), when conducting administrative adjudications. For ease of reference, this Chapter refers to these statutory schemes as either “Article 6” or “Article 10.” Article 10 governs the vast majority of agencies.

There are many differences between the procedures required by Article 6 and Article 10. Agencies required to follow Article 10 should not apply the statutory scheme and terminology in Article 6. Conversely, if an agency is exempt from Article 10, it should conduct its administrative adjudications under the statutes and terminology in Article 6.

**Caveat:** Nearly all administrative adjudications conducted by state agencies are subject to the APA, and the APA supersedes any other statute that would diminish a right provided in the APA, unless a statute expressly provides otherwise. A.R.S. § 41-1002 (B). However, the APA also specifically states that agencies may grant procedural rights greater than those allowed by the APA, so long as those rights do not substantially prejudice the rights of others. See A.R.S. § 41-1002(B), (C). An agency’s specific statutes and rules must, therefore, be reviewed to determine if any rights differ from those described in this Chapter.

**10.2 The APA's Application to Administrative Adjudications.** It is critical for an agency to determine if Article 6 or Article 10 of the APA applies to the administrative adjudications it conducts. Before determining which Article to apply, however, it is first necessary to review the definitions of certain key words and phrases used in the APA

generally to determine if an agency action requires application of APA procedures at all. Some entities may also be statutorily exempt from the APA altogether.

**10.2.1 Definition of “Agency” and Statutory Exemptions.** The APA defines the term “agency” as “any board, commission, department or other administrative unit of this state, including the agency head and . . . other persons directly or indirectly purporting to act on behalf or under the authority of the agency head, whether created under the Constitution of Arizona or by enactment of the legislature.” A.R.S. § 41-1001(1). This definition controls over all other statutes in determining whether an entity is an “agency” for purposes of the APA, including the organic laws of that entity. See *Thompson v. Tucson Airport Auth.*, 163 Ariz. 173, 786 P.2d 1024, 1025 (App. 1989).

The APA's definition of “agency” exempts several entities from its application, including the legislature, the courts, the governor, and all political subdivisions of the State and any administrative units of a political subdivision. A.R.S. § 41-1001(1). Additionally, A.R.S. § 41-1005 specifically exempts any order of the Arizona Game and Fish Commission to open, close or alter seasons or establish bag or possession limits for wildlife, and orders of the Director of Water Resources adopting or modifying a management plan under A.R.S. § 45-561 *et seq.* See A.R.S. §§ 41-1005(A)(2) and (11).

If a board, commission, department, officer or other administrative unit is created or appointed by the joint or concerted action of a state entity (which is covered by the APA), and a political subdivision (which is exempt), the entity is considered an “agency” for APA purposes. A.R.S. § 41-1001(1).

Question about whether an entity is an “agency” under the APA should be addressed to assigned legal counsel.

**10.2.2 Administrative Adjudications Requiring Application of the APA.** Both Article 6 and 10 of the APA refer to “contested cases.” Article 10 of the APA includes the additional concept of the “appealable agency action.” These are terms defined specifically to apply to different types of agency decisions. This subsection examines the meaning of these key phrases.

**10.2.2.1 Contested Cases.** Both Articles 6 and 10 of the APA use the term “contested case,” which is defined to include “any proceeding, including rate making, price fixing and licensing, in which the legal rights, duties or privileges of a party are required or permitted by law . . . to be determined by an agency after an opportunity for an administrative hearing.” A.R.S. § 41-1001(5). So, a hearing on a contested case occurs *before* the agency renders a decision. The APA defines “licensing” to include those cases “respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal or amendment of a license.” A.R.S. § 41-1001(13).

**10.2.2.2 Appealable Agency Actions.** Article 10 of the APA defines an “appealable agency action” as “an action that determines the legal rights, duties or

privileges of a party and that is not a contested case.” A.R.S. § 41-1092(3). A hearing on an appealable agency action occurs *after* an agency renders a decision and only when a party with standing to challenge the decision requests a hearing. See A.R.S. § 41-1092.03. Also, a hearing on an “appealable agency action” occurs only for agencies governed by Article 10 of the APA.

The definition of “appealable agency action” exempts several actions, including: (a) “interim orders by self-supporting regulatory boards”, (b) “rules, orders, standards or statements of policy of general application issued by an administrative agency to implement, interpret or make specific the legislation enforced or administered by it,” and (c) rules “concerning the internal management of the agency that do not affect private rights or interests.” A.R.S. § 41-1092(3); see also A.R.S. § 41-1092(7) (listing self-supporting regulatory boards). An agency’s organic statutes may also exempt application of the procedures for a decision that might otherwise be considered an appealable agency action. See, e.g., A.R.S. § 8-811 (applicable to certain DES decisions).

**10.2.2.3 Determining Whether “Legal Rights, Duties or Privileges” Are Affected.** The APA does not define the term “legal rights, duties or privileges.” In general, the federal and state constitutions, together with Arizona statutes and rules, determine the existence of legal rights, duties, or privileges.

The Fourteenth Amendment to the United States Constitution and Article II, Section 4, of the Arizona Constitution, which both provide that “[n]o person may be deprived of life, liberty, or property without due process of law,” require notice and an opportunity for hearing before an agency can take away a person’s property interest, such as an existing license to practice a profession. See *Schillerstrom v. State*, 180 Ariz. 468, 471, 885 P.2d 156, 159 (App. 1994). Due process, however, is not a technical concept with fixed requirements, but is instead flexible, calling only for those procedural protections demanded by the particular situation. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); see also *Comeau v. Arizona State Bd. of Dental Exam’rs*, 196 Ariz. 102, 107, 993 P.2d 1066, 1071 (App. 1999).

In some situations in which due process may not necessarily require a full hearing before an agency decision, Arizona law creates such a right by statute or rule. See, e.g., A.R.S. § 49-428(A). This statutory grant of a procedural right constitutes the type of “legal right, duty or privilege” to which the APA applies.

An agency may also create a right to a hearing by its rules. Whether the APA applies will depend on the language of the rule and the context of the agency decision. For example, the Arizona Court of Appeals considered the unique nature of a prison setting in holding that an inmate disciplinary hearing is not a “contested case” within the meaning of the APA. *Rose v. Ariz. Dept. of Corrections*, 167 Ariz. 116, 120, 804 P.2d 845, 849 (App. 1991).

In general, questions about the requirement of a full hearing under the APA should be resolved in favor of affording a party a hearing.

**10.2.3 Possible Exception from the APA for Jurisdictional Decisions.** The APA controls procedures regarding decisions that go to the merits of a matter involving the “legal rights, duties or privileges” of a party. However, the Arizona Court of Appeals has held that the procedures of the APA do not apply to the initial inquiry by an agency concerning the agency's jurisdiction to review a matter. *Stoffel v. Ariz. Dept. of Econ. Sec.*, 162 Ariz. 449, 450-51, 784 P.2d 275, 276-77 (App. 1989). This decision may not apply, however, to those agencies that are governed by Article 10 of the APA, because the statutory definition of appealable agency actions exempts an internal management decision only if it does not “affect private rights or interests.” A.R.S. § 41-1092(3). Under this more recent statute, an agency’s jurisdictional decision may be considered an appealable agency action if it affects someone's private rights or interests.

**10.2.4 Waiver of Procedural Rights in the APA.** “Except to the extent precluded by another provision of law, a person may waive any right conferred on that person by [the APA].” A.R.S. § 41-1004.

**10.3 Determining Whether a Hearing is Required Prior to Action.** The APA contemplates that hearings may occur either before or after an agency makes a decision that determines a “right, duty or privilege.” As a general rule, a hearing occurs upon request of a party after an agency decision when the agency is deciding whether or not to grant a privilege, and an opportunity for hearing must occur before an agency decision when the agency is deciding whether to alter or terminate a privilege that has already been granted.

Both Article 6 and Article 10 of the APA specifically provide that “[n]o revocation, suspension, annulment or withdrawal of any license is lawful unless, prior to the action, the agency provides the licensee with notice and an opportunity for a hearing in accordance with [the APA].” A.R.S. § 41-1064(C); A.R.S. § 41-1092.11(B). This statutory requirement is consistent with principles of due process, which generally require an opportunity for a hearing before a decision is made to revoke an existing property right or privilege. *State v. O'Connor*, 171 Ariz. 19, 23, 827 P.2d 480, 484 (App. 1992). This provision does not address whether a hearing is required prior to the imposition of civil penalties on a person who holds a license. Some agencies treat the imposition of civil penalties as an appealable agency action and hold a hearing upon request by the licensee. See A.R.S. § 3-3475(A) (Division of Weights & Measures). Other agencies treat the matter as a contested case and impose civil penalties only after an opportunity for an administrative proceeding. A.R.S. § 32-1451(K) (Arizona Medical Board). If you have any question about whether a hearing should be held before or after imposing a sanction other than those listed above, you should seek advice from your legal counsel.

Conversely, unless the organic statutes of the agency provide otherwise, if the decision involves whether to grant a property right or privilege (e.g., a license), then the

hearing need not be held until after the decision is made, and only upon the request of the person affected. See A.R.S. § 41-1065 (hearing on denial of license); A.R.S. § 41-1092.03 (appealable agency actions). In such cases, the party requesting the hearing has the burden of proof. See A.R.S. § 41-1065; A.R.S. § 41-1092.07(G)(1); A.A.C. R2-19-119 (rules of the Office of Administrative Hearings (OAH) establishing the burdens of proof).

Some organic statutes of an agency making a decision require that a hearing be held prior to a decision. Such matters should be treated as a contested case and a hearing must be held before any action is taken. See A.R.S. § 41-1001(5).

There are some recognized exceptions to the requirement that a hearing must be held prior to taking action against a legal right, duty or privilege.

1. *Summary Proceedings.* In certain instances, state law allows an agency to take action without first holding a hearing. In most cases, action taken without a prior hearing must be promptly followed by a hearing that affords the party an opportunity to present its side of the case. For example, both A.R.S. §§ 41-1064(C) and 41-1092.11(B) provide for summary suspensions: “[i]f the agency finds that public health, safety or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order,” the agency may summarily suspend a license pending formal “proceedings for revocation or other action.” Generally, the hearing must be held less than sixty days after the summary action. *Dahnad v. Buttrick*, 201 Ariz. 394, 400, ¶ 24, 36 P.3d 742, 748 (App. 2001) (finding commencement of hearing nearly sixty days after summary action violates due process).

The decision to proceed without a hearing should be made with caution. If the agency provides notice and an opportunity to attend a public meeting to institute a summary action, upon request, the licensee must be allowed to address the agency regarding the allegations. *Dahnad*, 201 Ariz. at 399, ¶ 21, 36 P.2d at 747.

2. *Failure to File.* A hearing is not required when the agency's action is based solely upon the failure of a person to timely file a required report, application, or other material, to pay required fees, or maintain required bonds or insurance. See *Estate of Miner v. Commercial Fisheries Entry Comm'n*, 635 P.2d 827, 834 (Alaska 1981). For example, the statutes governing the practice of chiropractic medicine in Arizona allow the Board to automatically suspend a license for failure to pay the renewal fee and to reinstate the license once the licensee pays the statutory late fees. A.R.S. § 32-923(C).
3. *Non-discretionary Acts.* A hearing is not required when agency action is mandated by law, such as actions involving the suspension of a driver's license upon certain traffic-related convictions. See *Thomson v. Miller ex rel. Highway Dep't*, 163 Ariz. 461, 462, 788 P.2d 1212, 1213 (App. 1989).

## **10.4 Deciding Whether to Apply Article 6 or Article 10 of the APA.**

**10.4.1 General Background.** Before 1995, only Article 6 of the APA (A.R.S. §§ 41-1061 through -1067) governed administrative adjudications for Arizona administrative agencies. However, with the legislation creating OAH in 1995, most administrative adjudications in Arizona are now governed by Article 10 of the APA, found at A.R.S. §§ 41-1092 through -1092.12. Only one of the Articles will apply to each agency – either Article 6 or Article 10. Thus, before conducting any administrative adjudication, it is critical to determine if the agency is governed by Article 6 or Article 10.

**10.4.2 Application of Article 10 to Most State Agencies.** Unless expressly exempted by A.R.S. § 41-1092.02(A), every State agency in Arizona is required to apply Article 10 of the APA to conduct all contested cases and appealable agency actions. Also, A.R.S. § 41-1092.02(B) indicates that the procedural rules established by the Director of OAH apply to all hearings conducted under Article 10. Thus, even if an agency chooses not to use OAH to conduct its hearings, and instead conducts the hearing itself under the authority of A.R.S. § 41-1092.01(F), the agency must apply the procedures in Article 10 and should follow the rules created by OAH for Article 10 hearings. In addition, an agency's organic statutes may require application of Article 10 and the use of OAH as the administrative law judge for the hearing. See, e.g., A.R.S. § 8-811(J).

Article 6, on the other hand, now applies only to contested cases of agencies that are exempt from Article 10 by statute, such as those exempted by A.R.S. § 41-1092.02(A). See A.R.S. § 41-1067.

**10.4.2.1 Exemptions from Application of Article 10.** Agencies exempt from Article 10 of the APA are listed in A.R.S. § 41-1092.02(A). The Legislature may exempt other agencies from Article 10 by so providing in the agency's organic statutes.

A.R.S. § 41-1092.02 exempts some agencies from Article 10 only for particular types of contested cases and appealable agency actions. A.R.S. § 41-1092.02(A)(13) (State Board of Education for certification matters). Also, A.R.S. § 41-1092.02 exempts some agencies from certain parts of Article 10:

- Subsection (E) exempts the Department of Revenue from A.R.S. §§ 41-1092.03, -1092.08, and -1092.09, unless the case involves unclaimed property.
- Subsection (F) exempts the Board of Appeals for the Land Department, established by A.R.S. § 37-213, from the time frames for hearings and decisions in A.R.S. § 41-1092.05(A), A.R.S. § 41-1092.08, and A.R.S. § 41-1092.09.

Finally, the Arizona Peace Officer Standards and Training Board is exempt only from the application of A.R.S. § 41-1092.08. See A.R.S. § 41-1092.08(I).

