RESOLUTION 08-01-2020

DIGEST
Administrative Law: Agency Rejection of Administrative Law Judge Decisions
Amends Government Code section 11517 to require substantial evidence and a statement of reasons when agencies reject administrative law judges' proposed decisions.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Government Code section 11517 to require substantial evidence and a statement of reasons when agencies reject administrative law judges' proposed decisions. This resolution should be disapproved because agencies are already required to support their final decisions with written reasons setting forth the evidence in the administrative record supporting the agencies' ultimate findings of fact and conclusions of law, such that the basis for the departure from administrative law judge proposed decisions would be evident by comparison with agency final decisions.

Under current law, state agencies (including state boards, commissions and officers) governed by the Administrative Procedures Act have the option of hearing a dispute in the first instance, or the agency may elect to refer the dispute to an administrative law judge. (Gov. Code, § 11517, subd. (a).) When an agency elects to hear the dispute itself, the agency acts as the trier of fact and law, with an administrative law judge acting as the presiding officer. (Gov. Code, §§ 11371, 11512, subds. (a) and (b), 11517, subd. (b).) When the dispute is referred to an administrative law judge for hearing, the judge acts as the initial trier of fact and law, and issues a proposed decision that is transmitted to the agency. (Gov. Code, § 11517, subd. (c).) The agency then has the option of (1) adopting the decision in its entirety; (2) approving the decision with an altered penalty; (3) modifying the decision with technical or other minor changes; (4) rejecting the proposed decision and referring the dispute back to the administrative law judge for the taking of additional evidence; or (5) rejecting the proposed decision and deciding the case on the administrative record, with or without taking additional evidence. (Gov. Code, § 11517, subd. (c)(2)(A)-(E).) When the agency elects to reject the proposed decision and issue its own decision, Government Code section 11517, subdivision (c)(2)(E), currently allows the agency to do so without the need to provide reasons for the rejection. The agency must nevertheless issue a final written decision. (*Id*., at §§ 11517, subds. (c)(2)(E)(iv) and (d), and 11518.) An agency's final decision is subject to judicial review by writ of administrative mandate. (Gov. Code, § 11523; Code Civ. Proc., § 1094.5.) When the administrative action involves a fundamental vested right, such as a professional license, the superior court exercises independent judgment review and "the trial court must weigh the evidence and make its own determination as to whether the administrative findings should be sustained." (*Sandarg v. Dental Bd. of California* (2010) 184 Cal.App.4th 1434, 1440.)

This resolution would impose a requirement on state agencies to state in writing the reasons for the agency's rejection of an administrative law judge's proposed decision. It would require that the rejection of the proposed decision be based upon substantial evidence in the administrative record. Finally, it would require the agency to reference the substantial evidence in the administrative record that supports the basis for the rejection of the administrative law judge's proposed decision.

The resolution suggests, without citation to any supporting studies or evidence, that state agencies are increasingly using their power to reject administrative law judge proposed decisions because licensing agencies are allowed to recoup the costs of disciplinary cases when discipline is imposed on licensees. The resolution argues that agency rejections of administrative law judges' proposed decisions undermines the fairness and validity of the entire administrative disciplinary hearing process.

However, agencies are already required to provide a written, reasoned final decision, with reference to the evidence in the administrative record that supports the final decision. (Gov. Code, §§ 11517, subds. (c)(2)(E)(iv) and (d), and 11518.) It is, therefore, unnecessary to mandate a specific explanation as to why an administrative law judge's proposed decision is rejected because agencies must explain the evidence and reasons for reaching a different conclusion and the differences would be evident from a simple comparison of the administrative law judge's proposed decision and the agency's final decision. Requiring a specific explanation simply imposes an unnecessary burden on agencies.

Likewise, agencies have the final decision-making authority and they must set forth the evidence and reasons in their final decisions if the decisions are to survive judicial review. (Gov. Code, § 11523; Code Civ. Proc., §1094.5, subd. (b).) This necessarily requires that agencies support their final decisions with the substantial evidence to the requisite degree of proof (preponderance of the evidence or clear and convincing evidence) so as to support the different result reached, as compared to the administrative law judge's proposed decision.

