

**2nd Civil No. G035923**  
**OCSC Case No. 05CC00971**

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

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CHARLES BENNINGHOFF,

Petitioner,

vs.

ORANGE COUNTY SUPERIOR COURT OF THE STATE,

Respondent,

The Honorable Michael Brenner, Judge Presiding.

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THE STATE BAR OF CALIFORNIA,

Real Party In Interest.

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Friend of the Court Brief

In Support Of Petitioner

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## Application to File Amicus Curiae

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### Work Experience:

1. I am a retired state administrative law judge, having served as such before the Department of Health Services (DHS) for more than 20 years. I first became a lawyer in 1972. I mention this because in some agencies it is not necessary to be a lawyer in order to become an administrative law judge.
2. During my tenure on the bench, I presided over and mediated many hundreds of cases in many different areas including agricultural marketing, child developmental disability, a broad area of health care issues including physician and surgeon and dentist quality of care issues and issues dealing with acute care hospitals and clinical laboratories, as well as contract and complex accounting issues. These many cases were both under the California Administrative Procedure Act (APA) and were also non-APA Cases.
3. In addition I have experience in business, commercial, labor and employment law, construction law, torts, partnership, international law and international transactions, real estate law and immigration law.

4. Also following retirement in 2002, I began my association with [www.mediate.com](http://www.mediate.com) and began to emphasize mediation and arbitration in the following areas:

- a. Health care law and medical issues (due to my many DHS cases).
- b. Contract and commercial law including complex accounting issues.
- c. Family law including divorce, property settlements and child custody and visitation issues. My mediation program grew into becoming part of the Plumas County Superior Court's family mediation program where I became a Co-Director of the Plumas Family Court Services and Mediation, L.L.C. This activity is rewarding because I can spend a lot of my time assisting families work their way through the often-times tragic tolls that family disputes may extract.
- d. I also offer transactional mediation for companies and corporations to assist in resolving internal conflicts which prevent efficient operations of the company or impede moving forward with mergers or stock issuance.

5. As an ALJ from approximately 1982 through 2002 I saw a tremendous growth in the amount of statutory change that occurred in

administrative agencies. I was also a fortunate bystander to Professor Emeritus Michael R. Asimow of UCLA fame, whose work for the California Law Revision Commission (CLRC) in its effort to forge anew the old 1945 Administrative Procedure Act and replace it with the “new” 1995 Act was truly inspired. I have a great admiration for Professor Asimow due to his world-renown devotion to administrative law in general and in California administrative law in particular.

6. Sitting on the judicial sidelines and watching the development from about 1988 through its final passage in 1995 as SB523, I was very aware of many of the profound changes Professor Asimow advocated to the 1945 APA, including the universal and low-cost availability of lay representation through the enactment of his 1995 “new” APA.

7. However, from my personal experience as a sitting ALJ under the control of the 1945 APA up to 1997, lay representation was absolutely nothing new prior to the new APA’s operative date in 1997. I – from 1978 to 2002 – had a steady and constant stream of independent lay representatives who represented Respondents before the DHS for a profit such as accountants, specialists in particular health care fields by virtue of training and education, and the like. There was never any question that a person had to be a lawyer in order to represent some one before an agency

controlled by the APA (either the “old” 1945 or the “new” 1995 version) until I heard of Mr. Benninghoff’s case! In fact, in the “early” days when I started hearing cases lay representation was the rule rather than the exception.

8. By virtue of my years on the bench and my knowledge of the administrative process including rulemaking requirements that since 1995 are found within Chapter 3.5 of the APA I have learned that one of the major impulses for the push by our Legislature for the “new” APA was to respond to the California State Supreme Court case of *Armistead* (discussed infra) which simply holds that before an agency can impose a sanction it must go through proper rulemaking. As will be shown through this Brief, the very heart of what is happening to Mr. Benninghoff is that the Attorney General, the Office of Administrative Hearings (“OAH”) and – indeed – the Bar itself are all violating the holding of *Armistead*.

