

Memorandum 96-50

Quasi-Public Entity Hearings: Draft of Recommendation

Attached to this memorandum is a draft of the recommendation on quasi-public entity hearings, revised in accordance with Commission decisions at the June meeting.

At the June meeting Commission approved the recommendation, subject to action on further information about the following matters:

- The Department of Corporations concern about physicians and surgeons cooperative corporations which enter into indemnity, reciprocal, or interinsurance contracts.

- The operation of the State Bar Court.

Attached as Exhibit p. 1 is a letter from Professor Gregory Ogden expressing support for the recommendation, noting that it would promote the following policies:

- (1) Preventing arbitrary decision making through procedural protections.
- (2) Providing uniform administrative procedures.
- (3) Fostering alternative dispute resolution and informal hearings.

Physicians and Surgeons Cooperative Corporations

Insurance Code Section 1280.7 governs unincorporated interindemnity, reciprocal, and interinsurance contracts between members of a cooperative corporation consisting solely of physicians and surgeons licensed in California. The purpose of these contracts is to indemnify for medical malpractice claims against the members out of a collective reserve trust fund created by contributions of the members.

The trust fund is administered by a board of trustees of the participating members. The board may terminate a person's membership for failure to comply with any provision of the trust agreement. "[T]he person shall be given the right to call for a hearing before the board of trustees ... at which hearing the person shall be given the opportunity to demonstrate to the board of trustees that no failure to comply has occurred or, if it has occurred, that it has been cured." Ins. Code § 1280.7(a)(9)(E).

The Department of Corporations has noted that the proposal to apply the Administrative Procedure Act to quasi-public entity hearings “may unjustifiably affect” these physician and surgeon cooperative corporations. Arguably the prescribed hearing does fall within the terms of the proposal — it is (i) imposed by statute (ii) on a private entity created pursuant to statute (iii) for the purpose of administration of a state function (i.e., in lieu of regulation by the Insurance Commissioner or the Commissioner of Corporations), and (iv) there is no administrative review of the decision.

The question is, would application of the Administrative Procedure Act to these hearings cause a problem? The bill of rights requirements are generally fairly modest, e.g., a copy of the hearing procedure, an unbiased hearing officer, no ex parte communications allowed, etc. However, some of the requirements could pose significant problems for an entity such as a volunteer board of trustees of this type with minimal administrative structure. Perhaps the most significant requirement in this context would be separation of functions, which understandably could add substantial formality and expense to these hearings.

To the staff, this argues for narrowing the scope of the recommendation so it is limited to specific entities created by statute (e.g., the Kiwifruit Commission or the Escrow Agents Fidelity Corporation), and would not extend to entities such as boards of trustees that are established pursuant to statute under interindemnity, reciprocal, and interinsurance contracts between members of a cooperative corporation.

This chapter applies to a decision by a private entity if all of the following conditions are satisfied:

(1) The entity is created by ~~or pursuant to~~ statute for the purpose of administration of a state function.

An alternative would be to go through the Administrative Procedure Act and identify specific provisions that do not apply to hearings of this type. The staff thinks this is a fairly hopeless task, since we would need to investigate the circumstances of many different types of entities. It is simpler just to exclude them for now, until we have some experience with application of the APA to quasi-public entities.

State Bar Court

The issue arose at the June meeting whether the State Bar Court should be excepted from the Administrative Procedure Act.

On reviewing the statutes governing the State Bar Court and its operation, the staff concludes that the State Bar Court already satisfies most of the requirements of the Administrative Procedure Act. The person complained against is entitled to notice and an opportunity to be heard, to present and rebut evidence, and to issue subpoenas. Bus. & Prof. Code § 6085. The governing procedure is publicly available. See Rules of Practice & Rules of Procedure. The hearing is open to public observation. Bus. & Prof. Code § 6086.1; Rule 20. There is separation of functions. Bus. & Prof. Code § 6086.5, 6086.65. The presiding officer is subject to disqualification for bias. Rule 106. A written decision is required. Rule 1270. We did not notice any express ex parte communications limitations, but these are inherent in the judicial character of State Bar Court proceedings. We did not notice any precedent decision provisions.

