

2nd Civil No.
OCSC Case No. 05CC00971

IN THE COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION 3

CHARLES BENNINGHOFF,

Petitioner,

vs.

ORANGE COUNTY SUPERIOR COURT OF THE STATE,

Respondent,

The Honorable Michael Brenner, Judge Presiding.

THE STATE BAR OF CALIFORNIA,

Real Party In Interest.

AMICUS CURIAE

IN SUPPORT OF PETITIONER

BY: Michael Asimow, Esq.
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Table of Contents

Application

- I. Author's Background En Breve
- II. The Compelling Public Issue
- III. Guidance Provided Herein
 - 1. Lay representation is in the best interests of California and I have written about this extensively.
 - 2. I have been a professor emeritus of administrative law for more than 30 years at UCLA.
 - 3. I have no clients.
 - 4. I am completely impartial insofar as the Petition is concerned.
 - 5. My task with this Amicus Curiae brief is to discuss the issue of whether lay representation before administrative agencies is unauthorized practice of law.

Amicus Curiae Brief

- IV. Author's Qualifications
- V. The Right to Lay Representation is **Established by Custom and Court Decisions in California**
- VI. California's Statutory and Regulatory Framework
- VII. APA's Notice of hearing provision

Table of Authorities

Application to File Amicus Curiae

I. Author's Qualifications En Breve

In 1985, the California Law Revision Commission retained me as the consultant to the Commission in drafting a legislatively-mandated overhaul of the 1945 Administrative Procedure Act (APA). As the consultant, I wrote the study *The Adjudicative Process*, 25 Cal. L. Rev'n Comm'n Reports 447 (1995). In that study I wrote, "I believe that the APA should provide that a party can be represented by anyone of his choice, before any agency, whether or not a licensed attorney. The prohibitive cost of legal services, and the very limited availability of legal services for the poor or pro bono representation, means that most parties to administrative proceedings cannot afford lawyers. Indeed, non-lawyer advocates' may do a better job than lawyers in specialized tribunals such as tax or welfare cases or in cases raising scientific or technical issues" *Id.* at 516

The Legislature adopted, and the Governor signed into law, the recommendations of the Commission in SB 523 of 1995 which replaced the old 1945 APA with Government Code §§ 11400, et seq., which *inter alia* permitted lay representation using the nomenclature "attorney or authorized representative."

As the Chief Consultant to the California Law Revision Commission

starting in 1988, I also wrote several other works that formed the basis of the Commission's proposed APA revisions. During the period of time in which the Commission considered my many recommendations (approximately 1989 through 1995), I urged the Commission to confirm the right of any person to have any other person represent them in an administrative hearing. The Commission adopted this view by providing for representation by an "authorized representative."

II. The Compelling Public Issue

I understand that this case presents the issue of whether lay representation before administrative agencies is the unauthorized practice of law. I believe that lay representation is vital in administrative cases because (a) many people cannot afford to hire specialized lawyers that are needed in administrative cases, (b) lay representatives many times are better able to provide the services needed since they specialize in the area. As a result, if the law is unclear, this policy in favor of law representation should inform this Court in deciding whether lay representation is unauthorized practice.

As my brief will explain, both long-established custom before federal, state and local agencies permitting lay representation, and the language of the 1995 revisions to the ABA, confirm that lay representation is authorized,

not unauthorized practice of law.

III. Guidance Provided Herein

Based upon the above, and as further amplified within, it is my conviction that this Amicus Curiae Brief will assist the court in the following ways:

1. As an expert on California administrative law, and as a participant in drafting the present APA, I believe my input regarding lay representation will be helpful to this court.

2. I am a nationally-recognized professor emeritus at UCLA where I have taught administrative law for more than 30 years. I am the Vice Chair of the Administrative Law Section of the American Bar Association and will be the chair in the 2007.

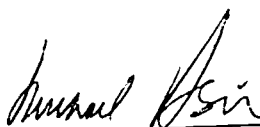
3. I do not represent individual clients. I haven't done that for years.

4. I do not know Mr. Benninghoff. I have never met him. He is not my client. I have talked with him on the phone several times and have read emails and documents that he has sent me. I have no personal interest, financial or otherwise, in the outcome of this case.

5. My task in this case is to assist this Court in deciding an issue

of great importance to California agencies and to persons litigating before those agencies.

Date: August 27, 2005



Michael Asimow
Professor of Law Emeritus
UCLA School of Law

AMICUS CURIAE

IV.

Author's Qualifications

I am filing this amicus curiae on behalf of Mr. Charles Benninghoff. Although Mr. Benninghoff called this matter to my attention, he is not my client. I am not being paid in any form for filing this brief. I have no interest in the outcome of this matter, financial, personal, or otherwise. My interest in the matter is an academic interest in California administrative law and the fact that provision of lay representation to our citizens and residents is a compelling public issue of statewide concern.