### **The Compelling Public Issue**

9. The Attorney General and the State Bar Association allege that there is no right to lay representation in California by any one, and especially by Mr. Benninghoff. I have read sufficient documentation to allow me to

conclude that this is what the true agenda is in Case Number G034923 for them which is discussed *infra*.

10. This agenda cannot stand. It is crucial in California that we utilize the resources available to provide low-cost representation in administrative cases because:

a. Many people who are involved in administrative cases cannot afford to hire specialized lawyers;

b. Lay representatives many times are better able to provide the services needed since they specialize in the area;

c. This issue has already been settled by our Legislature;

d. An administrative tribunal is not a court of record and the same rules extant in a court of record do not apply in a more informal setting (See the holding of your own District in the Caressa Camille case (Camille, Inc. v. Alcoholic Beverage Control Appeals Board 99 Cal.App.4th 1094, 121 Cal.Rptr.2d 758);

e. ALJs are mostly lawyers (and many are former prosecutors) and all agency lawyers are highly-trained prosecutors so there is an abundance of checks and balances present in an administrative hearing to ensure that any lay representative is monitored;

f. Existing case precedent from our Supreme Court establishes that communications in cases where lay representatives are working are protected exactly like those between attorney and client (*Welfare Rights Organization v. Crisan* (1983) 33 Cal.3d 766 , 190 Cal.Rptr. 919; 661 P.2d 1073);

g. The APA clearly empowers any ALJ presiding over a hearing to sanction any party before it including an authorized representative, which provision gives the ALJ a plenary power sufficient in any conceivable circumstances to deal with disruption, dishonesty, or any other untoward act by either counsel or representative (see *inter alia* Government Code §11455.10), and,

h. It is clear to me that selective prosecution is indulged in by the Real Party in Interest based upon the facts as I understand them to be and if Petitioner is susceptible to being prosecuted for UPL then literally hundreds of lay representatives in California should also be prosecuted for it is clear that performing the duties of an authorized representative in an administrative proceeding have been exempted from the application of the UPL statues (particularly Business & Professions Code § 6126).

11. It is clear that the recommendation of Professor Asimow providing for universal availability of lay representatives is now firmly implanted in the

statutes, regulations, various opinions of ALJs, and the case law of courts of record that have examined the issue.

12. My analysis of the facts herein leads to a clear inference that it is highly likely that a second, even more hidden, agenda exists on the part of the California Medical Board (“CMB”). Questionable behavior by the CMB is not unknown and is a major part of the reason why the California Legislature imposed an “Enforcement Monitor” (see B&P §2201.1), Professor Fellmeth of the University of San Diego, to oversee the CMB and report back to the Legislature whether, or not, the CMB was in compliance with its own rules. In a case in which Mr. Benninghoff was intimately involved, and in which he uncovered substantial wrongdoing by the CMB, it was clear that the mandate of the monitor to report wrongdoing on the CMB’s part could result in substantial harm to the CMB. Immediately after this disclosure, the CMB began to engineer a series of steps which end with us being before this Honorable Court of Appeals.

## Guidance Provided Herein

13. Based upon the above, and as further amplified within, it is my conviction that this Friend of the Court Brief will assist the court in the following ways:

a. The right to lay representation in all cases covered by the APA. Included herein are OAH informal and formal hearing and intra-agency hearings covered by the APA – many of which are licensing.

b. I find this to be an appalling lack of due process. We seem to have an OAH run amok with state employees who are ALJs donning the robes of judges of a court of record. This mutation of a public agency into a quasi court of record is clearly against the best interest of the public of the state of California. Prior to ALJ Reyes' order disqualifying Mr. Benninghoff, discussed *infra*, the APA had for more than 10 years numerous references to “authorized representative” and the regulations promulgated through the Office of Administrative Law by the OAH are even more replete with those references.