This resolution is also largely unnecessary because in decisions that involve vested fundamental rights, the trial court exercises independent judgment review of the administrative decision. Because the trial court "must weigh the evidence and make its own determination as to whether the administrative findings should be sustained" (*Sandarg v. Dental Bd. of California*, *supra*, 184 Cal.App.4th at p. 1440), an explanation of why the agency reached a different conclusion than the administrative law judge is unnecessary.

Therefore, this resolution should be disapproved.

This resolution is related to Resolution 08-02-2020.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Government Code section 11517, to read as follows:

§ 11517

(a) A contested case may be originally heard by the agency itself and subdivision (b) shall apply. Alternatively, at the discretion of the agency, an administrative law judge may originally hear the case alone and subdivision (c) shall apply.

(b) If a contested case is originally heard before an agency itself, all of the following provisions apply:

(1) An administrative law judge shall be present during the consideration of the case and, if requested, shall assist and advise the agency in the conduct of the hearing.

(2) No member of the agency who did not hear the evidence shall vote on the decision.

(3) The agency shall issue its decision within 100 days of submission of the case.

(c) (1) If a contested case is originally heard by an administrative law judge alone, he or she shall prepare within 30 days after the case is submitted to him or her a proposed decision in a form that may be adopted by the agency as the final decision in the case. Failure of the administrative law judge to deliver a proposed decision within the time required does not prejudice the rights of the agency in the case. Thirty days after the receipt by the agency of the proposed decision, a copy of the proposed decision shall be filed by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney. The filing and service is not an adoption of a proposed decision by the agency.

(2) Within 100 days of receipt by the agency of the administrative law judge's proposed decision, the agency may act as prescribed in subparagraphs (A) to (E), inclusive. If the agency fails to act as prescribed in subparagraphs (A) to (E), inclusive, within 100 days of receipt of the proposed decision, the proposed decision shall be deemed adopted by the agency. The agency may do any of the following:

(A) Adopt the proposed decision in its entirety.

(B) Reduce or otherwise mitigate the proposed penalty and adopt the balance of the proposed decision.

(C) Make technical or other minor changes in the proposed decision and adopt it as the decision. Action by the agency under this paragraph is limited to a clarifying change or a change of a similar nature that does not affect the factual or legal basis of the proposed decision.

(D) Reject the proposed decision and refer the case to the same administrative law judge if reasonably available, otherwise to another administrative law judge, to take additional evidence. If the case is referred to an administrative law judge pursuant to this subparagraph, he or she shall prepare a revised proposed decision, as provided in paragraph (1), based upon the additional evidence and the transcript and other papers that are part of the record of the prior hearing. A copy of the revised proposed decision shall be furnished to each party and his or her attorney as prescribed in this subdivision.

(E) Reject the proposed decision, and decide the case upon the record, including the transcript, or upon an agreed statement of the parties, with or without taking additional evidence. <u>If the agency elects to proceed under this subparagraph, the rejection of the proposed decision shall be based upon substantial evidence in the record. Substantial evidence is more than a mere scintilla of evidence, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Further, the decision of the agency must state in writing its reasons for rejection of the proposed decision, with reference to supporting evidence.</u> By stipulation of the parties, the agency may decide the case upon the record without including the transcript. If the agency acts pursuant to this subparagraph, all of the following provisions apply:

(i) A copy of the record shall be made available to the parties. The agency may require payment of fees covering direct costs of making the copy.

(ii) The agency itself shall not decide any case provided for in this subdivision without affording the parties the opportunity to present either oral or written argument before the agency itself. If additional oral evidence is introduced before the agency itself, no agency member may vote unless the member heard the additional oral evidence.

(iii) The authority of the agency itself to decide the case under this subdivision includes authority to decide some but not all issues in the case.

(iv) If the agency elects to proceed under this subparagraph, the agency shall issue its final decision not later than 100 days after rejection of the proposed decision. If the agency elects to proceed under this subparagraph, and has ordered a transcript of the proceedings before the administrative law judge, the agency shall issue its final decision not later than 100 days after receipt of the transcript. If the agency finds that a further delay is required by special circumstance, it shall issue an order delaying the decision for no more than 30 days and specifying the reasons therefor. The order shall be subject to judicial review pursuant to Section 11523.

(d) The decision of the agency shall be filed immediately by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Various governmental agencies are tasked with the issuing and regulation of professional licenses in California. The Administrative Procedures Act, the Government Code, the Business & Professions Code, and the California Code of Regulations collectively govern how these agencies issue and discipline professional licenses.