The staff concludes that we could apply the Administrative Procedure Act to the State Bar Court without undue disruption. This would require express language, since Business and Professions Code Section 6001 provides that:

No law of this state restricting, or prescribing a mode of procedure for the exercise of powers of state public bodies or state agencies, or classes thereof, including, but not by way of limitation, the provisions contained in Division 3 (commencing with Section 11000) ... of Title 2 of the Government Code, shall be applicable to the State Bar, unless the Legislature expressly so declares.

On the other hand, the State Bar Court procedures are full of due process, probably far more than any state agency, not to mention other quasi-public entities. The fundamental defects we have noted in quasi-public entity proceedings are not present in State Bar Court proceedings. On balance, the staff thinks it is preferable to let the existing statutory State Bar exemption stand. We would add a sentence to the Comment that “This section does not apply to the State Bar, including proceedings of the State Bar Court. See Bus. & Prof. Code § 6001.”

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Memo 96-50

PEPPERDINE UNIVERSITY

SCHOOL OF LAW

June 18, 1996

Mr. Nat Sterling
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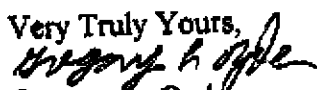
Re: Quasi-Public Entity Hearings

Dear Nat:

I have read both the tentative recommendation and the comments on the tentative recommendation on Quasi-Public Entity Hearings. I support the provisions of proposed Govt. Code Section 11410.60, as amended based on the initial comments. Specifically, I support the application of Chapter 4.5, including the administrative adjudication bill of rights, of the new administrative adjudication legislation to quasi-public entities, as defined in Section 11410.60(a). Second, I support the exception for private entity decisions that are administratively reviewed in an adjudicative proceeding as defined in Section 11410.60(b). I also support the provisions of subsection (c), and the comments as amended.

The rationale for this proposal that is most compelling to me is the need to ensure that fair procedures are followed when private entities perform public functions. It makes sense to me to proceed cautiously, to not impose full formal adjudicatory procedure on these quasi-public entities. It also makes sense to have minimum standards of fair procedure that these entities must comply with when they act in an adjudicatory capacity. As the experience with some local agency decision making suggests, the lack of procedural safeguards can lead to, or at least not prevent, arbitrary decision making. Procedural safeguards do not guarantee that all decisions will be rational or fair, but these safeguards do provide minimal protections for litigants facing the power of a governmental agency, whether public or quasi-public. The second rationale that supports this recommendation, promotion of uniformity of administrative procedure, is also an important protection so that litigants before quasi-public entities do not get blind sided by agency specific procedures that are not widely known. Finally, quasi-public entities may be able to take advantage of some of the innovations of the new administrative adjudication legislation, such as alternative dispute resolution, and informal hearings.

Very Truly Yours,



Gregory L. Ogden
Professor of Law

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

**STAFF DRAFT
RECOMMENDATION**

Administrative Adjudication by Quasi-Public Entities

July 1996

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ADMINISTRATIVE ADJUDICATION BY QUASI-PUBLIC ENTITIES

Summary of Recommendation

An adjudicative decision of a private entity, when affecting the public interest, is subject to common law fair procedure requirements. The exact scope of the fair procedure requirement is not clear, particularly as applied to a quasi-public entity — a private entity created by or pursuant to statute for the purpose of administering a state function. This recommendation would impose the administrative adjudication provisions of the state Administrative Procedure Act, including the administrative adjudication “bill of rights”, on any statutorily or constitutionally required evidentiary hearing of a quasi-public entity administering a state function for which there is no other administrative review with Administrative Procedure Act protections.

ADMINISTRATIVE ADJUDICATION BY QUASI-PUBLIC ENTITIES

1 Comprehensive legislation enacted in 1995 requires state agency administrative
2 adjudication to adhere to fundamental due process and public policy
3 requirements.¹ Among the requirements the Administrative Procedure Act imposes
4 on state agency administrative adjudication are:²

- 5 • The agency must give notice and an opportunity to be heard, including the
6 right to present and rebut evidence.
- 7 • The agency must make available a copy of its hearing procedure.
- 8 • The hearing must be open to public observation.
- 9 • The presiding officer must be neutral, the adjudicative function being
10 separated from the investigative, prosecutorial, and advocacy functions
11 within the agency.
- 12 • The presiding officer must be free of bias, prejudice, and interest.
- 13 • The decision must be in writing, be based on the record, and include a
14 statement of the factual and legal basis of the decision. Credibility
15 determinations made by the presiding officer are entitled to great weight on
16 review. A penalty may not be based on an agency "guideline" unless the
17 agency has adopted the guideline as a regulation.
- 18 • The decision may not be relied on as precedent unless the agency designates
19 and indexes it as precedent.
- 20 • Ex parte communications to the presiding officer are prohibited.
- 21 • The agency must make available language assistance to the extent required
22 by existing law.