c. Then, ALJ Reyes signs an order in this case that says there is no right to lay representation. This was so outlandish that the current Director of the Office of Administrative Law personally wrote that ALJ Reyes' order

is an underground regulation, illegal and unenforceable. Shortly afterwards ALJ Steven Adler wrote an order in a second case in which he cited a case involving appearances before courts of record and applied it in an administrative court even though the Caressa Camille case had given him prior direction that lay representation was correct because, "... that's the way we do it here." (See Petitioner's Exhibit 3, pages 120-125, which is a transcript of ALJ Adler denying a request to disqualify Mr. Benninghoff.)

d. That a person is being charged with UPL for being a lay representative is insightful to the true motive of the real party in interest which appears to be nothing but an exclusionary effort and trade protectionism. As will be discussed *infra* the Bar's 2002 efforts to strengthen the Business & Professions Code §6026 were blocked in two material ways. First, Bar advocates argued for the possibility that a conviction for UPL be a "second strike" and even a "third strike". That effort was soundly defeated in committee. Second, the author of the bill introduced the concept on a carte blanche basis in that whoever wrote the bill for him did not limit its coverage in any way. Thus, I will show that the initial effort by the Bar in promoting the Romero bill had no exceptions: if the activity constituted, even arguably, the practice of law the alleged perpetrator did not even have to know the law was being broken – in essence

a strict liability felony so common in our federal criminal statutes – and the charge would be either a misdemeanor or a felony depending upon the circumstances. Common sense did take hold and these provisions were written out of the bill in Committee and, as passed, the bill provided that no conduct authorized by a statute or rule is UPL. While we will discuss other statutory interplays with UPL, this amendment in 2002 to the Romero bill amending B&P §6026 literally guts the Bar’s case. Further, it bears repeating that lay representation is clearly statutorily authorized in the APA and the OAH’s promulgated rules as will be discussed. Based thereon it is clear that B&P §6026(b) does **not** bar resigned attorneys from performing functions that are lawful for any person.

e. Further elucidation will come from my analysis of what is required of an agency if that agency wishes to restrict those lay representatives who appear before it in administrative matters held under the APA. In this section I will discuss the concept of a “rule” (in an administrative agency sense) of general application and what must be done procedurally should an agency, such as the California Medical Board (CMB) or the OAH, wish to promulgate a restrictive rule. In this area will be covered the concept of “underground regulation” and why California’s statutory scheme of controlling rules of general application is so strong. I

will also demonstrate in this section how the importance of rulemaking was overlooked in the instant stampede to change existing statutes and rules by state employee fiat that which can only be altered by statute or legally-promulgated agency rules.

14. Finally I will discuss in depth the inference that the CMB, being found in a pool of wrongful conduct in an administrative case, while under the monitoring of a legislatively-appointed Enforcement Monitor, pounced upon Mr. Benninghoff possibly in order to quiet his voice of dissent.

15. Upon this Application it is respectfully submitted that this Honorable Court should entertain my Friend of the Court Brief as sufficiently probative and explanative of the sometimes arcane processes of administrative procedures such that the brief will greatly assist the court in deciding the matter of great public interest and concern now before it in the Petition.

Respectfully submitted this 8<sup>th</sup> day of September, 2005 by:  
Roger Diefendorf, ALJ (Ret.)

## **FRIEND OF THE COURT BRIEF**

1. I am filing this Friend of the Court Brief on behalf of Mr. Charles Benninghoff who is a former client of mine. He retained me to represent him before the OAH and in such capacity I attended one hearing with him on December 3, 2004. I am not now being paid for my work in bringing this Brief to this Honorable Court. I am doing this because of the substantial public issues involved here; principally what I believe is the unsustainable claim that lay representation in administrative hearings is illegal, that it is illegal for Mr. Benninghoff to provide lay representation services because he is a resigned attorney and because traditional concepts of due process and fairness have been trampled on by the agency actions in this case.