## **10.5 Administrative Adjudications Under the APA - An Overview.**

### **10.5.1 Types of Administrative Adjudications Under the APA.**

**10.5.1.1 Disciplinary and Enforcement Proceedings.** State agencies most commonly use formal administrative hearings to determine whether disciplinary or enforcement actions should be taken against persons they license or otherwise regulate. After a formal notice of the allegations is given to the licensee (Respondent), the agency, through its board, agency head, or ALJ/hearing officer, takes evidence. The agency must then make findings of fact, conclusions of law, and an order based on the evidence presented at the hearing.

The agency may deny, suspend, or revoke a license, or impose other sanctions, such as ordering payment of civil penalties or issuing censures, remedial probations, or cease and desist orders. The sanctions available depend on what is allowed by the agency's organic statutes.

**10.5.1.2 Summary Suspension of License.** If an “agency finds that the public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order,” the agency may summarily suspend a license. A.R.S. § 41-1064(C); A.R.S. § 41-1092.11(B). However, proceedings for an administrative adjudication under the APA must be promptly instituted and determined. *Id. Dahnad v. Buttrick*, 201 Ariz. 394, 400, ¶ 23, 36 P.3d 742, 748 (App. 2001). If an agency's own statutes or rules provide summary suspension procedures and timetables that are more specific than those in the APA, the agency's scheme should control. See *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375, 1378 (9th Cir. 1989).

**10.5.1.3 Appealable Agency Actions.** Article 10 of the APA recognizes a type of administrative adjudication called the “appealable agency action,” which is defined broadly to include any action that determines the legal rights, duties, or privileges of a party that is not preceded by an opportunity for a hearing. A.R.S. § 41-1092(3). When an agency makes a decision that constitutes an appealable agency action, it is required to serve notice on the affected individual, and hold a hearing if requested. A.R.S. § 41-1092.03. The procedures for appealable agency actions are more fully discussed at Sections 10.6.3 and 10.7 through 10.7.6.

**10.5.1.4 Other Administrative Adjudications.** In addition to enforcement and disciplinary proceedings, some agencies conduct administrative adjudications of a different nature. Examples include rate hearings before the Corporation Commission, and benefits hearings involving the Department of Economic Security or the Arizona Health Care Cost Containment System. Any hearing conducted by any agency that falls within the definition

of a “contested case” or “appealable agency action” is subject to either Article 6 or Article 10 of the APA.

### **10.5.2 Quasi-Judicial Nature of the Administrative Adjudication.**

Administrative adjudications are often referred to as “quasi-judicial” proceedings, because, although much less formal, they are similar to judicial proceedings in court. An administrative adjudication before an agency is not subject to the strict procedural and evidentiary rules applicable in most court proceedings. A.R.S. § 41-1062(A)(1); A.R.S. § 41-1092.07(F)(1). Agencies must, however, observe all procedural requirements imposed on them by statute or rule and conduct administrative adjudications in accordance with applicable constitutional due process requirements.

Like a judicial proceeding, the function of an administrative adjudication is twofold. First, the proceeding is used to determine contested issues of fact and law. This portion of the proceeding is the most trial-like of the administrative functions and may be conducted by the agency’s decision making body, the OAH, or, by a hearing officer appointed to preside over the proceeding. If an administrative law judge or a hearing officer hears the evidence, she or he is required to provide recommended findings of facts and conclusions of law to the decision making body of the agency, which may then adopt, modify, or reject them.

Second, an administrative adjudication is used to determine what action is appropriate based on the findings of facts and conclusions of law adopted. The agency’s decision making body, absent specific statutory authority, may not delegate its final decision making function to an administrative law judge or a hearing officer although the ALJ or hearing officer may recommend an appropriate order.

**10.5.3 Minimum Rights of the Parties Under the APA.** The APA includes certain minimum rights of the parties that are designed to protect due process in administrative adjudications. The following is a general list of the minimum rights required for administrative adjudications.

**10.5.3.1 Opportunity for a Hearing after Reasonable Notice.** Any person who is a party to a proceeding must be provided reasonable notice of the proceeding and an opportunity to appear and be heard. A.R.S. § 41-1061(A),(B); A.R.S. § 41-1092.05(D).

**10.5.3.2 Right to Present Evidence and Cross-Examine.** Every party to a proceeding has the opportunity to respond and to present evidence on all issues. A.R.S. § 41-1061(D); A.R.S. § 41-1092.07(D). The parties have the right to cross-examine witnesses. A.R.S. § 41-1062(A)(1); A.R.S. § 41-1092.07(B).

**10.5.3.3 Right to Counsel.** A party to a proceeding may be accompanied and represented by legal counsel. A.R.S. § 41-1062(A)(1); A.R.S. § 41-1092.07(B).



**10.5.3.4 Final Decision Based Solely on the Record.** Parties to an administrative adjudication are entitled to a decision in writing or stated upon the record that is based solely upon the record admitted at the hearing. A.R.S. §§ 41-1063 and -1061(G); A.R.S. §§ 41-1092.07(F)(6) and -1092.08. Final decisions in matters proceeding under Article 10 must include conclusions of law that specifically address the agency's authority to make the decision consistent with A.R.S. § 41-1030. A.R.S. § 41-1092.07(F)(7).

**10.5.3.5 Rehearing and Review.** Except when good cause exists, an "agency shall provide an opportunity for a rehearing or review of the [agency's decision] before such decision becomes final." A.R.S. § 41-1062(B); see also A.R.S. § 41-1092.09.

**10.5.4 Agency Adoption of Rules of Practice.** Prior to the creation of Article 10, the APA required that every agency adopt rules of practice establishing the nature and requirements of all formal procedures available to the public. A.R.S. § 41-1003;. Now, however, those agencies required to follow Article 10 for administrative adjudications must follow the procedures in Article 10 and should follow the rules adopted by OAH. Thus, an agency's procedural rules for administrative adjudications should describe only those procedures for decisions that are not covered by Article 10 of the APA. The failure to adopt such rules, standing alone, does not violate due process. *Elia v. Ariz. State Bd. of Dental Exam'rs*, 168 Ariz. 221, 228, 812 P.2d 1039, 1046 (App. 1990). The APA, however, will control any conflict between rules of procedure created by an agency and those in the APA.

**10.5.5 Informal Disposition of Complaints.** Article 10 of the APA specifically provides that "[i]nformal disposition [of a complaint] may be made by stipulation, agreed settlement, consent order or default." A.R.S. § 41-1092.07(F)(5). In contested cases, the parties or a hearing officer may request a settlement conference. See A.R.S. §§ 41-1061(C) and -1092.05(F)(6). The process under Article 10 for appealable agency actions and contested cases specifically requires an informal settlement conference when requested by the appellant. See A.R.S. § 41-1092.06; Section 10.7.4.

**10.5.6 The Regulatory Bill of Rights - Application to Administrative Adjudications.** In 1998, the Legislature added the "Regulatory Bill of Rights" to the APA. See A.R.S. § 41-1001.01. The following is a description of the enumerated "rights" that apply to administrative adjudications:

A person is eligible to be reimbursed for fees and expenses incurred if the person prevails by adjudication on the merits against an agency in a court proceeding, regarding an agency decision, "as provided in [A.R.S.] § 12-348." See A.R.S. § 41-1001.01(A)(1). Under A.R.S. § 12-348(A)(2), a court may award fees and other expenses to a party that prevails "by an adjudication on the merits" in a "court proceeding to review a state agency decision pursuant to chapter 7, article 6 of this title or any other statute authorizing judicial review of agency . . . decisions."

A person is also eligible to receive reimbursement of costs and fees if the person prevails against an agency in an administrative hearing, as provided in A.R.S. § 41-1007. See A.R.S. § 41-1001.01(A)(2). In order for such an award of fees to be made, a finding must be made that the agency's position was not substantially justified *and* that the person prevailed as to the most significant issue or set of issues, absent any intervening change in the law. A.R.S. § 41-1007(A). For further information, see Section 10.18.

A person may have the administrative hearing on contested cases and appealable agency actions "heard by an independent administrative law judge as provided by Articles 6 and 10 of [the APA.]" See A.R.S. § 41-1001.01(A)(11).

A person may have an administrative adjudication governed by the uniform administrative appeal procedures in Article 6 or Article 10 of the APA. See A.R.S. § 41-1001.01(A)(12).

A person may file a complaint or inquiry with the Office of the Ombudsman - Citizen's Aid to investigate administrative actions. See A.R.S. § 41-1001.01(A)(18).

## **10.6 Parties to the Proceeding.**

**10.6.1 General Definition.** The APA defines "party" to include "each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party." A.R.S. § 41-1001(14).

**10.6.2 Agency Initiated Proceedings.** Unless otherwise specified by its organic statutes, an agency usually has authority to institute administrative adjudications only regarding (a) those persons to whom it has issued licenses or (b) those who claim a benefit or right under statutes administered by the agency. Some agencies are also empowered to take enforcement actions, such as issuing cease and desist orders, against unlicensed individuals who have engaged in acts that violate the statutes and rules administered by the agency. Some agencies can also commence enforcement actions against licensed persons who fail to renew the relevant licenses after being informed of a pending investigation of alleged misconduct. See A.R.S. § 32-3202.

When an agency initiates an action that will affect the rights, duties, or privileges of any person, and serves that person with notice of the proceeding, that person becomes known as the "Respondent" and is a party to the proceeding. The respondent may be a natural person, a partnership, a corporation, or some other entity.

**10.6.2.1 Disciplinary and Enforcement Proceedings.** In enforcement and disciplinary proceedings, there are usually two parties: the State or the State agency that brings the charges, and the licensee or respondent against whom the charges have been brought. In many cases the agency brings charges as a result of a complaint filed by a private individual or other entity, but in such cases the complaining person or entity does not normally become a party to the action. However, some agencies hold administrative

adjudications based on formal complaints filed by a complainant, who is then a party to the proceeding. See A.R.S. § 32-1155(A) (Registrar of Contractors).

**10.6.3 Appealable Agency Actions.** In an appealable agency action, there are two parties: the “appellant” who requests a hearing to challenge an appealable agency action and the agency that took the action.

**10.6.4 Party Representation.** Before the initiation of a formal administrative adjudication, the agency’s case is usually prepared and presented by a member of the agency’s staff who investigates and obtains evidence that supports action against the licensee or respondent. After the agency determines to file formal charges, either an agency staff member or the Assistant Attorney General assigned to represent the agency prepares the notice of hearing. The Assistant Attorney General then presents the evidence to the hearing board or officer and makes any argument allowed by the final decision maker.

The licensee or respondent may represent himself or herself at the hearing or may be represented by an attorney. A.R.S. § 41-1062(A)(1); A.R.S. § 41-1092.07(B). There is no constitutional right to representation that requires an agency to pay for or appoint legal counsel for a party in an administrative adjudication, even if the party is indigent.

**10.6.4.1 Representation by Layperson.** Generally, a non-lawyer may not represent another in a judicial or quasi-judicial proceeding unless the Arizona Supreme Court has authorized such representation. *Hunt v. Maricopa Cty. Employees Merit Sys. Comm’n*, 127 Ariz. 259, 264, 619 P.2d 1036, 1041 (1980). The Supreme Court’s rules clearly indicate the Court’s intent to regulate the practice of law in administrative proceedings as well as in courts. See Ariz. Sup. Ct. R. 31(d)(11) (permitting layperson to represent parties in certain administrative proceedings).

Because a corporation is an entity separate from its owners, a corporation may not normally represent itself in a quasi-judicial proceeding through an officer, shareholder, or other employee. *Ramada Inns, Inc. v. Lane & Bird Advertising, Inc.*, 102 Ariz. 127, 128, 426 P.2d 395, 396 (1967). Therefore, except when authorized by the Supreme Court as identified below, a corporation must be represented by an attorney when appearing before an agency.

The Court has authorized lay representation in administrative proceedings under the following circumstances:

1. *DES and DCS matters.* As authorized by Ariz. Sup. Ct. R. 31(d)(1).
2. *Personnel matters.* As authorized by Ariz. Sup. Ct. R. 31(d)(2).
3. *Industrial Commission/Arizona Division of Occupational Safety and Health.* As authorized by Ariz. Sup. Ct. R. 31(d)(5).

4. *DHS/Ambulance Service*. As authorized by Ariz. Sup. Ct. R. 31(d)(6).
5. *AHCCCS/Behavioral Health Services*. As authorized by Ariz. Sup. Ct. R. 31(d)(8).
6. *DEQ Matters*. As authorized by Ariz. Sup. Ct. R. 31(d)(10).
7. *Matters Before OAH*. As authorized by Ariz. Sup. Ct. R. 31(d)(11).
8. *AHCCCS Administrative Appeal Matters*. As authorized by Ariz. Sup. Ct. R. 31(d)(12).
9. *Tax Related Matters*. As authorized by Ariz. Sup. Ct. R. 31(d)(13).
10. *Supervised Law Students*. An Arizona law professor or law student, certified by his or her law school with the Supreme Court as eligible to participate as a clinical law professor or legal intern, as authorized by Ariz. Sup. Ct. R. 38(d).

The Arizona Legislature has enacted several statutes that purport to authorize lay representation under other circumstances. In light of the *Hunt* decision, these statutes alone do not authorize non-lawyers to appear and represent others in administrative adjudications. See *Hunt*, 127 Ariz. at 259, 619 P.2d at 1036. In addition, an agency does not have the authority to promulgate rules permitting lay representation unless such representation is permitted by the Arizona Supreme Court. *Id.*

A non-lawyer permitted to represent a party in a particular proceeding is subject to the disciplinary jurisdiction of the Arizona Supreme Court. Ariz. Sup. Ct. R. 46(b).

#### **10.6.4.2 Representation by Attorney Not Admitted to State Bar of Arizona.**

Attorneys who are not members of the State Bar of Arizona may be permitted to represent parties in state courts if they satisfy the requirements for admission *pro hac vice*. Ariz. Sup. Ct. R. 33(c), 38(a). Attorneys given this permission are subject to the disciplinary jurisdiction of the Arizona Supreme Court. Ariz. Sup. Ct. R. 38(a)(11), 46(b).