Currently, once formal disciplinary proceedings are initiated against licensed professionals and/or license applicants, those individuals are entitled to have a hearing before an Administrative Law Judge ("ALJ.") The ALJ is the neutral arbiter of the facts and provides a rational and logical Proposed Decision and Order to the governmental agency after the hearing on the merits, which is based on the facts and evidence adduced at trial.

However, Government Code §11517(c)(2)(E) permits the agencies to entirely reject the ALJ's Proposed Decision and Order without providing justification or meeting any legal standard. Because licensing agencies are permitted to recoup all of the costs of handling these cases when any level is discipline is imposed on the licensees, it is becoming more frequent that the governmental agencies entirely disregard and usurp an ALJ's rational and logical Proposed Decision and Order and impose harsher discipline despite the ALJ's Findings and Order. When this happens, the agency's actions completely undermine the fairness and validity of the entire administrative disciplinary hearing process. This is especially more egregious given the fact that many of these Board and Committee members are individuals with very little to no legal experience or training.

The Solution: Enact legislation that requires governmental agencies to identify "substantial evidence" in the record to support their rejection of the ALJ's Proposed Decision and Order after a hearing on the merits of the case to ensure that there is no incorrect or erroneous legal basis for their decision, and that their decision is consistent with, and supported by the facts.

IMPACT STATEMENT
This resolution may require additional statutory changes. This statutory change would require state agencies to adopt conforming changes to applicable sections of the California Code of Regulations and Business and Professions Code.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESOLUTION 08-02-2020

DIGEST
Administrative Law Judge Decisions: Limits Medical Board Rights to Reject or Modify
This resolution amends Government Code section 11517 and Business and Professions Code section 2335 to limit Medical Board powers to reject or modify administrative law judge decisions.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Government Code, section 11517 and Business and Professions Code, section 2335 to limit Medical Board powers to reject or modify an administrative law judge decision. This resolution should be disapproved because the proposed changes extend beyond limiting the Medical Board's ability to reject administrative law judge licensing decisions to impacting all agency decisions governed by Government Code section 11517.

Current law establishes a disciplinary process for licensees of the Medical Board of California, related health boards, and the Board of Podiatric Medicine (collectively the Medical Board). (Bus. & Prof. Code, § 2220, et seq.) The disciplinary process is governed by the Administrative Procedures Act. (Bus. & Prof. Code, § 2230; Gov. Code, § 11500 et seq.) The disciplinary process currently allows the Medical Board the option of hearing a disciplinary matter itself (through a selected panel) with an administrative law judge acting as the presiding officer, or to have the matter heard by an administrative law judge from the Medical Quality Hearing Panel (administrative law judges with special medical training). (Bus. & Prof. Code, §§ 2330, subd. (b), 2331; Gov. Code, §§ 11371, 11512, subds. (a) and (b), 11517.) When the matter is heard by an administrative law judge, the judge issues a proposed decision that is transmitted to the Medical Board. (Bus. & Prof. Code, § 2335; Gov. Code, § 11517.) The Medical Board then has the option of (1) approving the decision; (2) approving the decision with an altered penalty; (3) referring the case back to the administrative law judge for the taking of additional evidence; (4) deferring final decision pending discussion of the case by a panel of the Medial Board or the Medical Board as a whole; or (5) to "nonadopt" the decision. (Bus. & Prof. Code, § 2335, subd. (c)(2); Gov. Code, § 11517, subd. (c)(2).) When the Medical Board "nonadopts" a decision and does not refer the matter back to the administrative law judge, it can decide the matter itself after an opportunity for the parties to present additional evidence. (Bus. & Prof. Code, § 2335, subd. (c)(4); Gov. Code, § 11517, subd. (c)(2)(E).) The authority to impose final disciplinary action remains at all times with the Medical Board and cannot be delegated. (Bus. & Prof. Code, § 2224, subd. (a).) All final Medical Board decisions are subject to court review by writ of administrative mandamus. (Bus. & Prof. Code, § 2337; Gov. Code, § 11523; Code Civ. Proc., § 1094.5.) The superior court exercises independent judgment review where a vested professional license is subject to disciplinary action, and "the trial court must weigh the evidence and make its

own determination as to whether the administrative findings should be sustained." (*Sandarg v. Dental Bd. of California* (2010) 184 Cal.App.4th 1434, 1440.)