23 The new legislation also encourages settlements,³ alternative dispute resolution,⁴
24 and informal proceedings.⁵

25 The coverage of the new provisions is limited to adjudication by state agencies
26 made pursuant to constitutionally or statutorily required hearings.⁶ However, in

1. 1995 Cal. Stat. ch. 938, § 21. The legislation implements a recommendation of the California Law Revision Commission, and is operative July 1, 1997. See *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm'n Reports 55 (1995); *Annual Report for 1995*, 25 Cal. L. Revision Comm'n Reports 615, 711 (Appendix 7) (1995).

2. Gov't Code § 11425.10 (administrative adjudication bill of rights).

3. Gov't Code § 11415.60 (settlement).

4. Gov't Code §§ 11420.10-11420.30 (alternative dispute resolution).

5. Gov't Code §§ 11445.10-11445.60 (informal hearing).

6. Gov't Code § 11410.10. A number of state agency hearings are exempted from the coverage of the new provisions. Separation of powers principles exempt the Legislature, the Governor and Governor's Office, and the courts and judicial branch. The California Constitution also exempts the University of

1 many cases a statute delegates or authorizes delegation of a state function to a
2 private entity, including delegation of adjudicative authority. Examples of such
3 delegations to “quasi-public” entities include:

4 California Automobile Assigned Risk Plan (Ins. Code § 11623)
5 California Insurance Guarantee Association (Ins. Code § 1063)
6 Escrow Agents’ Fidelity Corporation (Fin. Code § 17311)
7 Foster Family Agencies (Health & Saf. Code § 1506)
8 State Compensation Insurance Fund (Ins. Code § 11773)
9 Various agricultural produce commissions (Food & Ag. Code § 67111 *ff.*)⁷

10 Adjudicative proceedings conducted by quasi-public entities of this type are not
11 subject to the administrative adjudication requirements of the Administrative
12 Procedure Act.⁸

13 Adjudicative proceedings of private entities, when affecting the public interest,
14 are subject to common law “fair procedure” requirements.⁹ For example, private
15 hospitals in the admission or exclusion of physicians to staff privileges, and
16 professional societies in the exclusion and expulsion of members, must provide
17 fair procedures, particularly notice and an opportunity to be heard. These

California. See discussion in *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm’n Reports 55, 87-91 (1995).

Specified hearings of the following executive branch agencies are also exempted by statute:

State Bar of California
Alcoholic Beverage Control Appeals Board
Commission on State Mandates
Military Department
Department of Corrections (including Board of Prison Terms, Youth Authority, Youthful
Offenders Parol Board, Narcotic Evaluation Authority)
Public Utilities Commission
State Board of Equalization
Public Employment Relations Board
Agricultural Labor Relations Board
Franchise Tax Board

7. A typical example is the Winegrowers of California Commission, created by the Dills-Bronzan Winegrowers Joint Commission Act of 1986. The statute proclaims that “There is in state government, the Winegrowers of California Commission.” Food & Agric. Code § 74061. However, the statute then proceeds to distance the Commission from the state, providing that it is a corporate body and the state is not liable for its acts. Food & Agric. Code §§ 74074, 74078. It is funded by producer assessments. Food & Agric. Code § 74104. The Commission must provide an informal hearing for individuals aggrieved by its acts; appeals from Commission decisions are made to the Director of Food and Agriculture; the Director’s determinations are subject to judicial review. Food & Agric. Code § 74172.

8. See Gov’t Code § 11410.20 (application to state); *cf.* *Henry George School of Social Science v. San Diego Unified School Dist.*, 183 Cal. App. 2d 82, 85-86, 6 Cal. Rptr. 661 (1960) (“While it is true that in a limited sense school districts are state agencies, we are of the view that the chapters last above referred to were intended to apply only to those state agencies exercising under authority of statute certain statewide functions, or who exercised some statewide function locally under some statute specifically localizing that function.”)