The APA provides that parties to an administrative proceeding have the right to be represented by counsel. A.R.S. §§ 41-1062(A)(1); -1092.07(B). To assist parties in utilizing the counsel of their choice, agencies should allow attorneys who are not members of the State Bar of Arizona to represent parties in administrative proceedings if the attorneys properly file a request and satisfy the admission *pro hac vice* requirements listed in Rule 38(a) of the Arizona Rules of Supreme Court.

Additionally, a statutory grant of power to prescribe rules of practice and procedure impliedly authorizes a quasi-judicial board or commission to prescribe rules governing the procedure for admission of attorneys to practice before it. See *Goldsmith v. U. S. Bd. of Tax Appeals*, 270 U.S. 117, 122 (1926). See, e.g., A.R.S. § 32-703(B)(5) (Board of Accountancy) When an attorney who is not a member of the Arizona Bar notifies an

agency that he or she plans to represent a party before the agency's decision making body, the agency should promptly notify the attorney of the required procedures. See Appendix 10.1 (Sample Letter to Nonmember Attorney or Representative).

**10.6.5 Intervention.** Intervention is the procedure by which a person not originally a party to a proceeding requests that she or he be included as a party.

Neither Article 6 nor Article 10 of the APA specifically provides for intervention, although the APA implies that the procedure should be available when it defines a “party” to include those who are “properly seeking and entitled as of right to be admitted as a party.” A.R.S. § 41-1001(14). However, OAH will consider intervention requests under A.A.C. R2-19-102.C and A.R.S. Rule 24, Arizona Rules of Civil Procedure.

A person who seeks to intervene in a proceeding before an agency must file a motion to do so. The motion should state the name and address of the person making the motion, the name and number, if any, of the proceeding, the grounds justifying intervention, and the claim or defense on which intervention is sought. The person seeking to intervene should serve a copy of the motion on all parties. If the motion is granted, the intervenor becomes a party for all purposes for which intervention has been allowed.

**10.6.5.1 Intervention as of Right.** The statutes and rules applicable to the agency may require that a person be allowed to intervene in an administrative adjudication under certain circumstances. In such a case, the agency must allow the person to become a party if the person files a timely motion in the proper form and meets the necessary requirements prescribed by statute or rule.

**10.6.5.2 Discretionary Intervention.** An agency may be authorized, by statute or rule, to allow persons other than the original parties to intervene in a contested case.

As a general rule, if the agency's statutes or rules permit intervention, the agency should nonetheless grant a motion to intervene only if: 1) the motion is timely, which usually means that it should be made before the hearing begins; 2) the person asking to intervene has an interest that would be substantially affected by the proceeding; 3) the person's interest is not adequately represented by another party to the proceeding; and 4) the intervention would not cause serious delay or disruption, or otherwise burden the hearing process or unfairly prejudice the rights of existing parties. See *generally* Ariz. R. Civ. P. 24 (rules governing intervention in civil cases in Arizona superior courts).

In cases in which intervention of right is not available, the agency, in its discretion, may deny intervention altogether or it may limit the scope of the intervention.

## **10.7 Initial Procedures for Article 10 Appealable Agency Actions.**

**10.7.1 Initiating the Process for Appealable Agency Actions.** An agency initiates the process for an appealable agency action by making a decision that constitutes

an appealable agency action (such as a license denial) and then serving a “Notice of Appealable Agency Action” on the affected party. A.R.S. § 41-1092.03(A). The notice must meet the statutory requirements under Chapter 10.. *Id.* For the denial of a license application, the notice must also comply with A.R.S. § 41-1076. See Appendix 10.2 (sample form notice of appealable agency action).

**10.7.1.1 Timing for Notice of Appealable Agency Action.** Notice of the denial of a license must be made within the time frames set by an agency pursuant to A.R.S. §§ 41-1072 through -1079. Failure to timely issue the written notice denying a license application can result in sanctions. See A.R.S. § 41-1077.

**10.7.1.2 Appeal in the Absence of Notice - DEQ Actions.** Under a statute applicable only to actions taken by the Department of Environmental Quality (“DEQ”), a party may seek review of an action taken by DEQ even if the party did not receive a “notice of appealable agency action.” A.R.S. § 41-1092.12. This statute applies very narrowly, and legal counsel should be consulted if a question arises concerning its application.

**10.7.2 The Notice of Appeal.** A party may obtain a hearing by filing a notice of appeal that meets the statutory requirements within thirty (30) days after receiving the notice of appealable agency action. A.R.S. § 41-1092.03(B). The notice of appeal may be filed by the party whose legal rights, duties, or privileges were determined by the agency, or by anyone who is adversely affected by the appealable agency action and who was allowed to comment on the action by law or rule. *Id.* If good cause is shown, an agency head may accept an appeal that is not filed timely. A.R.S. § 41-1092.03(C).

**10.7.3 Notice of the Proceeding.** At least thirty (30) days prior to the hearing, the agency shall prepare and serve a notice of hearing on all parties to the appeal. A.R.S. § 41-1092.05(D). In the case of an appealable agency action there is no “complaint” by the agency. Hence, the notice should simply be called a “Notice of Hearing.” The notice should identify the scope of the hearing and must contain the information required by A.R.S. § 41-1092.05(D).

**10.7.4 Informal Settlement Conference.** Article 10 of the APA specifically provides that an appellant of an appealable agency action or the respondent in a contested case has the right to request an informal settlement conference with the agency. A.R.S. § 41-1092.06. If requested, the agency must hold the informal settlement conference within fifteen (15) days after receipt of the request. *Id.* The request for the informal settlement conference must be in writing and must be filed with the agency no later than twenty (20) days prior to the hearing. If the agency uses OAH as a hearing officer for the appealable agency action, the agency must notify OAH of the request for the informal settlement conference and of the outcome of the conference. *Id.* The statute has additional requirements and limitations that should be reviewed.

**10.7.5 Burden of Proof for Appealable Agency Actions.** Article 10, which governs appealable agency actions, does not specify which party bears the burden of proof

in an appealable agency action. However, in hearings on the denial of a license or permit, or an application for modification thereof, the applicant has the burden of proof. A.R.S. § 41-1092.07(G)(1). Also, when an agency takes action on its own initiative and without prior hearing to “suspend, revoke, terminate or modify” the material terms of a license or permit, the agency has the burden of proof in an appeal of the action. A.R.S. § 41 1092.07(G)(2). In situations where the agency imposes penalties or fees without a prior hearing, the agency has the burden of proof in an appeal of the action. A.R.S. § 41-1092.07(G)(3). OAH has also adopted a rule stating that the party asserting a claim, right, entitlement, or affirmative defense has the burden of proof. A.A.C. R2-19-119.

#### **10.7.6 Necessity of Filing Notice of Appeal to Preserve Judicial Review.**

Article 10 of the APA specifically provides that a person must file a Notice of Appeal from an appealable agency action to preserve the right to judicial review. A.R.S. § 41-1092.08(H).

### **10.8 Initial Procedures for Contested Cases.**

#### **10.8.1 Initiating the Process.**

An agency usually initiates an administrative proceeding by issuing a “Complaint and Notice of Hearing” or other similar document, which can be drafted by agency staff or an Assistant Attorney General who represents the agency.

The initiation of formal proceedings does not mean that the agency has made a final decision or that the respondent is guilty of the charges. The commencement of a proceeding means only that the agency has concluded that there is enough evidence to warrant a formal proceeding. *In re Davis*, 129 Ariz. 1, 3, 628 P.2d 38, 40 (1981).

#### **10.8.2 Notice of the Proceeding.**

**10.8.2.1 Purpose of the Notice.** Due process requires that an agency provide adequate notice of the formal administrative adjudication to all parties. The notice, which is analogous to the complaint filed in a civil action in court, informs the party of the existence and nature of a proceeding affecting his or her individual rights. *Elia v. Ariz. State Bd. of Dental Exam’rs*, 168 Ariz. 221, 228, 812 P.2d 1039, 1046 (App. 1990) (“Due process assures an individual notice of the charges prior to commencement of a hearing so that the person charged has a meaningful opportunity for explanation and defense.”) Failure to give adequate notice may cause a reviewing court to set aside the final decision of the agency.

**10.8.2.2 Form and Contents of the Notice.** Although this handbook uses the title “Complaint and Notice of Hearing,” the statutes applicable to the particular agency may refer to the charging document as a complaint, a petition, or some other title. Unless the applicable statutes require a different title, the notice document should always include the words “Notice of Hearing.”

The requirements for a notice of hearing are the same under both Article 6 and Article 10, and include the following:

1. A statement of the time, place and nature of the hearing.
2. A statement of the legal authority and jurisdiction under which the hearing is to be held.
3. A reference to the particular sections of the statutes and rules involved.
4. A short and plain statement of the matters asserted. The agency should identify the conduct which is alleged to give rise to the violations in the notice.

See A.R.S. §§ 41-1061(B) and -1092.05(D).

The content of the notice is extremely important. The notice frames the issues to be decided in the hearing. The agency cannot, for example, allege in its notice that a licensee has engaged in a certain type of misconduct, and then at the hearing introduce evidence of an entirely different type of misconduct. *Carlson v. Ariz. State Pers. Bd.*, 214 Ariz. 426, 433, 153 P.2d 1055, 1062 (App. 2007). If evidence of new misconduct arises, the agency should consider either addressing it in a separate proceeding or suspend the proceedings and issue an amended notice allowing the party an opportunity to prepare a defense for the additional charge. *Id.* at 433, ¶ 22, 153 P.2d 1062. Pleadings before administrative agencies are liberally construed, however, and if an issue is actually litigated with reasonable notice and opportunity to cure surprise, the agency's finding on the issue will be upheld. *Ethridge v. Ariz. State Bd. of Nursing*, 165 Ariz. 97, 106, 796 P.2d 899, 908 (App. 1989); see also *Gaveck v. Ariz. State Bd. of Podiatry Exam'rs*, 222 Ariz. 433, 437, ¶ 13, 215 P.3d 1114, 1118 (App. 2009).

**10.8.3 Service of the Notice.** Article 10 of the APA requires that, unless otherwise provided, every notice or decision must be served by personal delivery or certified mail, return receipt requested, or by any other method reasonable calculated to effect actual notice on the agency and every other party at the party's last address of record with the agency. A.R.S. § 41-1092.04. Every party is required to notify the agency of a change of address within five (5) days of the change. *Id.* The Office of Administrative Hearings requires service on all parties of any document filed with it. A.A.C. R2-19-108.E. That rule also identifies methods of service, including service by "express mail", which can include service by email. *Id.*

Article 6 of the APA does not specifically identify a method of service for a Complaint and Notice of Hearing. Due process requires that the agency use a method that is reasonably calculated, under all the circumstances, to inform the interested parties that an action is pending and to afford them the opportunity to present their objections. *Mullane*



*v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); see also *Comeau v. Ariz. State Bd. of Dental Exam'rs*, 196 Ariz. 102, 108, ¶ 28, 993 P.2d 1066, 1072 (App. 1999). Generally, the statutes applicable to an agency prescribe the manner of giving notice. If the agency statutes do not prescribe how the notice must be served, the notice should be given by personal delivery upon the person or sent by certified mail to the intended recipient at the last known address contained in the records of the agency. See, e.g., *Bingham v. Natural Res. & Env'tl. Protection Cabinet*, 761 S.W. 2d 627, 628 (Ky. App. 1988) (constructive service by certified mail to last known address is adequate.)

Neither Article 10 nor Article 6 of the APA requires sending a copy of the notice to a third party, e.g., a complainant. An agency's organic statutes or rules may, however, require service of various documents upon a complainant. See, e.g., A.R.S. § 32-1263.02(E) (Dental Board).

**10.8.4 Timing of Service - Notice of Hearing.** Article 10 specifies that the Notice of Hearing be served at least thirty (30) days prior to the date set for the hearing. A.R.S. § 41-1092.05(D).

In Article 6 cases, unless a specific statute applicable to the agency provides otherwise, "the notice [must] be given to the party at least twenty (20) days prior to the date set for hearing." A.R.S. § 41-1061(A).

**10.8.5 Response to the Complaint and Notice.** Although some agencies' organic statutes address the issue, neither Article 6 nor Article 10 of the APA addresses how a party is to respond in a contested case. All that the APA requires is an opportunity to respond. See A.R.S. §§ 41-1061(C) and -1092.07(D).

Generally, the parties may respond by filing an answer to the notice, and indeed may be required to do so by a statute or rule in an agency's organic law. The answer may contain a denial of some or all of the charges and an explanation of some or all of the facts alleged, or it may simply assert defenses to the charges. Article 10 also notes that a matter can be disposed of informally if a party "defaults," which is a failure to respond and defend. See A.R.S. § 41-1092.07(F)(5). Generally, a "default" should only be declared if an agency's statutes clearly require an answer within a specific time or if the agency's statutes specifically declare that the failure to respond will have the effect of deeming all allegations admitted without the collection of evidence. Also, depending upon the applicable statutes, failure to file an answer to the notice may carry other important procedural consequences, such as limiting the party's right to introduce evidence.

The time for filing an answer may be prescribed by statute or rule. However, a party may file a motion requesting an extension of time, stating the reasons for the request. The agency or presiding officer may, in its discretion, grant the extension upon a showing of good cause, for example, when the respondent has been ill or has been unable to obtain legal counsel.

## **10.9 Hearing Procedures Generally Applicable to Administrative Adjudications.**

**10.9.1 Initiating the Process.** Although similar, there are some differences in the way contested cases and appealable agency actions are initiated. The initiation procedures for appealable agency actions are discussed fully at Section 10.7. The initiation procedures for contested cases are discussed fully at Section 10.8.

### **10.9.2 Deciding When the Hearing Must Be Held - Time Requirements for Hearings.**

**10.9.2.1 Time to Hold Hearing for Appealable Agency Action.** Under Article 10, an agency must hold a hearing on an appealable agency action within sixty (60) days after the notice of appeal is filed with the agency. A.R.S. § 41-1092.05(A)(1). The agency must comply with the 60-day deadline regardless of whether it conducts the hearing itself or refers the case to OAH. Notwithstanding the requirements of A.R.S. § 41-1092.05(A), the Legislature has periodically modified this sixty day requirement through session law. Also, the time for a hearing can be advanced or delayed on the agreement of the parties or for good cause. A.R.S. § 41-1092.05(C).