2. Mr. Benninghoff provided me with a lengthy, detailed description of his education, experience, interests, even his family. In that description was an equally detailed description of the charges to which he pled guilty and for which he was sentenced by the federal government. Mr. Benninghoff has plainly accepted responsibility for his wrongdoing and indicated that he decided to assist others with licensing problems after he resigned from the bar because he felt others could benefit from his experiences. I believe that to be true. The fact that Mr. Benninghoff resigned with charges pending is

irrelevant to being a lay representative because anyone can be a lay representative in many administrative matters. After Mr. Benninghoff's work for four years before the OAH, and after handling hundreds of licensing cases, it may be a foregone conclusion that he has shown rehabilitation and I believe this to be the case based upon my observations of him. At the hearing before the OAH during which I represented him, it was plainly established that he did not undertake any lay representation until he received permission from his federal probation officer and sentencing judge and had received Legislative Counsel Opinion 18108 which stated that he could do so.

3. 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 a purely personal interest in California administrative law, which I practiced for nearly 30 years, and the fact that provision of lay representation to our citizens and residents is a compelling public issue of statewide concern. Further, I am truly appalled at what is happening to Mr. Benninghoff I feel compelled to provide the within information to help lead this court to a fair and just conclusion.

4. There clearly is a right of lay representation in California and federal administrative law. Unless specifically prohibited by the written procedural

rules of an agency, or by statute, 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 [see, e.g., Gov't Code §§ 11440.20(a), 11440.60(c), 11455.30(a) for informal Chapter 4.5 proceedings and §11520(b) for formal adjudication under Chapter 5 cases). As a result, any nonattorney is entitled to represent a client in adjudication before a California administrative agency. Consequently, such practice is not UPL.

### **Administrative Rulemaking in California**

5. The OAH has rulemaking power under the APA. See GovCode §11370.5. In administrative law and procedures “rulemaking” is a word of art that describes the procedural steps that an agency must complete in order to promulgate a “rule of general application.” If those procedural steps are not followed exactly the agency may be determined to have violated the provisions of the Government Code relating to “underground regulations” by either a court of law or the Office of Administrative Law which is charged, in part, with overseeing the rulemaking process. The result of “rulemaking” is the promulgation of a “rule” which is more commonly referred to as a

“regulation”. Any rule of general application must go through rulemaking. See, e.g., *Armistead v. State Personnel Board*, 22 Cal.3d 198 (1978). Court rules go through a similar general process before adoption. See <http://www.courtinfo.ca.gov/rules/intro/>.

6. 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 would seem to have settled the issue of whether there is a right of lay representation in a Chapter 5 hearing. There is such a right.

### **APA’s “Miranda” Warning**

7. The GovCode §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, it is something akin to the “Miranda” warning required in criminal cases in that it is simply designed to alert participants to their right to have an attorney.

8. 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. This interpretation of §11509 prevents conflict with Chapter 4.5. Generally the various parts of a statute should be interpreted in a way that avoids a conflict and allows each provision to function.

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

10. 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 should prevail over §11509.

11. In summary, 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 a statute or an agency regulation to the contrary. Such representation by a non-attorney cannot be the UPL because the APA itself creates a right of representation by an “other authorized representative.”

### **Lay Representation as UPL**

12. Next I would like to turn to the issue of lay representation as UPL. I would first like to establish that – for the reasons stated herein – I do not share the opinion that lay representation before an administrative body under the APA is the practice of law. If it ever were, it has become so widespread by virtue of the public demand for workaday assistance – it most certainly no longer is. It has most assuredly entered the public domain and is no longer associated with the practice of law except, that is, in the mind of some lawyers and prosecutors trying to establish dominion over it. Attached

hereto as Exhibit “A” is a true and correct copy of a letter from the Bar’s Chief Trial Counsel Scott J. Drexel, the contents of which are incorporated herein by this reference as though set forth in full. In Mr. Drexel’s letter at page 3, ¶2 he states,

“It is the position of both the California Attorney General’s Office and the Office of the Chief Trial Counsel that there is no right to lay representation in proceedings under the Administrative Procedures [sic] Act (Calif. Gov. Code §§ 11500, et seq.) and that even if there were such a right, Mr. Benninghoff is statutorily barred by Business and Professions Code section 6126, subdivision (b) from acting as a lay representative as a result of his resignation from the State Bar with disciplinary charges pending against him.”