9. For discussion of the fair procedure principle, see *California Administrative Hearing Practice* §§ 1.35-1.36 (Cal. Cont. Ed Bar. 1984; Supp. 1995).

1 principles apply whether or not the activity amounts to “state action” for purposes
2 of equal protection and due process of law.¹⁰

3 It is likely that adjudicative proceedings of quasi-public entities are subject to
4 fair procedure requirements to the same or a greater extent than proceedings of
5 purely private entities, but the law is not clear on this matter. It should be made
6 clear. The Law Revision Commission recommends that a quasi-public entity
7 administering a state function be subject to the administrative adjudication
8 provisions of the Administrative Procedure Act in its conduct of a constitutionally
9 or statutorily required adjudicative hearing. This would also clarify the precise
10 standards that are applicable, in place of nebulous “fair procedure” requirements.

11 It is appropriate that an adjudicative proceeding of a quasi-public entity
12 performing a state function be treated the same as an adjudicative proceeding of a
13 state agency. A person’s right to fundamental due process and public policy
14 protections should not depend on whether the adjudication is done by a state
15 agency or by a quasi-public entity to which the agency’s authority is delegated.
16 Application of the state procedural protections to quasi-public entity adjudication
17 will also promote uniformity of administrative procedure, to the ultimate benefit of
18 the regulated public.

19 A critical step in applying the administrative adjudication provisions of the
20 Administrative Procedure Act to quasi-public entities is specification of precisely
21 which entities are covered. Because many private entities perform functions that
22 are arguably “public” in nature, a private entity needs to know with some
23 assurance whether any of its proceedings is subject to the administrative
24 adjudication provisions of the Administrative Procedure Act. For this reason, the
25 Law Revision Commission recommends a narrowly drawn statute — a private
26 entity’s adjudicative proceeding will be subject to the administrative adjudication
27 provisions of the Administrative Procedure Act if each of the following
28 requirements is satisfied:

29 (1) The entity is a creature of statute.

30 (2) The entity is administering a state function.

31 (3) The entity is engaged in making an adjudicative decision that
32 determines the legal rights or other legal interests of a particular individual
33 or entity.

34 (4) The entity is constitutionally or statutorily required to formulate its
35 decision pursuant to an evidentiary hearing for determination of facts.

36 (5) The entity’s decision is not subject to administrative review in a
37 proceeding to which the administrative adjudication protections of the
38 Administrative Procedure Act apply.

10. See 1 G. Ogden, *California Public Agency Practice* § 2.03 (1994).

1 Under this test, for example, proceedings of a “community action agency” would
2 not be covered, since those quasi-public entities do not conduct evidentiary
3 hearings.¹¹

11. See Gov’t Code §§ 12750-12763.

PROPOSED LEGISLATION

An act to add Section 11410.60 to the Government Code, relating to administrative adjudication by quasi-public entities.

Gov't Code § 11410.60 (added). Application to quasi-public entities

SECTION 1. Section 11410.60 is added to the Government Code, to read:

11410.60. (a) This chapter applies to a decision by a private entity if all of the following conditions are satisfied:

(1) The entity is created by or pursuant to statute for the purpose of administration of a state function.

(2) Under the federal or state Constitution or a federal or state statute, an evidentiary hearing for determination of facts is required for formulation and issuance of the decision.

(b) Notwithstanding subdivision (a), this chapter does not apply to a decision by a private entity if the decision is subject to administrative review in an adjudicative proceeding to which this chapter does apply

(c) For the purpose of application of this chapter to a decision by a private entity, unless the provision or context requires otherwise:

(1) "Agency" means the private entity.

(2) "Regulation" means a rule promulgated by the private entity.

(3) Article 8 (commencing with Section 11435.05), requiring language assistance in an adjudicative proceeding, applies to the private entity to the same extent as to a state agency governed by Section 11018.

Comment. Section 11410.60 applies this chapter to decisions of quasi-public entities. It is limited to decisions for which an evidentiary hearing by the quasi-public entity is statutorily or constitutionally required. *Cf.* Section 11405.50 ("decision" is action of specific application that determines legal right or other legal interest of particular person).

Although subdivision (b) makes this chapter inapplicable to a quasi-public entity decision if the decision is otherwise reviewable in a proceeding governed by this chapter, the quasi-public entity may voluntarily adopt the procedural protections provided in this chapter. *Cf.* Section 11410.40 (election to apply administrative adjudication provisions).