If a self-supporting regulatory board (see A.R.S. § 41-1092(7)) that meets quarterly or less frequently receives a notice of appeal for an appealable agency action, it must hold the hearing at the next meeting of the board after the notice of hearing is issued, unless the notice is issued within thirty (30) days before the board meeting. A.R.S. § 41-1092.05(B). In such cases, the hearing will be held at the following meeting. *Id.* If good cause is shown, a hearing may be held at a later meeting of the board. A.R.S. § 41-1092.05(B)(2).

**10.9.2.2 Time to Hold Hearing for Contested Case.** Article 10 does not directly address the time in which an agency must hold a hearing on a contested case when it determines that a hearing is necessary and that it will conduct the hearing itself. The agency must provide thirty days notice of the hearing to all parties and provide the information required for a notice of hearing. A.R.S. § 41-1092.05(D). The organic statutes of some agencies may impose separate requirements to commence an administrative hearing. See A.R.S. § 32-1451(R) (requiring the Medical Board to commence a formal hearing within 120 days after completing notice of complaint and hearing).

If a self-supporting regulatory board (see A.R.S. § 41-1092(7)) that meets quarterly or less frequently chooses to hold its own hearing in a contested case, it must hold the hearing at the next meeting of the agency after the Notice of Hearing is issued, unless the notice is issued within thirty (30) days before the meeting, in which case the hearing will be held at the following meeting. A.R.S. § 41-1092.05(B). If good cause is shown, the time for a hearing may be extended to a later meeting. A.R.S. § 41-1092.05(B)(2).

If a contested case is referred to OAH for the hearing, OAH is required to hold the hearing within sixty (60) days of the agency's request for a hearing.

A.R.S. § 41-1092.05(A)(2). The hearing may be advanced or delayed by agreement of the parties, or for good cause. A.R.S. § 41-1092.05(C). Notwithstanding the requirements of A.R.S. § 41-1092.05(A), the Legislature may also modify the deadline for an agency to commence a hearing.

**10.9.2.3 Accelerating a Hearing in Article 10 Cases.** As already noted, the time requirements for a hearing can generally be advanced or delayed by the agreement of the parties or for good cause. A.R.S. § 41-1092.05(C). Additionally, Article 10 provides that a hearing “shall be expedited” in two circumstances: (1) where provided by law, and (2) upon a showing of extraordinary circumstances or the possibility of irreparable harm. A.R.S. § 41-1092.05(E). A hearing can be expedited, however, only if the parties to the administrative adjudication have actual notice of the hearing date. *Id.*

AHCCCS may file a motion requesting an expedited hearing within thirty (30) days in every member grievance and eligibility appeal that cites federal law. *Id.*

### **10.9.3 Use of OAH Administrative Law Judges or Hearing Officers.**

**10.9.3.1 General Information - Deciding Who Will Conduct the Hearing.** Under both Article 6 and Article 10 of the APA, one of the first decisions that the administrative decision maker must make is whether to assign the administrative adjudication to an administrative judge for the collection of evidence and a recommended decision or whether to conduct the hearing itself.

The purpose of referring a case to an administrative law judge or hearing officer is to satisfy due process by allowing for a full trial-like hearing. Use of an administrative law judge or hearing officer allows one person to preside over the receipt of evidence, listen to testimony, and review exhibits. The judge then reports his or her findings and conclusions to the decision maker. The document prepared is advisory only, as the ultimate decision must be made by the public body or State officer who has the duty to decide the controversy.

**10.9.3.2 Article 10 - Use of OAH.** Article 10 of the APA contemplates that an agency can either conduct its own hearings or use an administrative law judge (ALJ) employed by OAH. See A.R.S. §§ 41-1092.01(F), -1092.02(B) and (D). Article 10 allows an agency to conduct its own hearings if, and only if, the agency head, board, or commission responsible for making the final decision directly conducts the hearing itself. A.R.S. § 41-1092.01(F). If an agency is subject to Article 10, and chooses not to conduct its own hearing, it must use an ALJ employed by OAH. A.R.S. § 41-1092.02(B). When requesting a hearing from OAH, specific information must be supplied. A.A.C. R2-19-103(A). OAH has a form for providing this information. *Id.*

**10.9.3.3 Article 6 - Use of Hearing Officers.** Article 6 of the APA does not specifically discuss the use of a hearing officer to assist an agency in conducting an administrative adjudication, but the practice has been used by agencies for years. See,

e.g., *Walker v. De Concini*, 86 Ariz. 143, 151, 341 P.2d 933, 939 (1959). If authorized by statute or regulation, the agency may appoint a hearing officer to conduct the hearing. The hearing officer may be a member of the board, an employee of the agency, or someone hired by contract with the agency. If a hearing officer is used, a transcript or tape recording must be made of the proceeding for the decision maker's use in reviewing the hearing officer's actions and recommendations. *Id.* at 151-53, 341 P.2d at 939-40.

The decision maker for the Article 6 agency is responsible for deciding whether to use a hearing officer and, if so, determining the hearing officer's responsibilities.

**10.9.3.4 Duties of the Administrative Law Judge or Hearing Officer.** The duties of the individual appointed to preside over an administrative adjudication are basically the same for the OAH administrative law judge under Article 10 and the hearing officer under Article 6. The first and primary duty of the administrative law judge or hearing officer is to preside over the hearing. The presiding official is responsible for ensuring that the hearing is orderly, fair, and expeditious. He or she generally decides all procedural motions or requests. Dispositive motions, on the other hand, should be addressed directly to the decision maker.

The administrative law judge or hearing officer is required to prepare Findings of Fact and Conclusions of Law which she or he recommends to the decision maker. See Section 10.10.2.

#### **10.9.4 Impartiality of the Presiding Official or Decision Maker - Procedures to Protect.**

**10.9.4.1 Disqualification of the Presiding Official or Board Member.** An administrative law judge, hearing officer, or decision maker should be disqualified whenever bias or prejudice would make that person unable to conduct a fair and impartial hearing or when a statutory conflict of interest prevents participation.

Bias, prejudice, and prejudgment about issues of *fact* in a case are reasons for disqualification, as is bias or prejudice for or against one party in a proceeding. However, bias, prejudice, and prejudgment on issues of *law* or policy are not reasons for disqualification unless it is shown that the "mind of the decision maker is 'irrevocably closed' on the particular issues being decided." *Havasu Heights Ranch & Dev. Corp. v. Desert Valley Wood Prods., Inc.*, 167 Ariz. 383, 387, 807 P.2d 1119, 1123 (App. 1990). A presiding official is presumed to be fair and can be disqualified only upon a showing of actual bias. *Martin v. Superior Court*, 135 Ariz. 258, 260, 660 P.2d 859, 861 (1983).

If the presiding official or decision maker (e.g., a board member) has a financial or other property interest in the outcome of the proceeding that creates a conflict of interest under A.R.S. § 38-503 or any other statute, the individual cannot participate in the proceeding and should take whatever action is required by law. See Chapter 8.

**10.9.4.2 Procedures for Disqualification.** If a presiding official or decision maker determines that he or she is unable to conduct a hearing in an impartial manner or that he or she has a conflict of interest, he or she should promptly disqualify himself or herself from any participation in the matter. If any question arises about the existence of impartiality or a conflict, the matter should be disclosed to the parties.

A party to a proceeding may file a motion with the agency alleging that the hearing officer or a decision maker is unable to conduct the hearing because of bias or other disqualification and requesting that the decision maker or hearing officer recuse himself from the hearing. Article 10 of the APA specifically allows such a motion in any contested case or appealable agency action heard by OAH for reasons of bias, prejudice, personal interest, or lack of technical expertise necessary for a hearing. A.R.S. § 41-1092.07(A). Some agencies may have adopted their own rules prescribing procedures for deciding a motion to disqualify and prescribing the contents of such a motion and the circumstances under which it will be granted.

If a presiding official cannot conduct the hearing due to disqualification, the reasons for removal should be made part of the record and all parties should be informed of the disqualification. The hearing then resumes with a new presiding official, unless he or she determines that continuation will result in substantial prejudice to the rights of the parties. In that event, a new hearing should be scheduled or the case dismissed without prejudice to the right of the agency to initiate a new proceeding.

If disqualification of one member of a board or other multi-member entity is requested, and the member refuses to recuse himself, the full membership should decide whether disqualification is appropriate, without the member in question participating in that decision. If the board decides that disqualification is appropriate, the disqualified member should not participate in the hearing.

**10.9.4.3 Effect of Disqualification on the Quorum Requirement.** The disqualification of a board member may make it difficult for the public body to obtain a quorum. The general rule on disqualification is that a disqualified member, even though present at a meeting of the public body, may not be counted for purposes of convening the quorum to discuss or decide the particular matter for which the member is disqualified. See *Croaff v. Evans*, 130 Ariz. 353, 358-59, 636 P.2d 131, 136-37 (App. 1981).

For example, if four members of a seven member board are required for a quorum and are present at a board meeting to discuss several matters, the board could not discuss a particular matter in which one of the four members has been disqualified, because for purposes of discussing or deciding that matter, the necessary quorum of four members is not present.

If a majority of the total membership of a public body is disqualified, thereby making it impossible for the public body to convene a quorum to discuss or decide the matter, the disqualified members may disclose in the public record their reasons for disqualification

and proceed to act as if they were not disqualified. A.R.S. § 38-508(B); *Nider v. Homan*, 89 P.2d 136, 140 (Cal. App. 1939).

**10.9.4.4 Ex Parte Communications.** *Ex parte* communications are communications between one party to a proceeding, or his or her representative, and the hearing officer, the decision maker, or any member of a board conducting the hearing in the absence of other parties. Generally speaking, neither the hearing officer or any member of the decision making body may communicate *ex parte* with any party to a proceeding or his representative concerning any issue of fact or law involved in the proceeding, once notice of the proceeding has been issued. OAH's rules expressly prohibit *ex parte* communications with its ALJ's. A.A.C. R2-19-105. If the agency engages in such communications, its final decision may be reversed on appeal. *W. Gillette, Inc. v. Ariz. Corp. Comm'n*, 121 Ariz. 541, 542, 592 P.2d 375, 376 (App. 1979). A model rule on *ex parte* communications is provided in Appendix 10.3.

### **10.9.5 Pre-Hearing Conferences and Stipulations.**

**10.9.5.1 Pre-Hearing Conferences.** Article 10 of the APA specifically provides for pre-hearing conferences for a broad range of reasons. See A.R.S. § 41-1092.05(F). OAH's rule for pre-hearing conferences is at A.A.C. R2-19-112.

Under Article 6, all parties have the opportunity to participate in a settlement conference or mediation unless both parties or the hearing officer decline to set a settlement conference or mediation. A.R.S. § 41-1061 (C).

If a pre-hearing conference is held, written notice of the conference should be sent to all parties in advance of the conference, unless the scheduling of the conference is included in the notice of hearing.

Decision makers, who will make the ultimate decision if formal proceedings are instituted, should be careful not to become directly involved in informal conferences and proceedings. See Section 10.15 for a discussion of *Horne v. Polk*, 242 Ariz. 226, 394 P.3d 651 (2017), and Sections 12.4.1 - 12.4.2 for a more detailed discussion of informal disposition of charges.

**10.9.5.2 Stipulations.** The parties may stipulate to undisputed issues or facts. See A.R.S. § 41-1092.05(F)(4). Stipulated facts are not required to be proven at the hearing. Stipulations may also be used to extend time or to change procedures at the hearing. A stipulation should be in writing or stated upon the record.

**10.9.6 Discovery.** Discovery is the disclosure to the opposing side, prior to the hearing, of facts, documents, or other things that are within the knowledge or possession of a party. Although the Arizona Civil and Criminal Rules of Procedure provide for discovery, those rules do not apply in administrative adjudications, and both Article 6 and Article 10 of the APA provide very limited authority for discovery in administrative adjudications.

Therefore, although some agencies are specifically authorized by statute or rule to permit discovery in their administrative adjudications, the APA affords no general “right” for parties to engage in discovery in administrative hearings.

Article 6 of the APA authorizes only two pre-hearing discovery procedures, depositions and subpoenas. A.R.S. § 41-1062(A)(4). Depositions are testimony taken under oath and outside the presence of the hearing officer or members of the board and transcribed by a court reporter. Subpoenas are orders to produce documents or to appear for testimony. “Prehearing depositions and subpoenas for the production of documents may be ordered by the officer presiding at the hearing, provided that the party seeking such discovery demonstrates that the party has reasonable need of the deposition testimony or materials being sought.” *Id.* Under Article 6, the presiding officer may also order pre-hearing depositions for use as evidence at the hearing if a witness “cannot be subpoenaed or is unable to attend the hearing.” *Id.*

Article 10 of the APA does not provide for discovery depositions, and mentions only the allowance of subpoenas for the production of documents if the party seeking the discovery demonstrates that the party has reasonable need of the materials being sought. A.R.S. § 41-1092.07(F)(4). OAH has adopted a rule outlining the requirements for requesting/issuing/objecting to subpoenas. A.A.C. R2-19-113. Article 10 allows depositions for use as evidence only when a witness cannot be subpoenaed or is unable to attend the hearing. *Id.* Article 10 specifically states that no other means of discovery will be allowed. *Id.*

Arizona has a public records law that mandates the availability for inspection and copying all non-confidential records of a state agency. *See generally* A.R.S. § 39-121; Chapter 6. Many parties to administrative adjudications use this law to gain access to documents related to their case.

In addition, agencies that regulate health professionals may have separate disclosure requirements when they seek to hold a disciplinary interview or hearing. A.R.S. § 32-3206. The statute lists a number of such agencies that regulate health professionals, including the Arizona Medical Board, the Arizona Nursing Board, and the Arizona Board of Behavioral Health Examiners. A.R.S. § 32-3201(2). At least ten days before the disciplinary interview or hearing (if the agency does not hold an interview), the agency must notify the health professional of the information available for disclosure, and upon the request of the professional or his attorney, must disclose the information listed in the section. A.R.S. § 32-3206(B). The health professional or his attorney may not disclose the information received to any other person or use it in any proceeding other than the disciplinary interview or hearing, and subsequent appeals thereof. A.R.S. § 32-3206(C). The failure to abide by these restrictions constitutes unprofessional conduct. *Id.* The agency may charge the health professional or his attorney “for the cost of providing the information received up to the fee for making a copy of each page as prescribed by section 12-284, subsection A.” A.R.S. § 32-3206(D).

