

Open and Closed Session Protocols The Adjudication Process Conflicts of Interest

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Each board has essentially 3 duties under the Open Meetings Act (OMA)

1. Give adequate notice of meetings to be held
2. Provide opportunity for public comment
3. Conduct such meetings in open session, **except** where a closed session is specifically authorized

Bagley-Keene Open Meeting Act (OMA), Gov. Code section 11120 et seq.



General Rule: “Open and Public”

“All meetings of a state body shall be open and public and all persons shall be permitted to attend any meeting of a state body, **except** as otherwise provided in this article.”

DEPARTMENT OF CONSUMER AFFAIRS

OMA, Gov. Code section 11123



Exception: Closed Session

- Absent **statutory authorization**, business transacted by an agency **must** be transacted in open session.
- The OMA sets forth **specific** items of business which may be transacted in closed session, which must be held during a duly noticed regular or special meeting

OMA, Gov. Code § § 11126, 11128, 11132



Purposes for Closed Session

OMA Exceptions to the rule of open session are for the following:

Personnel matters (§ 11126(a))

Examination matters (§ 11126(c)(1))

Matters affecting individual privacy (§ 11126(c)(2))

Administrative disciplinary matters (§ 11126(c)(3))

Pending litigation (§ 11126(e)(2))

Response to confidential final draft audit report (§ 11126.2)

Threat of criminal or terrorist activity (§ 11126(c)(18))

Advisory bodies/committees may meet in closed session (§ 11126(f)(4)-(6))



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Notice and Reporting Requirements

- When a closed session will constitute part or all of a meeting, it is important that the Board disclose the nature of the item or items to be discussed, normally on the agenda
- If the board intends to have a closed session during the meeting, contact your legal counsel to ensure it is authorized and properly noticed

OMA, Gov. Code § 11126.3, 11126.3(f)



Other Procedural Requirements

1. Required agency staff person's attendance in closed session to record in a minute book a record of topics discussed and decisions made (§ 11126.1)
2. Restriction on additional closed session attendees: the body plus required support staff (83 Ops.Cal.Atty.Gen. 221, 222)
3. Confidentiality of the closed session minute book, available to members or a court of general jurisdiction (§ 11126.1)
4. Discussion and information received in closed session is confidential (83 Ops.Cal.Atty.Gen. 231)



Closed Session: Green Light

- A board may meet in closed session to deliberate on a decision in an administrative disciplinary proceeding under the APA to:
 1. Adopt a proposed decision
 2. Review a transcript of a hearing and render a decision of its own
 3. Deliberate upon evidence heard by the agency itself
 4. Consider a stipulation

OMA, Gov. Code § 11126(c)(3)



Closed Session: Red Light

- Assign cases, i.e. deciding whether a case should be heard by a hearing officer alone or by the agency itself with a hearing officer
- Review investigation files or complaints
- Electing officers or to discuss proposal or adoption of rules and regulations
- Discuss testimony received during a hearing on proposed rules and regulations
- Have a frank and open discussion among members on a matter of controversy



Separation of Functions

- Separation of functions; disqualification
- Prosecutorial/investigative functions, versus board's role as that of judge in the case
- Consult legal counsel before **any** enforcement actions are discussed with individual licensees
 - may impact participation in a final case decision
 - may require disclosures under the APA

Administrative Procedure Act (APA), Gov. Code section 11400 et seq.