13. B&P §6126 was most recently revised in 2002 as a result of the Bar’s lobbying efforts when it induced Senator Romero to introduce a bill it had written, entitled SB 1459.

14. The earliest versions of SB 1459 had some draconian language. In its February, 2002 iteration, which is attached hereto as Exhibit “B” which is incorporated herein by this reference as though set forth in full, it contained the following explanatory language:

“The bill would also make any person who has resigned from the State Bar, regardless of whether charges were pending, guilty of a crime if that person advertises or holds himself or herself out as practicing or entitled to practice law and would remove the exception that requires a specified category of persons involuntarily enrolled as inactive members of the State Bar to act knowingly in order to be guilty of a crime.”

15. It also stated in the proposed statutory language of B&P §6126:

“(a) Any person who practices or attempts to practice law who is not an active member of the State Bar at the time of doing so, is guilty of a misdemeanor.”

16. This is the Bar’s proposal of the law that apparently the Bar and Attorney General (AG) have in mind when they contemplate the legality of lay representation as well as Mr. Benninghoff’s involvement in it.

17. However the legislative process acted as a renderer to these draconian provisions, both of which were thrown aside in place of these current provisions that relate to statutorily approved nonattorney legal services. As is stated in the September 6, 2002 Chaptered version, attached hereto as Exhibit “C” and incorporated herein by this reference as though set forth in full:

“This bill would exempt from this provision a person who was authorized, pursuant to statute or court rule, to practice law in the state at the time he or she performed the act.”

18. Subsection (a) of B&P §6126 now reads:

“(a) Any person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, or otherwise authorized pursuant to statute or court rule to practice law in this state at the time of doing so, is guilty of a misdemeanor punishable by up to one year in a county jail or by a fine of up to one thousand ollas (\$1,000), or by both that fine and imprisonment.”

19. The Chaptered legislation amended subsection (b). Prior to SB 1459, subsection (b) was simply a special provision applying the illegality aspects of subsection (a) to disbarred, suspended or resigned lawyers (with charges pending). Subsection (b) in the current version simply applied increased penalty for the same described conduct of subsection (a) by again increasing the penalty for actual practice, the intent of which is fully described as follows in Exhibit “C”:

“Existing law provides that a person who holds himself or herself out as practicing or entitled to practice law is guilty of a crime punishable by imprisonment in the state prison or county jail if he or she has been (1) involuntarily enrolled as an inactive member of the State Bar, (2) suspended from membership from the State Bar, (3) disbarred, or (4) has resigned from the State Bar with charges pending.

“This bill would provide that the penalties also apply if a person meeting that criteria practices or attempts to practice law.”

20. There was no attempt in SB 1459 to exclude the exemption provided by the general provision found in subparagraph (a) for statutorily or rule-approved activities such as lay representation who suffered additional penalties under (b) by virtue of their prior licensure as an attorney. In other words, subsection (b) only operates to enhance the penalties for the activities already described in subsection (a) and repeated in subsection (b).

21. Three examples will serve well to show that §6126(b) cannot be read apart from (a).

22. The first example involves the fact that attorneys have for generations been deeply involved in all phases of taxation. The typical “tax attorney” does tax planning, suggesting strategies to minimize tax, completes tax returns, negotiates with the IRS and FTB over tax liabilities, prepares estimated tax requirements and the forms to use to pay those estimated taxes, prepares corporation tax returns and other compliance matters required by both the IRS and FTB, and occasionally will prepare a return for a bank. The breadth and scope of a “tax practice” – however defined – requires that the tax attorney be involved in the middle of a significant flow of government-mandated tax forms. Accordingly the specialty of having a “tax practice” is as much a part of the practice of law as is specialty of being a “trial lawyer”, or a “probate lawyer”, for example.