I am a Professor of Law Emeritus at UCLA School of Law. I have been teaching at UCLA School of Law since 1967. My primary field of expertise is administrative law. I have published a number of books in this area, including: *State and Federal Administrative Law* (West, 2d edition 1998, with A. Bonfield & R. Levin); *California Administrative Law* (West, 2002, with M. Cohen); *A Guide to Federal Agency Adjudication* (ABA 2003, editor and numerous co-authors); *Gilbert's Outline of Administrative Law* (13th ed. 2002).

I have also written numerous law review articles about federal and California administrative law. The articles concerning California law include: “Toward a New California Administrative Procedure Act: Adjudication Fundamentals,” 39 UCLA L. Rev. 1067 (1992); “The Scope of Judicial Review of Decisions of California Administrative Agencies,” 42 UCLA L. Rev. 1157 (1995); “The Influence of the Federal Administrative Procedure Act on California’s New Administrative Procedure Act,” 32 Tulsa L. J. 297 (1996); “Speed Bumps on the Road to Administrative Law Reform in California and Pennsylvania,” 8 Widener J. of Public Law 229 (1999); “California Underground Regulations,” 44 Admin. L. Rev. 43 (1992).

I have a long-term interest in California administrative law. I was the consultant to the California Law Revision Commission’s project on administrative law. As a result of this work, I generated numerous studies published by the Commission. I assisted the Commission in drafting the statute (SB 523) which completely revamped the adjudication provisions of the California APA. The Commission also drafted bills to update the rulemaking and judicial review provisions of the APA and CCP, but these failed of enactment. I am currently in the process of writing a treatise on California administrative law for the Rutter Group California Practice Guide series. I will express therein the same views that I put forth here.

V. The Right to Lay Representation is Established by Custom and
Court Decisions in California

I believe that there is a right of lay representation in California and federal administrative law. Unless specifically prohibited by the written procedural rules of an agency, a person engaged in adjudication before a California administrative agency has the right to be represented by any person he or she chooses, whether or not a member of the Bar. As a result, any nonattorney is entitled to represent a client in adjudication before a California administrative agency. Such lay representation is a form of authorized, not unauthorized, practice of law. Consequently, it could not be a violation of section 6126(a) or (b) of the Business and Professions Code. I realize that Mr. Benninghoff resigned from the State Bar with charges pending. However, he should be able to make a living doing what any other lay person in California is entitled to do: furnish lay representation before administrative agencies.

One of the many differences between a court of records and an administrative setting is that lay representation is taken for granted in administrative law. At the federal level, the U. S. Supreme Court has confirmed the right of lay representation in hearings before the Veterans' Administration. *Walters v. Ntl Ass'n of Radiation Survivors*, 473 U.S. 305

(1985). The *Walters* case held that the statutory limitation of \$10 on the payment of counsel fees did not deny an applicant due process because of the widespread availability of lay representatives employed by veterans' service organizations. In addition, lay representation is common before the Social Security Administration and the Board of Immigration Appeals.

In California, lay representatives are routinely allowed before numerous state and local agencies, including the Unemployment Insurance Appeals Board, Agricultural Labor Relations Board, the Department of Developmental Services, the Workers' Compensation Appeals Board, the Department of Social Services, and the Board of Equalization. Thus, there is a custom, spanning many decades, of permitting lay representation in California.

Court decisions have recognized that the custom of lay representation exists in California. The Supreme Court created a privilege for communications between welfare clients and lay representatives by analogy to the attorney-client privilege. [*Welfare Rts. Org. v. Crisan* (1983) 33 C3d 766, 190 CR 919] The Court allowed a lay representative in a workers' compensation proceeding to collect a fee even though the fee statute referred only to attorneys. [*Eagle Indem. Co. v. IAC* (1933) 217 Cal. 244, 18 P.2d 341] In addition, the rule prohibiting non-lawyer corporate employees from representing the corporation in a court of record does not apply to

administrative agencies since agencies are not courts of record. The court explained that the procedural and evidentiary problems arising in court are “greatly minimized in the more informal setting of a proceeding in a court which is not of record.” [*Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd.* (2002) 99 CA4th 1094, 1103, 121 CR2d 758, 765]

Because there are so many lay representatives working in California on adjudication before local, state and federal agencies, I am puzzled as to why State Bar prosecutors have singled out Mr. Benninghoff for prosecution for UPL charges. If he is engaged in UPL, so are all the other lay representatives and all of them should be prosecuted.

If this court holds that lay representation before administrative agencies is unauthorized practice, the result will be very disruptive. Federal, state, and local agencies where such representation is routinely allowed will be compelled to exclude lay representatives, to the detriment of clients who have relied on lay representation. Persons working as lay representatives will be compelled to halt that practice immediately lest they risk criminal prosecution. Such a holding would be extremely unfortunate for the cause of administrative justice in our state.

VI. California’s Statutory and Regulatory Framework

As revamped by SB 523 in 1995, the California APA adjudication provisions are rather complex. Chapter 5 of Title 2, Division 3, Part 1 of the Government Code, beginning with Government Code (hereinafter “GC”) §11500, applies only to agencies (and to particular adjudicatory schemes) whose statutes require them to comply with Chapter 5. The Chapter 5 agencies are primarily (though not exclusively) engaged in professional and occupational licensing. Medical Board adjudication is covered by Chapter 5. Chapter 5 cases are heard by ALJs employed by California’s OAH.