**10.9.6.1 Disclosure of Witnesses and Exhibits.** Neither Article 6 nor Article 10 of the APA contemplates the pre-hearing disclosure of witnesses and exhibits, although that may be part of the discussion at a pre-hearing conference in an Article 10 case. See A.R.S. § 41-1092.05(F)(3). Nevertheless, agencies may require by rule or order that each party disclose to the other parties the witnesses and exhibits that the party intends to use at the hearing. The failure to make the required disclosures may result in the exclusion of undisclosed evidence subsequently offered at the administrative hearing. In addition, as explained above, various statutes may impose separate disclosure requirements on agencies in different circumstances. See, A.R.S. § 32-3206.

**10.9.6.2 Disclosure of Investigative Materials.** Even if a party attempts to gain access to materials under the public records law, the organic statutes for many agencies provide for the confidentiality of materials obtained during the investigation of their licensees. See, e.g., A.R.S. § 32-1451.01(C). This type of law is designed to protect the confidentiality of patient names, medical records, and other such privileged matters from being open to public inspection merely because a state agency collects them. This type of confidentiality statute may also prevent the disclosure of investigative materials pursuant to a public records request by a respondent in an administrative adjudication.

**10.9.7 Motions.** A motion is simply a request by a party that the presiding officer or an agency's decision maker take a particular action. The APA does not specifically provide for requests by motion, but this is the generally accepted mode of making formal requests. OAH has adopted a rule defining the requirements for motions filed with it. A.A.C. R2-19-106.

**10.9.7.1 Use of Motions.** Motions should be made in writing or stated on the record so that a record can be maintained of all such requests. All motions must be made at the appropriate time and in accordance with any procedural requirements applicable to the proceeding. Although not exhaustive, R2-19-106(A) lists the types and requirements of motions that may be filed at OAH. Motions in an OAH case must be filed at least fifteen (15) days prior to the hearing unless the moving party can demonstrate good cause, as defined in the rule, for a later filing. A.A.C. R2-19-106(C).

**10.9.7.2 Responses to Motions.** Any party may, within applicable time limits, respond to a motion made by another. Time limits for responses are set by statute, rule, or, if not mentioned otherwise, by order of the presiding officer. OAH requires that responses be filed within five (5) days of service of the motion, or as otherwise directed by the administrative law judge. A.A.C. R2-19-106(D).

**10.9.7.3 Argument on Motions.** Oral argument or the presentation of evidence on a motion may be allowed, pursuant to applicable statutes or procedural rules, or in the absence thereof, at the presiding officer's discretion. A motion may be a simple one, such as a request to extend a deadline, or a motion may be complex and require the determination of contested issues, and may even be dispositive of the case.



OAH rules provide that a party may request oral argument, but discretion to allow such argument lies with the administrative law judge. A.A.C. R2-19-106(E). An administrative law judge at OAH does not have authority to grant or deny a dispositive motion. See § 10.9.7.4. However, in contested cases under Article 6, a party may seek disposition of the case by motion if there is no genuine issue of material fact. A.R.S. § 41-1061 (D).

**10.9.7.4 Disposition of Motions.** Unless a statute or rule provides otherwise, the presiding officer may rule on all procedural, discovery, and evidentiary motions. Rulings should be committed to writing or stated in the record so that the record is clear.

Dispositive motions, such as motions to dismiss the proceedings, must be ruled upon only by the ultimate decision maker. In the case of matters referred to OAH for hearing, this means that the administrative law judge can only recommend to the agency whether to dismiss the case. In cases where a pre-hearing motion to dismiss has been filed, the administrative law judge should conduct the hearing and rule on the motion as part of the recommended decision for the agency, rather than ruling on the motion without conducting the hearing.

## **10.9.8 Subpoenas.**

**10.9.8.1 Types of Subpoenas.** Two types of subpoenas can be issued in an administrative proceeding:

1. A subpoena requiring a person to appear and give testimony; and
2. A subpoena *duces tecum*, which requires that a person appear and produce books, records, correspondence, or materials over which the person has control, and, if necessary, to testify.

**10.9.8.2 Subpoena Authority.** The presiding officer of an administrative adjudication has the authority to issue subpoenas compelling the attendance of witnesses and the production of documents and other evidence. A.R.S. §§ 41-1062(A)(4), -1092.07(C). In addition, specific statutes applicable to an agency may authorize the issuance of subpoenas.

**10.9.8.3 Application for Issuance of a Subpoena.** Generally, any party to an administrative adjudication may request that the appropriate presiding officer issue a subpoena. The party requesting issuance of a subpoena is usually responsible for preparing the subpoena, obtaining the necessary signature, and effecting service.

The rules adopted by OAH, which apply to any subpoena requested from an administrative law judge in an Article 10 case, set specific requirements for subpoena requests. See A.A.C. R2-19-113. OAH also has a form for parties to utilize. See Appendix 10.4.

**10.9.8.4 Objections To and Enforcement of the Subpoena.** OAH's rules, applicable to Article 10 cases, allow a party served with a subpoena to object within five (5) days of service, or at the beginning of the hearing, if less than five days exists. A.A.C. R2-19-113(D). The administrative law judge may quash or modify the subpoena if it is unreasonable or oppressive, or if the requested testimony or evidence can be procured by other means. A.A.C. R2-19-113(E). In addition, the administrative law judge or decision maker may quash the subpoena if the information requested is not relevant or if the requesting party fails to establish reasonable need for such information. *Id.*

If a witness fails to comply with a subpoena, the agency or a party may apply to the superior court for an order compelling the person to comply. A.R.S. §§ 12-2212(B), 41-1062(A)(4), -1092.07(C). Before seeking such an order, an agency should weigh both the importance of the testimony or material sought and the delay that would result from petitioning the court to enforce the subpoena.

## **10.9.9 Conducting the Hearing.**

**10.9.9.1 The Presiding Officer.** Depending on the agency's statutes and rules, the presiding officer can either be an OAH administrative law judge, a hearing officer, a board member (usually the chairperson), or the agency head. The presiding officer usually has the power, pursuant to statute, rule, or written delegation, to perform many tasks, including: 1) regulating the discovery process in those cases in which discovery is permitted; 2) holding conferences to simplify or settle issues; 3) issuing subpoenas; 4) placing witnesses under oath; 5) establishing rules of conduct and decorum in the hearing and maintaining order during the hearing; 6) ruling on procedural questions; 7) ruling on evidentiary issues and controlling the introduction of evidence; 8) calling recesses or adjourning the hearing; 9) examining witnesses; and in some cases, and 10) appointing a Clerk to perform various tasks related to the hearing.

**10.9.9.2 Hearing Officers and Decision Makers -- Standards of Conduct.** The individual(s) who will be hearing evidence, whether members of a board or a hearing officer, should not discuss the case with a party or the party's attorney unless in the presence of all parties or their representatives. See Section 10.9.4.4 (*ex parte* communications). Decision makers should also refrain from conducting independent research into legal or factual issues presented by the case. In the event that a decision maker believes additional information is necessary, he should request that the parties address the information either orally or in a written brief so that the information is on the record and all parties may respond.

Decision makers should avoid any appearance of prejudice for or against any party, attorney, or witness, especially when questioning a witness.

**10.9.9.3 Party Standards of Conduct.** To ensure a fair and efficient hearing, the presiding officer must enforce standards of proper conduct on the part of persons present.

If a disturbance arises, the presiding officer should ask the offending person to be quiet or leave the hearing room. If necessary, and after appropriate warning, the hearing officer may rule that a person has forfeited his right to participate in the hearing and may order a person removed from the room. OAH has promulgated a rule to govern disruptions occurring at a hearing. A.A.C. R2-19-120.

**10.9.9.4 Application of Open Meeting Law.** Arizona's Open Meeting Law requires that agencies consisting of a multimember board allow the public to attend their administrative adjudications. See Chapter 7. To the extent practicable, hearing officers and agency heads should conduct all other aspects of the proceeding, such as argument or hearings on motions, in an open proceeding and on the record. The Open Meeting Law allows for testimony to be taken in executive session in some circumstances. See A.R.S. § 38-431.03(A)(2) (executive session for records and information confidential by law). It also requires that discussions and decisions concerning the case among a majority of the board members must take place in an open meeting. See A.R.S. § 38-431.01. For more information on the Open Meeting Law and its application to “quasi-judicial” proceedings, see Chapter 7.

**10.9.9.5 Maintaining a “Record” of the Proceeding.** Generally, the presentation of all oral arguments and oral testimony must be stenographically or mechanically recorded. A.R.S. §§ 41-1061(F), -1092.07(E). A tape recorder, digital recorder, video recorder or other recording device may be used to record the hearing instead of a court reporter or stenographer. A.R.S. § 38-424. Agencies using recording devices rather than a court reporter should ensure that the original recording is preserved for future reference and that any transcript of the recording is accurate.

Hearings conducted at OAH are digitally recorded, and any party requiring a transcript of the proceedings must pay to have the recording transcribed. A.R.S. § 41-1092.07(E). Alternatively, the agency can pay to have a court reporter present at the OAH hearing and to have the court reporter's transcript prepared.

Documentary evidence offered or admitted in evidence should be carefully marked and should remain in the custody of the presiding officer or a duly appointed clerk.

For cases adjudicated under Article 6, A.R.S. § 41-1061(E) identifies the information that shall constitute the “record” of an administrative adjudication.

Article 10 has no similar provision defining the exact contents of the “record,” but the agency must make and maintain a formal record of an administrative adjudication. The purpose of the record is to detail procedural matters decided at the hearing, all evidence received, and all decisions rendered with sufficient clarity so that others can use it to review the case. *Schmitz v. Ariz. State Bd. of Dental Examiners*, 141 Ariz. 37, 40-41, 684 P.2d 918, 921-22 (App. 1984). If OAH is used to conduct a hearing, the agency may request that OAH transmit to the agency the “record” of its proceedings as described in A.R.S. § 12-904. A.R.S. § 41-1092.08(A). An agency conducting its own hearing under

Article 10 can also use the definition of a “record” in A.R.S. § 12-904(B) as a guideline in maintaining the record of its own administrative hearings.

**10.9.9.6 Interpreters.** The presiding officer must appoint a qualified interpreter when notified that one is needed because the principal party in the proceeding or a witness, is deaf or substantially hard of hearing. A.R.S. § 12-242(B). A qualified interpreter is “a person who has a valid license of competency authorized by the commission for the deaf and the hard of hearing.” *Id.* § (H)(2). For further discussion of required accommodation of disabled persons under the Americans with Disabilities Act, see Sections 15.25 - 15.25.5.

The presiding officer may, in his or her discretion, appoint an interpreter when, for example, a principal party or witness cannot speak or understand English. See A.R.S. § 12-241. No one should be appointed as a foreign language interpreter unless the appointing officer first determines that the interpreter (a) is able to readily communicate with the person using the interpreter and (b) is able to accurately repeat and translate the statements of the party or witness.

**10.9.9.7 Order of Proceedings.** In Article 10 cases, the order of proceedings is governed by A.A.C. R2-19-116, which provides very specific guidance. Article 6 has no similar guidelines, but the OAH rules provide a useful guideline for any administrative adjudication.

**10.9.9.7.1 Convening the Hearing.** The presiding officer calls the session to order and identifies the case by name and number, if any. A.A.C. R2-19-116(B). The officer may also state for the record the general subject of the hearing and cite the statutory authority for holding the hearing. The presiding officer should ask the parties and their counsel to identify themselves.

**10.9.9.7.2 Deciding Whether to Exclude Non-party Witnesses.** A party may request that all non-party witnesses be excluded from the hearing room so that they cannot hear the testimony of others. A.A.C. R2-19-118. The decision maker should require the witnesses to leave the hearing room and admonish them not to talk to each other about their testimony while waiting to be called to the stand.

**10.9.9.7.3 Stipulations.** OAH's rules call for the administrative law judge to enter into the record any stipulations, settlements, agreements, or consent orders entered into by the parties before or during the hearing. A.A.C. R2-19-116(C).

**10.9.9.7.4 Opening Statements.** The party with the burden of proof may make an opening statement. A.A.C. R2-19-116(D). The remaining parties may also make opening statements in the order determined by the presiding officer. In the opening statement, each party summarizes their case and identifies what they intend to prove. Although the party may refer to facts, the presentation itself is not evidence. When a party is not represented by counsel, she may attempt to testify at this point in the proceeding. If

the self-represented party makes all of her factual assertions during the opening statement, the decision maker should ask her to confirm the truth of these statements after she has been sworn as a witness.

**10.9.9.7.5 Order of the Presentation of Evidence.** The order for the presentation of evidence, in OAH rules at A.A.C. R2-19-116(E), is as follows:

1. The party with the burden of proof normally presents evidence first. The parties can agree to change this order, or the administrative law judge may change the order.
2. The party who goes first should introduce their exhibits and question witnesses on direct examination. Again, the administrative law judge can change the order and manner of questioning to expedite and ensure a fair hearing. An individual party (i.e. a licensee or applicant) without a lawyer generally testifies on her own behalf by making a statement.
3. At the conclusion of the examination of each witness, the other party has the right to cross-examine the witness. The other party can ask questions regarding the testimony given, the credibility of the witness, or any matter relevant to the case. Re-direct examination, after cross-examination, may be permitted. During re-direct examination, the party calling the witness may ask further questions to clarify matters raised during cross examination. But she may not ask questions about new factual matters for the first time.
4. Although OAH's rules do not expressly provide for it, it is common for the presiding official (including all members of a multi-member body), to question the witnesses after the parties have completed their questioning. Any question from the decision maker should be phrased to elicit facts that are relevant to the case. If the decision maker asks questions of a witness, the decision maker should allow each party to ask any follow-up questions they may have, starting with the party that called the witness.
5. When the party with the burden of proof finishes calling all of its witnesses, it rests its case. The other party then presents evidence in the manner described in paragraphs 2-4.
6. Although OAH's rules do not expressly provide for it, the party with the burden of proof is normally given the opportunity to present rebuttal evidence in the form of witness testimony or documentary evidence. Rebuttal evidence should be limited to matters raised during the opposing party's presentation of evidence. The party with the burden of proof should not raise new factual issues during its rebuttal case that are not related to the evidence provided by the other party.