This resolution seeks to impose limits on the Medical Board's power to "nonadopt" administrative law judge decisions, thereby giving more finality to those decisions. It recommends amending Government Code section 11517, which generally governs the power of state agencies to refer hearings to administrative law judges for initial determination and agency powers to accept, reject or modify proposed decisions, by striking out the power to reject proposed decisions in total. Agencies could only accept the decision, reject the proposed penalty or discipline and re-decide the penalty or discipline. This resolution proposes conforming changes to the more specific provisions of Business and Professions Code section 2335, governing medical disciplinary matters. The resolution asserts that this change is necessary to overcome the unfairness of the Medical Board re-deciding facts in its favor based on a review of the cold record versus the administrative law judge who heard and observed the witnesses. The resolution also asserts that this change is necessary because the Medical Board has no incentive to settle a disciplinary action because it can control the outcome regardless of the administrative law judge's findings.

This resolution should be disapproved as currently written because the recommended changes go beyond Medical Board licensing decisions. The proposed changes to Government Code section 11517 would impact all agencies whose disputes are determined under the Administrative Procedures Act. The proposed change would effectively preclude all agencies from having the ability to change an administrative law judge's decision. That includes many matters unrelated to license discipline, such as hearings on benefit claims.

Even if amended to limit the impact of the proposed changes to Medical Board matters, the wholesale elimination of the Medical Board's ability to reject an administrative law judge's decision on findings of fact is not supported by basic principles of California jurisprudence. First, it is the Medical Board that is the agency vested with the power to discipline licensees (Bus. & Prof. Code, § 2224, subd. (a)), and even though it may delegate a hearing to an administrative law judge, it is the Medical Board that has the ultimate power and statutory duty to make the final determination. It is a system not unlike a superior court referring a matter to a referee to take evidence and issue a recommended decision, with the superior court free to accept, reject or modify the proposed decision and to issue its own final decision. (See Code Civ. Proc., § 644, subd. (b).) Second, when the Medical Board "non adopts" a proposed decision, the Medical Board must still explain in a written decision the facts and evidence supporting its final conclusions of fact and law, and the discipline imposed because that decision is subject to superior court review. (Bus. & Prof. Code, § 2337; Gov. Code, § 11523; Code Civ. Proc., § 1094.5.) Third, even courts of limited review have the ability to overturn findings of fact when those findings are not supported by substantial evidence. However, this resolution would deprive the Medical Board of even that basic ground for reversing findings of fact.

Therefore, this resolution should be disapproved.

This resolution is related to Resolution 08-01-2020.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Government Code section 11517 and Business and Professions Code section 2335, to read as follows:

Government Code, § 11517

(a) A contested case may be originally heard by the agency itself and subdivision (b) shall apply. Alternatively, at the discretion of the agency, an administrative law judge may originally hear the case alone and subdivision (c) shall apply.

(b) If a contested case is originally heard before an agency itself, all of the following provisions apply:

(1) An administrative law judge shall be present during the consideration of the case and, if requested, shall assist and advise the agency in the conduct of the hearing.

(2) No member of the agency who did not hear the evidence shall vote on the decision.

(3) The agency shall issue its decision within 100 days of submission of the case.

(c) (1) If a contested case is originally heard by an administrative law judge alone, he or she shall prepare within 30 days after the case is submitted to him or her a proposed decision in a form that may be adopted by the agency as the final decision in the case. Failure of the administrative law judge to deliver a proposed decision within the time required does not prejudice the rights of the agency in the case. Thirty days after the receipt by the agency of the proposed decision, a copy of the proposed decision shall be filed by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney. The filing and service is not an adoption of a proposed decision by the agency.

(2) Within 100 days of receipt by the agency of the administrative law judge's proposed decision, the agency may act as prescribed in subparagraphs (A) to (E), inclusive. If the agency fails to act as prescribed in subparagraphs (A) to (E), inclusive, within 100 days of receipt of the proposed decision, the proposed decision shall be deemed adopted by the agency. The agency may do any of the following:

(A) Adopt the proposed decision in its entirety.

(B) Reduce or otherwise mitigate the proposed penalty and adopt the balance of the proposed decision.