Chapter 4.5 of the APA, beginning with GC §11400, applies to virtually all formal administrative adjudication in California (that is, all hearings required by statute or the Constitution). Most of the provisions of Chapter 4.5 apply to *both* the hearings described in Chapter 5 (mostly professional licensing) *and* all other hearings. See §11410.20 (“This chapter applies to all agencies of the state.”). See also §11410.50 (“This chapter [Chapter 4.5] applies to an adjudicative proceeding required to be conducted under Chapter 5 (commencing with Section 11500) unless the statutes relating to the proceeding provide otherwise.”); §11501(c) (“Chapter 4.5 (commencing with Section 11400) applies to an adjudicative proceeding required to be conducted under this chapter [Chapter 5] unless the statutes relating to the proceeding provide otherwise.”); §11425.10, legislative comment: “Section 11425.10 specifies the minimum due process and public

interest requirements that must be satisfied in a hearing that is subject to this chapter, including a hearing under Chapter 5.”

At several points, Chapter 4.5 refers to “attorney or other authorized representative.” These references make it clear that the APA assumes that a person who is a party to administrative adjudication can be represented by anyone that person chooses, whether or not an attorney. See, e.g., GC §11440.20 (notice can be given to a party’s attorney or authorized representative); 11440.60(c) (“A state agency may refuse or ignore a written communication submitted by an attorney *or any other authorized representative on behalf of a client* in a quasi-judicial proceeding, unless the written communication clearly indicates the client on whose behalf the communication is submitted to the state agency”) §11455.30(a) (presiding officer may order party, party’s attorney, or other authorized representative, or both, to pay expenses incurred as result of bad faith actions).

In addition, the right to lay representation is recognized by an administrative regulation adopted by the Office of Administrative Hearings (OAH). The OAH has rulemaking power under the APA. See GC §11370.5. OAH regulations specifically provide for representation by “counsel or other representative who has assumed representation of a party after the agency has referred a case to the OAH...” 1 CCR §1015. This

regulation appears to settle the issue of whether there is a right of lay representation in a Chapter 5 hearing.

VII. APA's Notice Provision

I am aware that GC §11509, relating to the “notice of hearing,” provides “You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel.” This provision in §11509 should *not* be interpreted to prevent a party from being represented by someone other than an attorney.

Section 11509 says that you can be represented by an attorney. It does not say that you cannot be represented by a non-attorney. It is silent on whether you can be represented by a non-attorney. The section simply gives the content of the notice of a hearing and does not purport to be a complete statement of a party's rights in connection with administrative hearings. The entire APA consists of a list of rights possessed by parties litigating before agencies. Very few of these rights are included in the statutory notice provided by §11509.

Note that another provision on Chapter 5 specifically refers to “attorney or other authorized representative.” This language was added by

SB 523 in 1995. Under §11520(b), the ALJ may order the respondent, “or the respondent’s attorney or other authorized representative, or both, to pay reasonable expenses” in the event of a failure to appear at the hearing. If §11509 means that a party could only be represented by an attorney in any Title 5 case, how could §11520(b) provide for payment of costs by an “other authorized representative?” Clearly, §11509 should be interpreted to allow lay representation.

If §11509 and Chapter 4.5 are found to be in conflict, then the later provision should supersede the earlier. The language referring to the “right to be represented by an attorney” in §11509 was adopted in 1988, well before the enactment in 1995 of Chapter 4.5. Chapter 4.5, as pointed out above, has several provisions that refer to representation by an attorney “or other authorized representative.” In the case of a conflict, the provisions of Chapter 4.5 and of §11520 should prevail over §11509.

In summary, the APA and the OAH regulations make clear that a party to administrative adjudication in California is entitled to be represented by anyone that he or she chooses, whether or not an attorney, absent an agency regulation to the contrary. Such representation by a non-attorney cannot be UPL. Instead it is the practice of law explicitly *authorized* by statute and regulation. This is not only the correct statutory interpretation, it is the right policy outcome.

Respectfully submitted by on this 27 day of August, 2005 by:



Michael Asimow

Proof Of Service

I, ***, am a resident of the County of Orange, State of California, over the age of 18, am not a party to this action and my business address is 31103 Rancho Viejo Road, Number 2131, San Juan Capistrano, California 92675.

On the date set forth below, I served the within Application for Permission to File an Amicus Curiae Brief and an Amicus Curiae Brief of Michael R. Asimow in Support of

the Petitioner on the interested parties in said action by personally placing a true and correct copy thereof, enclosed in a sealed envelope with the postage thereon fully prepaid, in the United States Post Office in San Juan Capistrano, California, addressed to:

William John Cox
State Bar Of California
Office of Chief Trial Counsel
1149 S Hill Street
Los Angeles, CA 90015-2299

Presiding Judge
Orange County Superior Court
700 Civic Center Dr. W.
Santa Ana, CA 92701

James Link, Esq.
215 North Marengo
Third Floor
Pasadena, California 91101

I am aware that on motion of any party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in the declaration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: _____

,, Declarant