7. All parties may make closing arguments. The party with the burden of proof should go first. After the other parties have presented closing arguments, the party with the burden of proof may make a rebuttal closing argument. OAH's rules give the administrative law judge discretion on the order for closing arguments. A.A.C. R2-19-116(G). The administrative law judge may require that closing arguments be supplemented by written memoranda. *Id.*
8. Conclusion of the hearing. OAH's rules specify that a hearing ends when all evidence is submitted, final arguments are concluded, or when any post-hearing memoranda are submitted, whichever occurs last. A.A.C. R2-19-116(H).

**10.9.9.8 Evidence.** Evidence generally consists of testimony, documents, and other tangible items presented by the parties during the hearing that establish the facts necessary to reach a decision in the case. The agency is not obligated to adhere to the technical rules of evidence that govern court proceedings. A.R.S. §§ 41-1062(A)(1), -1092.07(F)(1). The APA specifically recognizes that the failure to adhere to the rules of evidence required in judicial proceedings shall not be grounds for reversal. *Id.* The evidence supporting a decision must only be “substantial, reliable and probative.” *Id.* Article 6 provides that “[i]rrelevant, immaterial or unduly repetitious evidence shall be excluded.” A.R.S. § 41-1062(A)(1). Article 10 allows an administrative law judge to “exclude evidence if “its probative value is outweighed by the danger of unfair prejudice, by confusion of the issues or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.” A.R.S. § 41-1092.07(D).

**10.9.9.8.1 Forms of Evidence.** Evidence may be in many forms, including oral testimony, written testimony, physical evidence, documents, charts/graphs, reference materials, audio/video recordings, and photographs.

**10.9.9.8.2 Oaths and Affirmations.** As a general rule, all testimony should be given under oath. If the witness objects to “swearing” or “taking an oath,” he may simply “affirm” the truthfulness of the testimony. If a witness's testimony is interrupted by a recess, the oath need not be re-administered when the hearing reconvenes. The presiding officer, however, should remind the witness that he is still under oath.

**10.9.9.8.2.1 Use of Depositions as Evidence.** On application of a party, a presiding officer may order a deposition of a witness for use at the hearing as evidence. A.R.S. §§ 41-1062(A)(4), -1092.07(F)(4). This form of substitute testimony is only appropriate when the witness cannot be subpoenaed or is unable to attend the hearing. *Id.*

**10.9.9.8.3 Objections to Evidence.** A party to the proceedings should inform the presiding officer if she objects to the admission of evidence. If a party fails to make a timely objection, the decision maker may consider the evidence even if it would normally be inadmissible. *Tabora v. State*, 150 Ariz. 262, 266, 722 P.2d 989, 993 (App. 1986) (citing *Justice v. City of Casa Grande*, 116 Ariz. 66, 68, 567 P.2d 1195, 1197 (App. 1977)). If the

presiding officer sustains an objection, the evidence is immediately withdrawn and may not be considered in making the final decision. Conversely, if the objection is overruled, the evidence is admitted and may be considered in the decision making process. Evidence can be re-offered if the offering party can cure the objection.

**10.9.9.8.4 Relevant/Probative Evidence.** Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ariz. R. Evid. 401. Article 10 of the APA states that only relevant evidence is admissible and Article 6 of the APA specifically provides that irrelevant evidence shall not be admitted in the administrative proceeding. A.R.S. §§ 41-1062(A)(1), -1092.07(D). The APA also uses the term “probative” in describing the type of evidence upon which an agency decision must rest. *Id.* Probative evidence is evidence that tends to prove or disprove some fact in question. Thus, if evidence in any way assists the trier of fact in resolving any fact at issue in a hearing, and is otherwise sufficiently reliable, it should be admitted. The trier of fact then must decide how much weight to give the evidence.

**10.9.9.8.5 Hearsay.** Hearsay is generally defined as evidence of a statement made by someone other than the party testifying, when the statement is “offered . . . to prove the truth of the matter asserted.” Ariz. R. Evid. 801(c). For example, instead of testifying about what he saw or heard, the witness testifies to what someone else wrote or said. Hearsay evidence is generally considered less reliable than eyewitness testimony because the person who made the original statement was not under oath, and the opposing party at the hearing does not have the opportunity to cross examine the person. The evidentiary weight of such a statement may depend upon whether the declarant is believable, and because he or she is not physically present, the decision maker cannot observe demeanor or judge credibility as effectively.

Despite these deficiencies, “[i]t is clear in Arizona that hearsay is admissible in administrative proceedings, and that it may, in proper circumstances, be given probative weight.” *Begay v. Ariz. Dept. of Econ. Sec.*, 128 Ariz. 407, 409, 626 P.2d 137, 139 (App. 1981). Even double or triple-hearsay can be admissible, if the circumstances tend to establish that the evidence offered is trustworthy. In *Wieseler v. Prins*, 167 Ariz. 223, 226-27, 805 P.2d 1044, 1047-48 (App. 1990).

Thus, as long as evidence is reliable and relevant, it should be admitted even though it may be hearsay. The trier of fact must decide what weight to give the evidence.

**10.9.9.8.6 Rules of Privilege.** The presiding officer should not usually permit or compel the discovery or introduction of privileged evidence. Generally, privileged evidence includes communications between client and attorney (A.R.S. § 12-2234); physician and patient (A.R.S. § 12-2235); husband and wife (A.R.S. §§ 12-2231, -2232); penitent and clergyman (A.R.S. § 12-2233); or informant and journalist (A.R.S. § 12-2237). Other specific privileges found in statute and case law may also apply to preclude the discovery

or admission of evidence. See, e.g., *City of Tucson v. Superior Court*, 167 Ariz. 513, 517, 809 P.2d 428, 432 (1991).

**10.9.9.8.6.1 The Fifth Amendment Privilege.** On occasion, a witness may invoke the Fifth Amendment privilege against self-incrimination. A party refusing to testify by invoking the Fifth Amendment privilege may be viewed as having presented no evidence on his behalf. This failure to testify may, from an evidentiary standpoint, weigh against him. See *Baxter v. Palmigiano*, 425 U.S. 308, 317-19 (1976); see also *U.S. v. Stein*, 233 F.3d 6, 15 (1st Cir. 2000) (“[T]he Supreme Court has adhered to the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions from their refusal to testify in response to probative evidence offered against them.”).

However, the agency cannot automatically infer guilt from a refusal to testify based on the Fifth Amendment privilege because “[t]he Supreme Court has repeatedly held that it violates the Fifth Amendment for public officials to discipline a person solely because of his or her refusal to answer questions in a non-criminal setting.” *Butler v. Oak Creek- Franklin Sch. Dist.*, 172 F.Supp.2d 1102, 1126 (E.D. Wis. 2001). The person’s refusal to testify merely constitutes another piece of evidence considered by the agency in reaching a factual determination.

See Section 12.3.4 for discussion of compulsory testimony and the privilege against self-incrimination; see also A.R.S. §§ 41-1066, and -1092.10.

If testimony is critical to a case, it is possible to compel a witness who has invoked the Fifth Amendment privilege to testify, after receiving written approval of the Attorney General. A.R.S. §§ 41-1066(B), and -1092.10(B). Testimony obtained in this way is generally not admissible in any criminal prosecution. Because compelling testimony can interfere with criminal prosecutions, an order to compel should not be requested without careful consideration.

**10.9.9.8.7 Exclusion of Evidence.** If evidence does not meet the standards of relevancy identified in the previous sections, or is unduly repetitive or unreliable, the presiding officer may exclude it. A.R.S. § 41-1092.07(D); A.A.C. R2-19-116(F) (administrative law judge shall make rulings necessary to prevent argumentative, repetitive, or irrelevant questioning and to expedite the examination). An order excluding evidence should be stated clearly on the record.

**10.9.9.8.8 Exhibits.** The presiding officer should require that all documentary and physical evidence be marked for identification and that a list be kept describing the exhibits and identification numbers. The list should also note whether each exhibit was admitted as evidence. During or prior to the hearing, the offering party should furnish every other party one copy of any document offered as evidence. The original exhibit should be given to the presiding officer. Copies of documents may be received in evidence in lieu of originals at the discretion of the presiding officer. However, if a party challenges the authenticity of the



copy, the party is entitled to compare the copy with the original. A.R.S. §§ 41-1062(A)(2), -1092.07(F)(2).

On May 30, 2014, OAH's Director issued a Standing Order permitting the filing of electronic exhibits and setting the standard for their submission. The Standing Order directs that that the CD or DVD, or thumb drive containing the pdf files, and all referenced audio and video files, be submitted by no later than 3 business days prior to the hearing date.

**10.9.9.8.9 Notice of Judicially Cognizable Facts and Technical and Scientific Facts.** The decision maker may consider, in addition to other evidence, (1) judicially cognizable facts and (2) "generally recognized technical or scientific facts within the agency's specialized knowledge." A.R.S. §§ 41-1062(A)(3), -1092.07(F)(3).

A judicially cognizable fact is one that is not subject to reasonable dispute because it is either generally known or is capable of accurate and ready verification from sources whose accuracy cannot be reasonably questioned.

Technical and scientific facts are those that are generally recognized within the applicable industry, trade, or profession and are within the agency's specialized knowledge.

It is permissible, although not desirable, to ask a decision maker to notice matters after the conclusion of the hearing, provided that all parties are given a reasonable opportunity to contest the matters to be noticed.

**10.9.9.8.10 Expert Testimony.** A decision maker in an adjudicative proceeding is specifically authorized to use his or her experience, technical competence, and specialized knowledge in evaluating the evidence presented. A.R.S. §§ 41-1062(A)(3), -1092.07(F)(3). And, even if expert opinion is introduced, the decision maker may use his or her own expertise to disagree with the opinions given by the expert witness.

If expert testimony is admitted, the presiding officer must first determine that the person is qualified to provide the information offered and whether the expertise of the witness applies to the subject about which the witness will testify. *Madison Granite Co. v. Indust. Comm'n*, 138 Ariz. 573, 576, 676 P.2d 1, 4 (App. 1983). The qualifications for expert witnesses in medical malpractice actions do not apply in Board disciplinary proceedings. *Kahn v. Arizona Medical Bd.*, 232 Ariz. 17, 19, 300 P.3d 552, 554 (App. 2013). If conflicting expert evidence is received, the decision maker has the responsibility to resolve the conflict. *Phelps v. Indust. Comm'n*, 155 Ariz. 501, 505, 747 P.2d 1200, 1204 (1987).

**10.9.9.9 Burden of Proof.** As a general rule, the burden of proof rests on the party bringing the charges or making a claim. In a contested case involving the revocation or suspension of a license, the burden of proof is on the agency bringing the charges. In an appeal from an appealable agency action, such as the denial of an application for a

license or an application for benefits, the burden of proof is generally on the appellant. See A.R.S. § 41-1065; § 41-1092.07(G); A.A.C. R2-19-119(B).

**10.9.9.1 Standard of Proof - Preponderance.** The APA does not specifically identify the standard of proof to be applied in administrative adjudications. Unless a different standard of proof is applicable pursuant to a statute, the standard of proof should be the same as in most civil proceedings - the preponderance of the evidence. See *Culpepper v. State*, 187 Ariz. 431, 437, 930 P.2d 508, 514 (App. 1996). OAH specifically recognizes this standard of proof in its rules. See A.A.C. R2-19-119(A).

The fact finder must be convinced that, based on the evidence admitted, the factual finding is more likely than not what truly happened. See *Hewett v. Indust. Comm'n*, 72 Ariz. 203, 209, 232 P.2d 850, 854 (1951).

The Legislature has specified a different standard of proof for some agencies. For example, with the exception of cases involving sexual conduct with a patient, the Medical Board must satisfy a clear and convincing standard to establish grounds for discipline. A.R.S. § 32-1451.04.

## **10.10 Making the Decision.**

**10.10.1 When the Board Conducts its Own Hearing.** At the conclusion of the presentation of evidence and after the final closing arguments are made, the agency must make its final decision and order. If a hearing officer is not used, the decision maker must consider all of the evidence presented and determine the facts and their legal significance. In making these determinations, it may be helpful for the decision maker to obtain from each party their proposed findings of fact and conclusions of law, including specific record references that support each finding proposed.

**10.10.1.1 Findings of Fact and Conclusions of Law.** The APA requires that “[a]ny final decision shall include findings of facts and conclusions of law, separately stated.” A.R.S. §§ 41-1063, -1092.07(F)(7). Further, the “[f]indings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.” *Id.* The findings of fact must be based exclusively on the evidence submitted at the hearing and any facts officially noticed. A.R.S. §§ 41-1061(G), -1092.07(F)(6). The agency's findings “must be explicit to make it possible for the [reviewing] court to make an intelligent review and to determine whether the facts as found provide a reasonable basis for the decision.” *Hatfield v. Indust. Comm'n*, 89 Ariz. 285, 288, 361 P.2d 544, 547 (1961).

As a general rule, when a hearing officer is not used, only those decision makers who were present during the entire hearing or have reviewed the transcripts of the hearing should participate in the decision. Either the decision or the record should reflect that the absent but voting board member has reviewed all the evidence.

Some agencies may require a separate vote for the findings of fact, the conclusions of law, and the sanctions. Some may vote on all three together. Regardless of how the vote is taken, the vote on the final decision must be recorded and available for inspection to demonstrate that the findings and conclusions were adopted by the required majority. The Open Meeting Law requires that this vote and all deliberations on a final decision by a multi-member body be taken in an open meeting for which proper notice has been given. See A.R.S. § 38-431(4) (defining “meeting”).