(C) Make technical or other minor changes in the proposed decision and adopt it as the decision. Action by the agency under this paragraph is limited to a clarifying change or a change of a similar nature that does not affect the factual or legal basis of the proposed decision.

(D) Reject the proposed decision and refer the case to the same administrative law judge if reasonably available, otherwise to another administrative law judge, to take additional evidence. If the case is referred to an administrative law judge pursuant to this subparagraph, he or she shall prepare a revised proposed decision, as provided in paragraph (1), based upon the additional evidence and the transcript and other papers that are part of the record of the prior hearing. A copy of the revised proposed decision shall be furnished to each party and his or her attorney as prescribed in this subdivision.

(E) ~~Reject~~ Adopt the proposed decision, and reject the proposed penalty or discipline, and decide the ~~case~~ penalty or discipline upon the record, including the transcript, or upon an agreed statement of the parties, with or without taking additional evidence. By stipulation of the parties, the agency may decide the ~~case~~ question of penalty or discipline upon the record without

including the transcript. If the agency acts pursuant to this subparagraph, all of the following provisions apply:

(i) A copy of the record shall be made available to the parties. The agency may require payment of fees covering direct costs of making the copy.

(ii) The agency itself shall not decide ~~any case~~ the question of penalty or discipline provided for in this subdivision without affording the parties the opportunity to present either oral or written argument before the agency itself. If additional oral evidence is introduced before the agency itself, no agency member may vote unless the member heard the additional oral evidence.

~~(iii) The authority of the agency itself to decide the case under this subdivision includes authority to decide some but not all issues in the case.~~

(~~iv~~ iii) If the agency elects to proceed under this subparagraph, the agency shall issue its final decision not later than 100 days after rejection of the proposed ~~decision~~ penalty or discipline. If the agency elects to proceed under this subparagraph, and has ordered a transcript of the proceedings before the administrative law judge, the agency shall issue its final decision not later than 100 days after receipt of the transcript. If the agency finds that a further delay is required by special circumstance, it shall issue an order delaying the decision for no more than 30 days and specifying the reasons therefor. The order shall be subject to judicial review pursuant to Section 11523.

(d) The decision of the agency shall be filed immediately by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney.

Business and Professions Code, § 2335

(a) All proposed decisions and interim orders of the Medical Quality Hearing Panel designated in Section 11371 of the Government Code shall be transmitted to the executive director of the board, or the executive director of the California Board of Podiatric Medicine as to the licensees of that board, within 48 hours of filing.

(b) All interim orders shall be final when filed.

(c) A proposed decision shall be acted upon by the board or by any panel appointed pursuant to Section 2008 or by the California Board of Podiatric Medicine, as the case may be, in accordance with Section 11517 of the Government Code, except that all of the following shall apply to proceedings against licensees under this chapter:

(1) When considering a proposed decision, the board or panel and the California Board of Podiatric Medicine shall give great weight to the findings of fact of the administrative law judge, except to the extent those findings of fact are controverted by new evidence.

(2) The board's staff or the staff of the California Board of Podiatric Medicine shall poll the members of the board or panel or of the California Board of Podiatric Medicine by written mail ballot concerning the proposed decision. The mail ballot shall be sent within 10 calendar days of receipt of the proposed decision, and shall poll each member on whether the member votes to approve the decision, to approve the decision with an altered penalty, to refer the case back to the administrative law judge for the taking of additional evidence, or to defer final decision pending discussion of the case by the panel or board as a whole~~, or to nonadopt the decision~~. No party to the proceeding, including employees of the agency that filed the accusation, and no person who has a direct or indirect interest in the outcome of the proceeding or who presided at a previous stage of the decision, may communicate directly or indirectly, upon the merits of a contested matter while the proceeding is pending, with any member of the

panel or board, without notice and opportunity for all parties to participate in the communication. The votes of a majority of the board or of the panel, and a majority of the California Board of Podiatric Medicine, are required to approve the decision with an altered penalty, or to refer the case back to the administrative law judge for the taking of further evidence~~, or to nonadopt the decision~~. The votes of two members of the panel or board are required to defer final decision pending discussion of the case by the panel or board as a whole; except that, in the case of the California Board of Podiatric Medicine, the vote of only one member of that board is required to defer final decision pending discussion of the case by the board as a whole. If there is a vote by the specified number to defer final decision pending discussion of the case by the panel or board as a whole, provision shall be made for that discussion before the 100-day period specified in paragraph (3) expires, but in no event shall that 100-day period be extended.