23. The B&P Code §22250, et seq. provide that any person who completes 60 hours of federal and California tax training, files a bond of \$5,000 and complies with the California Tax Education Council (CTEC) (<http://www.ctec.org/>) Code of Conduct can do pretty much the same thing as a tax attorney can do!

24. In fact, B&P §22251 at (b) provides that a “ ‘Tax return’ means a return, declaration, statement, refund claim, or other document required to

be made or filed in connection with state or federal income taxes or state bank and corporation franchise taxes.”

25. If a tax lawyer resigned from the Bar and decided thereafter to become registered with the CTEC as a tax return preparer (CTRP) he, or she, wouldn't even have to complete the normal 60-hour introduction lesson required of anyone else (see B&P § 22255(c)).

26. If the Bar's interpretation of §6126(b) is correct – that is that (b) stands alone with consideration of (a) – then this sad former lawyer is guilty of UPL. However, I am unaware of any instance where UPL has been charged against a resigned attorney who has become a CTRP.

27. Just one more example, I think, will suffice to show how absurd and unsupportable the position of the Bar is.

28. Let's analyze what a “trial lawyer” does in her, or his, practice of law, say – to get a case ready for a trial or appeal. In such a case, the lawyer would have to perform legal research involving the facts of the case and how law is applied to those facts, assemble data and the information necessary to present the case to judge or jury, draft the pleadings in the case such as motions, writs, petitions, appeals, briefs and replies, and jury instructions where appropriate. Additionally, the lawyer would have to have direct communication with the client and any related third parties to schedule such

things as depositions and attendance at hearings or the trial. Further economic issues would have to be contended with such as billing, reconciling bills with client expectations, providing updates to the clients about the status of a case and, very importantly, providing assurance to clients that “vital” documents have been received or sent to the proper party including correspondence and messages. All this constitutes in the context of a lawsuit the “practice of law.”

29. According to the Bar’s interpretation, if a resigned, disbarred or suspended attorney ever did such things under B&P §6126(b) there is absolutely no defense because (a) doesn’t apply. Correct?

30. Well, not so!

31. If we turn to a “rule” of the Bar – promulgated in a fashion very close and similar to a “court rule” and an agency “rule” (read that “regulation”) – that is named Rules of Professional Conduct 1-311 we find the following provision:

(C) A member may employ, associate professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member to perform research, drafting or clerical activities, including but not limited to:

(1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;

(2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages;

32. Thus, under rule 1-311 any lawyer can employ any resigned, disbarred or suspended former attorney to conduct the practice of law!

33. If we turn once against to B&P §6126(b) we find no exception therein for rule 1-311 activity. Accordingly every former attorney working under 1-311 is guilty of UPL! The Bar cannot have it both ways!

34. There is nothing superior about the tax return preparers' statutes or the Bar rules in relation to the APA's statutes or the OAH's rules! Again, the Bar cannot have it both ways. For it ever to argue again that §6126(b) must be read alone without the "safe harbor" provided in subsection (a) means that the Bar is talking out of both sides of its mouth.

35. The third example that shows §6126(b) cannot be read without the limitations found in §6126(a) comes from the very law that was abused to confiscate Mr. Benninghoff's business, namely Business & Professions Code Division 3, Chapter 4 ("Attorneys") Article 11. entitled *Cessation of Law Practice--Jurisdiction of Courts* §§6180-6185 at §6180.14's last sentence which reads, "This article does not apply to legal services rendered ... under a contract which does not create the relationship of lawyer and

client.” As B&P §6180 itself specifically applies the entire Article 11 to disbarred or suspended attorneys, as well as those who have resigned, it is patently clear that a disbarred, suspended or resigned attorney can engage in permissible legal services without being involved in the practice of law!