### **10.10.2 When the Board Receives a Hearing Officer's Recommended Decision.**

**10.10.2.1 Proceedings under Article 6.** If a hearing officer conducts the formal hearing, he or she should submit to the agency a document titled “Recommended Findings of Fact, Conclusions of Law and Decision.” Because it is the ultimate decision maker, the agency is not bound by the recommended findings of fact and conclusions of law provided by the hearing officer, including findings related to the credibility of witnesses. *Ritland v. Ariz. State Bd. of Medical Exam’rs*, 213 Ariz. 187, 191, ¶ 12, 140 P.3d 970, 974 (App. 2006). Thus, the decision maker has the option of modifying or rejecting the hearing officer's findings of fact and conclusions of law if its reading of the record differs from that of the hearing officer. Any deviations from the hearing officer's findings of fact and conclusions of law can *only* be made if the decision maker has reviewed all pertinent portions of the record. *Id.*, at ¶ 14 (citing *Stoffel v. Ariz. Dept. of Econ. Sec.*, 162 Ariz. 449, 451, 784 P.2d 275, 277 (App. 1990)). The decision maker should state, in the decision, the basis for the deviation.

Similarly, because the hearing officer “observes the demeanor and attitude of the witnesses” when making determinations about the credibility of the witnesses, her findings should be given “greater weight than other findings of fact more objectively discernible from the record.” *Ritland*, 213 Ariz. at 191, ¶ 13, 140 P.3d at 974. “Thus, while the [agency] should give deference to the ALJ’s credibility findings, it may overrule those findings only if it finds evidence in the record for so doing.” *Id.* at ¶ 14. The agency’s decision must state its factual support in the record for rejecting the credibility determinations. *Id.*

### **10.10.2.2 Proceedings under Article 10.**

**10.10.2.2.1 Time Limit for ALJ Decision.** If OAH is used, the administrative law judge must issue a written decision within twenty (20) days after the hearing is concluded. A.R.S. § 41-1092.08(A). See A.A.C. R2-19-116(H) for definition of hearing “conclusion.” If OAH is not used, there is no specific time within which the final written decision must be issued.

**10.10.2.2.2 Time Limit to Review ALJ Decision.** When OAH is used, Article 10 of the APA contains specific time requirements that a board or agency must follow in deciding whether to accept, reject, or modify the administrative law judge’s recommended order. The time limits depend on when the recommended decision is sent, who makes the final

decision (an agency head or a board), and if the final decision maker is a board, how often the board meets. If the time limits are not met, the administrative law judge's recommended decision becomes the final administrative decision. See A.R.S. § 41-1092.08(D) and (F).

**10.10.2.2.2.1 Final Decision by Agency Head.** The agency head must render his or her decision within thirty (30) days after OAH sends the recommended decision or the administrative law judge's recommended decision becomes the final recommended decision. A.R.S. § 41-1092.08(B).

**10.10.2.2.2.2 Final Decision by Board that Meets Monthly or Less Frequently.** If the final decision maker is a board or commission that meets monthly or less frequently, and the recommended decision is sent at least thirty (30) days before the next meeting of the board or commission, the decision must be made at that meeting of the board. A.R.S. § 41-1092.08(D). Conversely, if a recommended decision is sent within thirty (30) days of the next meeting of the board or commission, the decision should be made at the following meeting. See A.R.S. § 41-1092.05(B)(1).

**10.10.2.2.2.3 Date OAH "Sends" Recommended Decision.** A recommended decision from an OAH administrative law judge is deemed to be "sent" on personal delivery or five (5) days after the decision is mailed to the agency, executive director, board, or commission. A.R.S. § 41-1092.08(E).

**10.10.2.2.2.4 Time for Delivery of Final Decision to OAH.** Once a final decision is made, the final decision maker must ensure that OAH receives a copy of the decision no later than five (5) days after the deadline for decision (i.e., the date of the meeting at which the decision must be made). A.R.S. § 42-1092.08(B) and (D). If the fifth day is a Saturday, or if after hours filing is necessary, it is sufficient to fax a copy of the document to OAH. If the final decision is not so filed, the recommended order of the administrative law judge will be certified as the final decision in the case. *Id.*, see also A.R.S. § 41-1092.08(F)(1).

**10.10.2.3 Argument by Parties Prior to Final Decision on ALJ Recommendations.** While it may be helpful in some cases, it is not necessary for an agency to hear oral argument from the parties in considering the ALJ's recommended decision. Neither due process nor Arizona's Administrative Procedure Act requires that an agency hear argument on the ALJ's recommendation prior to the final decision.

#### **10.10.2.4 Deciding Final Findings of Fact and Conclusions of Law.**

**10.10.2.4.1 Option One: Affirm/Accept/Decline to Review the Decision.** The first option under the APA is for a decision maker to accept the hearing officer's decision without change. To do this, the decision maker need not review the transcripts or the exhibits, but can simply accept the ALJ's recommended decision. A.R.S. § 41-1092.08(B).

This can be done by taking a formal vote to accept the decision as the decision maker's own, or by simply voting not to review the decision.

**10.10.2.4.2 Option Two: Reject/Modify All or Part of the ALJ's Recommended Decision.** The decision maker has the option to accept portions of the ALJ's recommended decision and to reject or modify other portions. This option is a bit more complicated and the proper procedure depends on the types of changes involved.

**10.10.2.4.2.1 Changes to Factual Findings.** If the decision maker decides to reject or modify a finding of fact, each decision maker (i.e., every voting member of a Board) must have read the pertinent portions of the factual record presented at the formal hearing, including the transcript and the exhibits. See *Ritland*, 213 Ariz. at 191, ¶ 14, 140 P.3d at 974; *Stoffel*, 162 Ariz. at 451-52, 784 P.2d at 277-78 (App. 1989). To change a finding of fact, the APA requires the decision maker to specify the change and explain in writing the justification for the rejection or modification. A.R.S. § 41-1092.08(B). In addition, when modifying or rejecting findings of fact related to credibility issues, greater weight should be given to the ALJ's findings of fact than that given to other findings and the agency must identify a factual basis in the record for deviating from the ALJ's findings. *Ritland*, 213 Ariz. at 191, ¶ 13, 140 P.3d at 974

**10.10.2.4.2.2 Changes to Conclusions of Law.** The decision maker need not review the record to make changes to the Conclusions of Law, as long as they are truly legal conclusions and not factual findings in disguise. However, the decision maker must still provide written justification for the rejection or modification of the recommended Conclusion of Law and the written justification must be sent to the President of the Senate and the Speaker of the House of Representatives. A.R.S. § 41-1092.08(B).

**10.10.3 Determining Sanctions.** Once the agency has completed its fact finding function, if it has concluded that a violation of one or more rules or statutes has been demonstrated, it must determine what sanction or other action is appropriate. The sanctions available to the agency are determined by its organic statutes and must be based on the findings of fact and conclusions of law adopted by the agency. The agency may not impose a sanction greater than is permitted by the applicable statutes. See *Caldwell v. Ariz. State Bd. of Dental Exam'rs*, 137 Ariz. 396, 399, 670 P.2d 1220, 1223 (App. 1983). In addition, if the agency receives a recommended sanction from the ALJ under Article 10 of the APA, it must provide written justification for deviating from the recommendation. A.R.S. § 41-1092.08(B).

**10.10.4 Effect of Quorum Requirements on Decision Making.** As a general rule, a quorum must be present to enable a board or commission to transact business. Unless otherwise provided by law, a quorum consists of a majority of the statutory membership of the board or commission. A.R.S. § 1-216(B). See Section 10.9.4.3 for a discussion of the effects of the disqualification of a board or commission member on the quorum requirement.

**10.10.4.1 Failure to Obtain a Majority Vote.** While a quorum is necessary for the transaction of business, the well-established rule is that only the concurrence of a majority of the quorum, although not a majority of the statutory membership of the board or commission, is sufficient to take any particular action. *FTC v. Flotill Products, Inc.*, 389 U.S. 179, 182-4 (1967); see Ariz. Att'y Gen. Op. 184-165. This rule may be altered by specific legislation requiring the concurrence of a different number of members, such as a majority of the total membership of the board or commission. *Flotill Products*, 389 U.S. at 183.

**10.10.4.2 Effect of a Tie Vote.** As a general rule, where the members of the administrative tribunal are evenly divided on a particular question, the result is that no action can be taken by the agency. See *Siegel v. Ariz. State Liquor Bd.*, 167 Ariz. 400, 402, 807 P.2d 1136, 1138 (App. 1991).

The provisions of an agency's statutes and rules may cause a different result, particularly regarding the allocation of the burden of proof. For example, if the Petitioner has the burden of proof, a tie vote can result in denial of the Petition. *Scowden v. Indust. Comm'n*, 115 Ariz. 81, 84, 563 P.2d 336, 339 (App. 1977); *Rabago v. Indust. Comm'n*, 132 Ariz. 79, 80 n. 1, 643 P.2d 1049, 1050 n. 1 (App. 1982). On the other hand, if the agency has the burden of proof on the appeal, a tie vote may result in reversal of the final agency action. *Wicks v. City of Tucson*, 112 Ariz. 487, 488, 543 P. 2d 1116, 1117 (1975).

**10.10.5 Informal Disposition of Claims.** Article 10 specifically provides that informal disposition of a case may be made by stipulation, agreed settlement, consent order, or default. A.R.S. § 41-1092.07(F)(5).

**10.11 Form of the Decision.** Article 6 of the APA states that the final decision must be either stated in the record or in a written document. A.R.S. § 41-1063.

Article 10 of the APA requires that all decisions be memorialized in a final written document. See A.R.S. § 41-1092.08. The written decision should contain a caption identifying the agency before whom the proceeding took place, the title of the proceeding, the parties, and the agency case number for the proceeding. The decision should also include separate statements of the findings of fact and conclusions of law adopted by the decision maker and the decision maker's order reflecting the disposition of the matter. The decision maker or, in the case of a multi-member body, the presiding officer should sign the document.

**10.11.1 Changes to OAH Administrative Law Judge's Recommended Decision.** If a decision maker has modified the recommended order of an OAH administrative law judge, the decision maker must issue a final decision that identifies the modifications to the recommended decision and provides a written justification for each modification. The decision maker must attach a copy of the administrative law judge's decision to the final decision.. A.R.S. § 41-1092.08(B). The decision maker may also

create its own order with findings of fact, conclusions of law, and an order, incorporating the modifications to the recommendation from the administrative law judge.

**10.11.2 Providing Notice of Rehearing Requirement for Judicial Review.** As explained in Section 10.14.2.2, generally a party is not required to request a rehearing by the agency before seeking judicial review. For some agencies, however, a request for rehearing is required. See *Id.* Article 10 requires that in such cases the final decision provide notice of that requirement. A.R.S. § 41-1092.09(B).

## **10.12 Effectiveness of the Decision.**

**10.12.1 Article 6 Cases.** Except when good cause exists, a decision is not final and therefore not effective until the time for requesting a rehearing before the agency expires; or, if a rehearing is requested, when the agency's decision on the rehearing request has been rendered. A.R.S. § 41-1062(B); see also A.R.S. § 12-901(2). Some agencies have enacted a rule that allows for the immediate effectiveness of an order if the decision maker finds that the public health, safety, or welfare requires that the order be immediately effective and that a rehearing would be unnecessary or contrary to the public interest. See A.A.C. R17-1-512(J) (Department of Transportation).

**10.12.2 Article 10 Cases.** The statutes governing rehearing and review in Article 10 cases do not specify when a decision becomes effective. However, A.R.S. § 12-901(2) provides that decisions in administrative adjudications are not “final” for purposes of administrative review in superior court until after a request for rehearing or review is denied, or the decision on a request for rehearing or review is rendered. Many agencies that use Article 10 have also enacted a rule that allows for the immediate effectiveness of an order when the public health, safety, or welfare so requires and when a rehearing would be impracticable or contrary to the public interest. See A.A.C. R4-16-103(B) (Arizona Medical Board). As a result, the order should become effective after the time to request a rehearing or review expires or, if a request has been filed, after the decision maker rules on the request.

**10.13 Service of the Decision.** Article 6 of the APA provides that, “[u]nless otherwise provided by law, parties shall be notified either personally or by mail to their last known address of any decision or order.” A.R.S. § 41-1063.

Article 10 of the APA says that service of a decision is complete on personal service, or five (5) days after the date that the decision is mailed to the parties' last known address. A.R.S. § 41-1092.09(C). Under A.R.S. § 41-1092.04, “every . . . decision under this article shall be served by personal delivery or certified mail, return receipt requested, or by any other method reasonably calculated to effect actual notice on the agency and every other party to the action to the party's last address of record with the agency.” Failure to notify a party of the decision may prevent its effectiveness and may prevent the rehearing or appeal time from running. For more detailed discussion, consult Volume 3 of the Arizona Appellate Handbook.

## **10.14 Reconsideration of Decision.**

**10.14.1 Article 6 Procedures.** Article 6 of the APA provides that all State agencies must adopt a rule allowing all parties to apply for a rehearing or review of the agency decision before the decision becomes final. A.R.S. § 41-1062(B). The only time an agency need not provide an opportunity for rehearing is if “good cause exists otherwise.” *Id.* The rehearing shall be governed by a rule drafted as closely as practicable to Rule 59 of the Arizona Rules of Civil Procedure. See *id.* Because rule 59 of the Arizona Rules of Civil Procedures allows a motion to be filed within fifteen (15) days after a decision, a rule that requires a motion for rehearing to be filed in less than fifteen days is invalid. *Dioguardi v. Superior Court*, 184 Ariz. 414, 418, 909 P.2d 481, 485 (App. 1995). The rule should also include grounds for rehearing substantially similar to those listed in Rule 59.

Where an agency permits rehearing or other administrative review, that procedure must be followed or an appeal to the Superior Court may be precluded. For more detailed discussion of this principle, consult Volume 3 of the Arizona Appellate Handbook.

### **10.14.2 Article 10 Procedures.**

**10.14.2.1 Time to File Request for Rehearing or Review.** In cases governed by Article 10, a party has thirty (30) days after service of a final decision to file a motion for rehearing or review. A.R.S. § 42-1092.09(A)(1). This time limit governs despite the existence of another statute or rule that provides for a shorter time limit. See A.R.S. § 41-1092.02(B) and (D). The time for filing the motion is absolute. *Stapert v. Ariz. State Bd. Of Psychologist Exam’rs*, 210 Ariz. 177, 179, ¶ 8, 108 P.3d 956, 957 (2005) (holding that party’s failure to “scrupulously” follow administrative remedies deprives the superior court of jurisdiction).