(3) If a majority of the board or of the panel, or a majority of the California Board of Podiatric Medicine vote to do so, the board or the panel or the California Board of Podiatric Medicine shall issue an order of nonadoption of a proposed ~~decision~~ penalty or discipline within 100 calendar days of the date it is received by the board. If the board or the panel or the California Board of Podiatric Medicine does not refer the case back to the administrative law judge for the taking of additional evidence or issue an order of nonadoption concerning the proposed penalty or discipline within 100 calendar days, the decision shall be final and subject to review under Section 2337. Members of the board or of any panel or of the California Board of Podiatric Medicine who review a proposed decision or other matter and vote by mail as provided in paragraph (2) shall return their votes by mail to the board within 30 days from receipt of the proposed decision or other matter.

(4) The board or the panel or the California Board of Podiatric Medicine shall afford the parties the opportunity to present oral argument before deciding a case after nonadoption of the administrative law judge's penalty or discipline ~~decision~~.

(5) A vote of a majority of the board or of a panel, or a majority of the California Board of Podiatric Medicine, are required to increase the penalty from that contained in the proposed administrative law judge's decision. No member of the board or panel or of the California Board of Podiatric Medicine may vote to increase the penalty except after reading the entire record and personally hearing any additional oral argument and evidence presented to the panel or board.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Administrative agencies, e.g., Medical Board, may hear and decide contested licensing and disciplinary cases itself, or, as more commonly occurs, delegate the hearing and decision to an experienced administrative law judge with the Office of Administrative Hearings. When that occurs, the ALJ conducts a hearing, judging witnesses and evidence under the Administrative Procedure Act, then issues a proposed decision summarizing the evidence, the judge's findings of fact and conclusions of law, and recommendation for any penalty or discipline if finding against the respondent licensee. The agency currently may adopt the proposed decision (PD) as the final decision and order, or nonadopt and issue a completely different decision. The final decision is then subject to judicial review on writ petition. While the

agency should retain the discretion to adopt, reject or modify the nature and extent of any disciplinary order, it is fundamentally unfair to respondent licensee to allow an agency to completely reject the ALJ's PD on the merits simply because it may not like the outcome based on preconceived ideas. It's an anathema to principles of fairness and justice to permit the agency to then purport to redecide the facts of the case in its favor, based on its supposed reading of the cold record, after an ALJ determined the case in favor of the respondent and against the agency following a full due process hearing on the merits with all the parties, witnesses and evidence before it. With the agency having the plenary power to completely reject the ALJ's proposed decision, the agency is allowed to decide controversies based on agenda and politics rather than facts, it tramples on the rights of the licensee, and it has no incentive to settle since it knows and can control the outcome regardless of the hearing and what the ALJ finds. Even the OAH favors finality of its decisions.

The Solution: The agency may retain full authority over the decision in contested cases by conducting the hearing itself. But where it delegates the controversy for a full statutory hearing by an OAH ALJ, barring judicial review by the courts, both the agency and licensee should be required to accept the ALJ's PD as the outcome for the case. The resolution would end the agency's practice of summarily nonadopting PDs it doesn't like, irrespective of it being the product of a due process hearing conducted by an experienced ALJ who personally passed upon all the evidence presented at the trial. When both sides had their day in court, it is unfair for the agency to simply nonadopt it purport to redecide the case on the record, issuing the decision it wanted irrespective of the decision of the ALJ following a full, live trial on the merits. The resolution ends a practice repugnant to traditional notions fairness and jurisprudence, and may foster an interest in settlement that does not exist where the agency can arbitrarily control the outcome. The resolution would retain the agency's power to change any penalty or discipline, otherwise recommended in the PD, which the agency determines is not appropriate.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Joel Bruce Douglas

RESOLUTION 08-03-2020

DIGEST
State Bar: Expungement of Attorney Discipline Records
Amends Business and Professions Code section 6086.5 to specify the information the State Bar must post on its website about attorneys and creates a means to expunge discipline records.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Business and Professions Code section 6086.5 to specify the information the State Bar must post on its website about attorneys and creates a means to expunge discipline records. This resolution should be disapproved because expungement of attorney discipline records is contrary to California's policy which requires the California State Bar to protect the public from attorneys who violate the California Rules of Professional Conduct.