Gov. Code § 11425.10 et seq. (Administrative Adjudication Bill of Rights)

Gov. Code § 11430.10 et seq. (Ex Parte Communications)



Disqualification

- Actual or apparent bias, prejudice, conflict of interest
- Professional, personal, financial, or other association or relationship with or adversarial to any party should disclose it to all parties and to other agency members as soon as the agency member is aware of it
- Disqualification required if the association or relationship will impair their ability to consider the case fairly on the evidence and the law



Ex Parte Communications

Other members and staff

- Decisionmakers should not contact each other about a pending case outside of a meeting
- Members should not contact agency staff about a pending case, except on technical, procedural issues not in controversy



Ex Parte Communications

Parties, Witnesses, Representatives

- Decisionmaker must not initiate contact with any party, his or her witnesses, or representatives, and must avoid contact with any of them when anyone else initiates contact
- Should a decisionmaker be contacted, the contact should be terminated or stop reading
- Writing should be preserved
- Disqualification may be required if impartiality is compromised



Ex Parte Communications

- Communications are permitted with notice and opportunity for all parties to participate in the communication



The Administrative Record

- Must not consider evidence other than that which is properly before the agency
 - Proposed decision, exhibits,
 - Settlement and transmittal letter,
 - transcripts, exhibits, arguments
- Cannot conduct your own investigations or perform your own fact finding.

Gov. Code section 11425.50(c)



Factors Generally

- Consumer protection, not punishment
- Activities since discipline imposed
- The offenses for which disciplined
- Conduct during the time license was in good standing
- General reputation for truth
- Professional ability
- Good character

BPC section 4928.1; Disciplinary Guidelines



Mitigation and Rehabilitation

- Mitigation: Not a justification or excuse, but extenuating or reducing circumstances
- Rehabilitation: Restoring of a licensee to his or her greatest potential, has dealt with the basis for the misconduct or the root causes, such that it appears less likely to recur



Reinstatement/Penalty Relief

- Normally heard by agency, sitting with an ALJ
- The focus is on rehabilitation, criteria in DG, p.12-13
- Not to re-litigate, attack the harshness or correctness of the decision, except to show unreasonable limits inconsistent with the intent
- DAG appears on behalf of the State
- ALJ rules on legal issues, advises in closed session, and prepared the decision
- Burden on the petitioner to show rehabilitation by clear and convincing evidence to a reasonable certainty

Gov. Code section 11522, BPC 4960.5



Actions on Petitions

- Reinstatement
 - Deny; no license issued
 - Grant; unencumbered
 - Grant; with terms
- Termination/Modification of Penalty
 - Deny; continues with existing terms
 - Grant in part; modified
 - Grant; unencumbered



Review of Petition Decisions

- The Board has 100 days from the date the case was submitted (which is usually the date of the hearing) to issue its Decision
- Reviewed by staff for obvious errors or omissions
- Staff sends for reviewed by counsel, noting errors/omissions
- Counsel drafts memo to the Board on recommended changes and process for review



Actions on Proposed Decisions

- Two types of cases; charging documents
 - Licensing: Applicants: Statement of Issues
 - Discipline: Licensees: Accusation
- Normally heard by ALJ, followed by mail ballot to with options to adopt, reject, hold, or recuse
- If held for discussion, considering whether to:
 1. **.Adopt** in its entirety
 2. Reduce or otherwise **mitigate** penalty, adopt balance
 3. **.Technical** or **minor changes**, and adopt
 4. Reject and **remand** to ALJ to take additional evidence
 5. Reject and decide the case upon the record

Gov. Code section 11517(c)(2)



Review of Proposed Decisions

- Burden of proof
 - Discipline: On agency; clear and convincing evidence to a reasonable certainty, unless statute provides otherwise
 - Licensing: On applicant; preponderance of the evidence standard; qualified to hold the license.
- Substantial Relationship Criteria: “substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued”; Nexus required
- Mitigation and rehabilitation evidence

BPC § 480, 490; *Coffin v. Dept. of Alcoholic Beverage Control* (2006) 139 Cal.App.4th 471, 475-476.