The opposing party then has fifteen (15) days to respond after the motion for rehearing is filed. A.R.S. § 42-1092.09(A)(2).

**10.14.2.2 Necessity of Request for Rehearing or Review to Preserve Right to Seek Judicial Review.** Generally, a party need not seek rehearing or review to exhaust administrative remedies. A.R.S. § 41-1092.09(A)(3). However, a party to an administrative adjudication before a “self- supporting regulatory board” must file a petition for rehearing or review in order to be eligible to seek judicial review. See A.R.S. § 41-1092.09(B). Failure to timely file a motion for rehearing or review bars a party from judicial review. *Stapert*, 210 Ariz. at 179, ¶ 8, 108 P.3d at 957. The boards that are considered to be “self-supporting regulatory boards” are listed in A.R.S. § 41-1092(7). Furthermore, if a motion for rehearing or review is required prior to judicial review, the board must notify the parties of this requirement in its final decision. See A.R.S. § 41-1092.09(B); see also Section 10.11.2.



**10.14.2.3 Time for Ruling on Rehearing Motion.** A ruling on a motion for rehearing or review must occur within fifteen (15) days after the response to the motion is filed, or if none is filed, within five (5) days after the response was due. A.R.S. § 41 1092.09(D). A self-supporting regulatory board must rule on the motion within fifteen (15) days after the response is filed or at the board's next meeting after the motion is received, whichever is later. *Id.* The agency may rule on the motion for rehearing or review at a later date if the parties agree to the extension of time.

**10.14.3 Ability of the Agency Prosecutor or the Agency to Request Rehearing or Review of an Agency Decision in a Disciplinary or Enforcement Matter.** In most cases involving discipline or enforcement, the case is brought in the name of the agency that eventually makes the final decision on what sanctions, if any, to apply. In these cases, an Assistant Attorney General will “prosecute” the case, and the agency will reach its decision based upon the record as submitted by both the prosecution and the respondent. In some cases, the question arises whether the prosecution can request a rehearing or review of the agency's decision. The answer is yes. A.R.S. § 41-1092.09, provides that any “party” may file a motion for rehearing or review. One of the parties to any administrative adjudication is the prosecution, which should have an equal ability to challenge a board decision by seeking rehearing or review. See A.R.S. § 41-1001(14) (defining the term “party”).

In addition, a statute or rule may authorize an agency to order rehearing or review of the decision on its own initiative. For example, the Arizona Medical Board “of its own initiative may order a rehearing or review for any reason that it might have granted a rehearing or review on motion of a party” but must do so not later than 15 days after its decision is issued. A.A.C. R4-16-103(G).

**10.15 Combining Administrative, Investigative, and Prosecutorial Functions with Adjudicatory Functions.** Challenges sometimes have been raised to a single agency investigating, prosecuting, and adjudicating charges against persons regulated by the agency. In *Withrow v. Larkin*, 421 U.S. 35, 46-55 (1975), the United States Supreme Court held that, absent a showing of special circumstances, combining such functions in the same agency is not unconstitutional. See also *Comeau v. Ariz. State Bd. of Dental Exam'rs*, 196 Ariz. 102, 108, ¶ 26, 993 P.2d 1066, 1072 (App. 1999); *Croft v. Ariz. State Bd. of Dental Exam'rs*, 157 Ariz. 203, 210, 755 P.2d 1191, 1198 (App. 1988); *In re Davis*, 129 Ariz. 1, 3, 628 P.2d 38, 40 (1981); *In re Johnston*, 663 P.2d 457, 464 (Wash. 1983). However, the Arizona Supreme Court held that combining the prosecutorial and adjudicative functions, in the same person, can result in a due process violation and that the “special facts and circumstances” of a case can create “an intolerable risk of unfairness”. *Horne v. Polk*, 242 Ariz. 226, 232-233, 394 P.3d 651, 657-658 (2017). In *Horne*, the Court found that due process is violated when the “agency head makes an initial determination of a legal violation, participates materially in prosecuting the case, and makes the final agency decision.” *Id.* at 230.

However, the court recognized that it is not practical to bar an agency head from having supervisory authority over employees involved in the prosecution of the case and in those circumstances due process is met if the agency head does not act as both the advocate and the ultimate adjudicator in the proceedings. *Id* at 231, 394 P.3d at 656.

To minimize problems in this area, the agency should consider implementing practices that limit a hearing officer or decision maker from participating directly in an investigation, prosecution, or *ex parte* discussions of the merits of a pending matter.

**10.16 Assistant Attorney General as Agency Advice Counsel.** In general, an Assistant Attorney General is assigned to provide agencies with advice and counsel with regard to administrative, policy and adjudicative decisions. The AAG Advisor shall provide both substantive and procedural advice to the agency client.

**10.17 Assistant Attorney General as Advocate before Adjudicative Body of Agency Client.** When a matter becomes adversarial and requires an Assistant Attorney General to serve as an advocate before an agency client's decision-making body, that AAG advocate shall not have *ex parte* communications with, or advise members of the decision-making body regarding that particular matter. All assertions made by the Assistant Attorney General Advocate presenting the case should be considered as the argument of an advocate and not as neutral legal advice, and should only occur in open hearing. In those adversarial cases, a separate AAG shall be assigned to provide substantive and procedural advice and counsel to the decision-making body as to that particular matter. The AAG Advocate and the AAG Advisor shall not communicate with each other regarding the particular matter and shall keep all files and materials relating to the matter confidential from each other and follow the Attorney General Suggested Protocols for Screening Staff. See Section 1.9.4.

**10.18 Judicial Review.** Nearly all final decisions entered in administrative adjudications are subject to judicial review in the State Superior Court or Court of Appeals, either under the Administrative Review Act, A.R.S. §§ 12-901 to -914, or under special review statutes applicable to the agency's decisions. Because the agency is the fact finder and hears the evidence and observes the demeanor of the witnesses, a reviewing court will give substantial weight to the determinations of fact made by the agency. *Siegel v. Ariz. State Liquor Bd.*, 167 Ariz. 400, 401, 807 P.2d 1136, 1137 (App. 1991). A reviewing court will also give deference to the determination of what disciplinary action is appropriate in the case (for example, revocation versus suspension of the license), because the law presumes that the administrative agency has expertise in its area of responsibility. See *Bear v. Nicholls*, 142 Ariz. 560, 563, 691 P.2d 326, 329 (App. 1984). On the other hand, the reviewing court is not bound by an agency's determinations of law. *Eshelman v. Blubaum*, 114 Ariz. 376, 378, 560 P.2d 1283, 1285 (App. 1977). Under A.R.S. § 12-910 (E), a reviewing court must decide all questions of law without deference to any previous determinations by the agency. This does not apply to Corporation Commission matters. A.R.S. § 12-910 (G).

A detailed discussion of the procedures applicable to appeals from administrative tribunals is beyond the scope of this Chapter. Additional information should be obtained from legal counsel and Volume 3 of the Arizona Appellate Handbook.

**10.19 Recovery of Costs and Fees and Related to Administrative Adjudications.** A hearing officer or administrative law judge is authorized to award fees and costs to any “prevailing party” in an administrative adjudication. A.R.S. § 41-1007(A). A “party” is defined, for purposes of this statute, to include only individuals, partnerships, corporations, associations, and public or private organizations. A.R.S. § 41-1007(H)(2). A party is considered to be a “prevailing” party only if the agency's position was not substantially justified and the person prevails as to the most significant issue or set of issues, unless the reason for the success is an intervening change in the law. A.R.S. § 41-1007(A). The statute does not define what "substantially justified" means, but case law indicates that the standard is one of good faith, as when a genuine dispute exists or reasonable people could differ on the issue. *See Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The award may be denied if the party seeking fees unduly and unreasonably protracted the final resolution of the case. A.R.S. § 41-1007(B).

The party seeking an award must request it within thirty (30) days of the final decision and submit (1) evidence of eligibility for the award, (2) the amount sought, and (3) an itemized statement of attorneys' fees, showing the actual time spent representing the party and the rate charged, A.R.S. § 41-1007(C).

A decision on the award of fees is subject to judicial review. A court that reviews the decision can award fees and costs incurred during the proceedings before the hearing officer or administrative law judge. A.R.S. § 41-1007(E).

## Appendix 10.1

### Sample Letter to Nonmember Attorney or Representative

[Date]

[Representative's name and address]

Dear [Representative's name]:

Representatives who are not members of the State Bar of Arizona must file a Request for Permission to Represent Party before [agency's decision making body] with [agency's clerk or executive director] within [insert number] days before they wish to represent a party or parties before the [agency's decision making body].

Representatives filing the request must consent to the jurisdiction of the [agency's decision making body] and the Arizona Supreme Court for any alleged misconduct in the matter in which they are permitted to participate. Representatives agree to follow the agency tribunal's rules. It is further agreed that any failure of the representative to do so will be attributed to the represented party.

Failure to provide complete information or to timely file the request may result in denial of permission to represent a party before the [agency's decision making body]. The Request must include the following:

[requesting representative] hereby requests permission to represent [parties] in the matter of [title of the matter] and states the following under penalty of perjury:

Representative's current address and telephone number;

By what courts (if any) the representative has been admitted to practice and the dates of admission and whether the representative is in good standing and currently eligible to practice in those courts;

The title of any administrative tribunal or court in this state, and the cause therein (if any), in which the applicant has filed a request to appear as representative in this state in the preceding two years, the date of each request, and whether or not it was granted;

Whether the representative is currently suspended, censured, or disbarred by any court or tribunal.

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[Exec. Dir., Clerk or Chairman]

**Appendix 10.2**

**CERTIFIED MAIL/RETURN RECEIPT REQUESTED**

**[Date]**

**[Name]**

**[Last known address of record of applicant]**

Re: Notice of Appealable Agency Action  
(Subject matter)

Dear \_\_\_\_\_:

The purpose of this letter is to officially notify you that at its meeting on \_\_\_\_\_, 20\_\_\_\_, the Board voted to deny your \_\_\_\_\_. The Board denied you \_\_\_\_\_ for the following reasons: [insert reasons, with references to statutes or rules on which denial is based].

You are also advised pursuant to A.R.S. § 41-1092.03 that this denial constitutes an appealable agency action subject to a hearing pursuant to A.R.S. § 41-1092, *et seq.* You are entitled to have a hearing before an administrative law judge or the Board on the denial of your certification application by filing a written request for a hearing/notice of appeal within thirty (30) days after receipt of this letter. The request for hearing/notice of appeal shall identify the party, the party's address, the agency, the action being appealed, and a concise statement of the reasons for the appeal. At the hearing you shall be the moving party and have the burden of proof. Additionally, pursuant to A.R.S. § 41-1092.06, you are hereby notified that you have the right to request an informal settlement conference by filing such a request with the Board in writing no less than twenty (20) days before the hearing.

If you have any questions, or if we can be of any further assistance, please contact \_\_\_\_\_ at (602) 542-\_\_\_\_\_.

Sincerely,

\_\_\_\_\_

cc: Assistant Attorney General

## Appendix 10.3

### Model Rule on *Ex parte* Communication

A. In any contested case or appeal from an appealable agency action before the commission, except to the extent required for disposition of *ex parte* matters as authorized by law or these rules of procedure:

1. No interested person outside the commission shall make or knowingly cause to be made to any commissioner, commission hearing officer, personal aide to a commissioner, or other employee or consultant who is or may reasonably be expected to be involved in the decisional process of the proceeding, an *ex parte* communication relevant to the merits of the proceeding;

2. No commissioner, commission hearing officer, personal aide to a commissioner, or other employee or consultant who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the commission an *ex parte* communication relevant to the merits of the proceeding.

B. A commissioner, commission hearing officer, personal aide to a commissioner, or other employee or consultant who is or may be reasonably expected to be involved in the decisional process of the proceeding, who receives, makes, or knowingly causes to be made a communication prohibited by this rule, shall place on the public record of the proceeding and serve on all parties to the proceeding:

1. All such written communications;

2. Memoranda stating the substance of all such oral communications;  
and

3. All written responses and memoranda stating the substance of all oral responses, to the communications described in paragraph 1 and 2 of this subsection.

C. Upon receipt of a communication made or knowingly caused to be made by a party in violation of this section, the commission or its hearing officer, to the extent consistent with the interests of justice and the policy of the underlying statutes and rules, may require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

## Appendix 10.3

### Model Rule on *Ex parte* Communication

D. The provisions of this section shall apply beginning at the time in which the contested case proceeding is noticed for hearing or at the time a notice of opportunity for hearing is issued or a request for hearing is filed, whichever comes first, unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his or her acquisition of such knowledge.

E. For purposes of this section:

1. “Person outside the Commission” means any person other than a Commissioner, an employee or consultant of the Commission, or an attorney representing the Commission in its adjudicatory role.

2. “*Ex parte* communication” means an oral or written communication not on the public record and not the subject of reasonable prior notice to all parties.

**Appendix 10.4**

**Office of Administrative Hearings - Subpoena Form**

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

Caption: \_\_\_\_\_ No. \_\_\_\_\_

v.

SUBPOENA (Duces Tecum)  
Under the Authority of  
Arizona Revised Statutes 41-1062/-1092.07

TO: Name: \_\_\_\_\_  
Address: \_\_\_\_\_

You are commanded to ATTEND a hearing in this matter at the date, time and location listed below and to remain until excused.

Date: \_\_\_\_\_ Time: \_\_\_\_\_  
Location: \_\_\_\_\_  
\_\_\_\_\_

You are commanded to PRODUCE documents or other tangible items for the above entitled matter, specifically:(describe items)

\_\_\_\_\_  
\_\_\_\_\_ for the hearing listed above OR (if another date other than the hearing) then on or before \_\_\_\_\_, 20\_\_ at (location): \_\_\_\_\_.)

The Office of Administrative Hearings endeavors to ensure the accessibility of its hearings to all persons with disabilities. Should you need special accommodations, please contact the Office of Administrative Hearings at (602)-542-9826 at least three working days prior to the hearing.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Administrative Law Judge

AT THE REQUEST OF: \_\_\_\_\_