There is no current California law that permits attorneys to seek expungement of their discipline records or that permits the California State Bar to limit the record of attorney discipline available to the public.

This resolution gives attorneys the ability to seek expungement of discipline records that are publicly available as follows: For 'administrative actions' (the resolution does not specify what an 'administrative action' would be in the context of attorney licensing/discipline), the attorney may petition for removal of the record from publicly available information five years after it was posted under the attorney's State Bar profile on the State Bar's website. For disciplinary actions, ten years after the record is posted under the attorney's State Bar profile, the attorney may petition the State Bar to have the record expunged from public view, and is required to show that he/she/they has been rehabilitated and no longer poses a "credible risk" to the public. This resolution grants the State Bar authority to determine the amount of the fee for such petitions, and the minimum information the petitioning attorney must provide. This resolution requires the State Bar to maintain a list of all attorneys whose records were altered under this expungement scheme, and to make that list available to "other licensing bodies." This resolution does not specify whether the list the State Bar is required to maintain must contain the information that was expunged from public view.

This resolution does not heed the public protection purpose of the State Bar (see e.g., the Mission Statement of the State Bar, https://www.calbar.ca.gov/About-Us/Our-Mission), or the fact that attorneys' fiduciary duties to their clients is of the highest importance (see e.g., *Magee v. State Bar of Cal*. (1962) 58 Cal.2d 423, 430). When an attorney violates the Rules of Professional Conduct and is disciplined by the State Bar for such misconduct, the information never stops being relevant for public protection. Members of the public are able to decide for themselves whether to hire an attorney disciplined more than 10 years ago. Whatever the attorney's

wrongdoing may have been (whether minor or egregious), the public should not be denied the right to know the information. Attorneys are public figures, officers of the court, and are expected to conduct themselves accordingly. In addition, this resolution improperly asks the State Bar to focus on the attorneys' interests in perhaps not being embarrassed by past wrongdoing, or worse, losing clients/not getting retained by potential clients rather than on protecting the public from unscrupulous attorneys.

This resolution also fails to take into consideration that the State Bar's public disclosure requirements are far greater than the information the State Bar posts on its website under attorneys' profiles. For example, the State Bar must disclose (upon request by any member of the public) "any information reasonably available to it pursuant to subdivision (o) of [Business and Professions Code] Section 6068, and to [Business and Professions Code] Sections 6087.7, 6086.8, and 61-1, concerning a licensee of the State Bar which is otherwise a matter of public record, including civil or criminal filings and dispositions." (Bus. & Prof. Code, § 6086.1, subd. (c).) The State Bar complies with this requirement, in part, by posting the records of attorney discipline to its website. (See e.g., *Mack v. State Bar of California* (2001) 92 Cal.App.4th 957, 962-963.) All of these categories of information about attorneys are public records. (*Ibid*.) In addition, this resolution fails to consider that the opinions of the State Bar Court and the California Supreme Court relating to attorney's discipline remain publicly available records of attorney discipline.

Finally, it is unclear under this resolution whether the State Bar would be prohibited from disclosing discipline records that were removed from the attorney's profile to a member of the public who requests all information about that attorney. It is also unclear whether the State Bar would be required to maintain its own record of the expunged discipline.

Therefore, this resolution should be disapproved.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Business and Professions Code section 6086.5, to read as follows:

§ 6086.5

(a) The board of trustees shall establish a State Bar Court, to act in its place and stead in the determination of disciplinary and reinstatement proceedings and proceedings pursuant to subdivisions (b) and (c) of Section 6007 to the extent provided by rules adopted by the board of trustees pursuant to this chapter. In these proceedings the State Bar Court may exercise the powers and authority vested in the board of trustees by this chapter, including those powers and that authority vested in committees of, or established by, the board, except as limited by rules of the board of trustees within the scope of this chapter.

(b) Access to records of the State Bar Court shall be governed by court rules and laws applicable to records of the judiciary and not the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code).

(c) The State Bar of California shall provide on the Internet on its website information regarding the status of every license issued by the State Bar of California in accordance with the

California Public Records Act. The public information to be provided on the Internet shall include information on administrative actions, disciplinary actions, suspensions and disbarments as part of the State Bar's licensees' State Bar profiles.