Proposed Decision: Timelines

- The ALJ provides a Proposed Decision within 30 days after the case is submitted
- Within 100 days of the Board's receipt of the Proposed Decision, the Board must decide whether to:
 - (1) adopt; (2) reject; (3) remand; (4) make technical or minor changes; or (5) mitigate



Rejection Timelines

- If the Board rejects the Proposed Decision:
 - The Board must issue its Final Decision within 100 days after it rejected the Proposed Decision; OR
 - Within 100 days after the Board received the hearing transcript



Actions on Stipulated Settlements

- Looking whether to:
 - adopt,
 - reject and counter,
 - reject (matter goes to hearing)
- Board staff should provide a copy of the accusation/statement of issues (SOI)
- DAG letter of recommendation
- DAG can participate in closed session to discuss any questions about the letter/stipulated settlement



Review of Stipulated Settlements

- Looking for
 - advisement and waivers
 - culpability
 - contingency
 - disciplinary order



Tools to Assist in Deliberations

- Disciplinary Guidelines
- Your counsel, if a legal question arises



Other Types of Cases

- Requests for Reconsideration
- Petitions to Vacate Default Decisions
- Citations
- Default Decision



Open Session Motions

- “Words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the Act giving the authority.”
 - Civ. Code, § 12; CCP § 15.
- A majority of a quorum is empowered to act for the body.
 - *People v. Harrington* (1883) 63 Cal. 257, 260; *Martin v. Ballinger* (1938) 25 Cal.App.2d 435, 439.



Communications and Conflicts



How to determine if a communication is appropriate?

- **When in doubt**, contact your legal counsel
- Board's Administrative Manual
- Fair Political Practices Commission Website
 - Fppc.ca.gov
- DCA Incompatible Work Activities policy
- Board Member Orientation Training Manual



Written Correspondence

- All correspondence, press releases, articles, memoranda or any other communication written by any Board member in his or her official capacity must be provided to the Executive Officer. The Executive Officer will retain a copy in a chronological file.

Administrative manual, p.14



Communications with Other Organizations & Individuals

- All communications relating to any Board action or policy to any individual or organization shall be made only by the Chair of the Board, his or her designee, or the Executive Officer.
- Any Board member who is contacted by any of the above should inform the Board Chair or Executive Officer of the contact immediately.
- All correspondence shall be issued on the Board's standard letterhead and will be disseminated by the Executive Officer's office.

Administrative Manual, p. 14, 17



Events and Associations

- Generally, members may attend and participate in professional events in their individual capacities.
- They may also attend in their official capacities, if authorized per Board policies.
- If three or more Board members are attending an event, they should not discuss any board business to avoid triggering Open Meetings Act requirements.
- If making remarks or presenting, clarify the capacity in which you are presenting i.e. individual or official capacity.



Incompatible Work Activities Policy

- (1) **Using the prestige or influence of a State office or employment** for the officer's or employee's private gain or advantage, or the private gain or advantage of another.
- (3) **Using confidential information** acquired by virtue of State employment for the officer's or employee's private gain or advantage, or the private gain or advantage of another.
- (5) **Performance of an act in other than his [or her] capacity as a State officer or employee** knowing that such an act may later be subject, directly or indirectly, to the control, inspection, review, audit or enforcement by such officer or employee or the agency by which he or she is employed. [This would not preclude an "industry" member of a board or commission from performing the normal functions of his or her occupation.]



Conflicts: Issue Spotting

- Step 1: Is a public official involved?
- Step 2: Is the official making, participating in the making of, or using his or her official position to influence the making of a governmental decision?
- Step 3: Does the official have one of the qualifying types of economic interests?
- Step 4: Is the economic interest directly or indirectly involved in the governmental decision?



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- Step 5: Will the governmental decision have a material financial effect on the public official's economic interests?
- Step 6: Is it reasonably foreseeable that the economic interest will be materially affected?
- Step 7: Is the effect of the governmental decision on the public official's economic interests distinguishable from its effect on the general public?



Cont'd

- Step 8: Despite a disqualifying conflict of interest, is the public official's participation legally required?
- If you spot a potential issue, you're encouraged to contact your legal counsel.
- You may also contact the executive officer or the FPPC.



Questions?

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