(d) Upon petition by a licensee accompanied by a fee sufficient to defray costs associated with consideration of a petition, filed in State Bar Court, the State Bar of California may remove from the licensee's State Bar Profile the public information described in subdivision (c) an item that has been posted on the licensee's State Bar Profile for no less than five years which constitutes an administrative action, or an item that has been posted on the licensee's State Bar Profile for no less than ten years which constitutes a disciplinary action, where the licensee provides evidence of rehabilitation indicating that the notice is no longer required in order to prevent a credible risk to members of the public utilizing licensed activity of the licensee. In evaluating a petition, the State Bar Court shall take into consideration other violations that present a credible risk to the members of the public since the administrative or disciplinary action which the licensee has petitioned to be removed from the licensee's State Bar Profile.

(e) The State Bar of California may develop, through regulations, the amount of the fee and the minimum information to be included in a licensee's petition, including, but not limited to, a written justification and evidence of rehabilitation.

(f) The petition process described by subdivisions (d) and (e) shall commence January 1, 2021.

(g) The State Bar of California shall maintain a list of all licensees whose administrative or disciplinary records are altered as a result of a petition approved under subdivision (d). The State Bar of California shall make the list accessible to other licensing bodies. The State Bar of California shall update and provide the list to other licensing bodies as often as it modifies the records displayed on its website in response to petitions approved under subdivision (d).

(h) For the purposes of Sections 6007, 6043, 6049, 6049.2, 6050, 6051, 6052, 6077 (excluding the first sentence), 6078, 6080, 6081, and 6082, "board" includes the State Bar Court.

(i) Nothing in this section shall authorize the State Bar Court to adopt rules of professional conduct or rules of procedure.

(j) The Executive Committee of the State Bar Court may adopt rules of practice for the conduct of all proceedings within its jurisdiction. These rules may not conflict with the rules of procedure adopted by the board, unless approved by the Supreme Court.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: The State Bar Act (codified in the Business and Professions Code) provides for the licensing and regulation of lawyers by the State Bar of California. Fees charged and collected by the State Bar of California from its licensees under the Business and Professions Code are paid to the State Bar of California for the purpose of funding the discipline system and admissions. Existing law requires the State Bar of California to provide on the Internet on the State Bar website specific information regarding the status of every license issued by the State Bar of California on licensees' State Bar Profiles.

At this time any administrative action or any level of discipline against a licensee remains on a licensee's State Bar profile indefinitely, except in rare circumstances. For instance, an administrative inactive enrollment for failing to timely comply with a licensee's MCLE requirement can be expunged from a licensee's State Bar profile after seven years under certain conditions. Very remote or minor violations remain on a State Bar profile much longer than necessary to protect the public by providing full information about lawyers. This resolution would strike a balance in allowing a licensee to seek expungement where the licensee could establish the information is not necessary to ensure public protection.

The Solution: This resolution would authorize the State Bar Court, upon petition by a licensee accompanied by a specified fee, to (1) remove from the licensee's State Bar Profile an item that has been posted for at least five years which constitutes an administrative action against a licensee's license; and (2) remove from the licensee's State Bar Profile an item that has been posted for at least ten years which constitutes any level of public discipline, where the licensee can establish rehabilitation indicating that the notice is no longer required to prevent a credible risk to members of the public utilizing licensed activity of the licensee. The resolution would require the State Bar Court, in evaluating a petition, to take into consideration other violations that present a credible risk to the members of the public since the administrative or disciplinary action which the licensee is seeking to be removed occurred. The resolution would also authorize the State Bar of California to develop, through regulations, the amount of the fee and the minimum information to be included in a licensee's petition, including, but not limited to, a written justification and evidence of rehabilitation. The resolution would require the petition process to commence January 1, 2021. The resolution would require the State Bar of California to maintain a list of all licensees whose disciplinary records are altered as a result of the petition process and to update the list and make it available to other licensing bodies, as specified.

IMPACT STATEMENT
This resolution may require additional statutory changes.

CURRENT OR PRIOR RELATED LEGISLATION
In 2016, the Legislature created a pathway for licensees of the Department of Real Estate to seek expungement of remote discipline recorded on that agency's website in AB 1807, which amended Business and Professions Code, Sections 10083.2 et seq.

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