36. In my investigation of cases under §6180 I have found four cases (*People v. Hinckley*, (1987) 193 Cal. App. 3d 383, 238 Cal. Rptr. 272, *In re Johnson* (1992) 1 Cal. 4th 689, 822 P.2d 1317, 4 Cal. Rptr. 2d 170, *Lewis v. Superior Court of Los Angeles County* (1985) 175 Cal. App. 3d 366, 220 Cal. Rptr. 594 and *Preferred Risk Mutual Insurance Co. v. Reiswig* (1999) 21 Cal.4th 208, 980 P.2d 895, 87 Cal.Rptr.2d 187) none of which even vaguely touch on the subject of this case and **all** involving practicing attorneys, not as in this case someone who is not an attorney, who has not represented himself to be an attorney and whom no one else involved believed to be an attorney. So, for all intents and purposes this is a case of first impression and grave results to Mr. Benninghoff, despite all of his best efforts to ensure compliance with the law, will result if he is found susceptible to the provisions of B&P §6180, *et seq.*

37. Thus, even assuming that lay representation is some form of the practice of law, which I do not believe that it is after enactment of the 1995 APA, performing lay representation could not be UPL under B&P §6126(a)

or (b) because there are both statutes and rules (i.e., regulations) clearly permitting lay representation to be performed under both Chapters 4.5 and 5 of the APA.

38. This is a situation where services of a needful social nature – assistance before government agencies -- has been deemed by our legislature and governor to be so in need of general assistance that in 1995 these services were taken out of the practice of law, in effect “secularized” and as such “... by virtue of their secularization were to become part of the public domain.” *The City of San Diego V. Cuyamaca Water Company* (1030) 209 Cal. 105 at 126.

39. No discussion of the “practice of law” would be complete without a discussion of the impact of *Goldberg v. Kelly* (1970) 397 U.S. 254. Included in the panoply of due process rights attendant to an administrative hearing is the right to confront and cross-examine witnesses, to present your own witnesses, and subpoena witnesses to testify in your behalf, *Goldberg supra* at 260.

40. What arose from the *Goldberg* decision in 1970 was a revolution in the Department of Social Services throughout the State of California as well in other states in the nation. The State DSS hired many attorneys to become hearing officers as well as non attorneys and those officers were

grandfathered in eventually as ALJs. Along with that came literally legions of lay representatives because Goldberg gave its imprimatur, as well, to lay representation referring to the right of a person to be represented by an attorney or “other person” (*id* at 259).

41. If the Bar’s proposal were to become the law of the land, that there is no right to lay representation, then literally hundreds of state and county employees as well as hordes of other lay representatives involved in OAH, DSS, DHS, State Board of Equalization cases, etc. would all be guilty of UPL. This is simply absurd. Lay representation is not the practice of law. It is an exception to the practice of law which is recognized from the U.S. Supreme Court by case law on down through state statutes and duly promulgated State regulations.

42. That a resigned attorney becomes an authorized representative no more makes his conduct as a lay representative, or “authorized representative”, UPL than the exact same conduct undertaken by any other person causes that to be UPL. In neither the resigned attorney’s case nor in the other cases is being an authorized representative UPL. It is simply authorized representation.

## **Medical Licensing Agencies & Petitioner**

43. Beginning about 1991 through 1999 Petitioner represented a surgeon whose medical facility had been “sealed” by the Osteopathic Medical Board of California. Petitioner filed a Chapter 11 for the surgeon and succeeded in re-opening the facility. The surgeon was an early advocate of hyperbaric therapy who had a purchased hyperbaric chamber which, for reasons not his fault, “exploded” injuring patients. At the time, hyperbaric therapy was considered “quackery” and was questioned by the medical establishment<sup>1</sup>.

44. Attached hereto as Exhibit “D” is a true and correct copy of page 25 of the adopted decision of Mani Nambiar, M.D., the contents of which are incorporated herein by this reference as though set forth in full. This decision is a public record. I have not burdened the record with the entirety of it because of its length (37pages) and the only page relevant is page 25 at the second full paragraph which states:

In addition, respondent [Nambiar] sought to show the board's experts had been prejudiced by having reviewed the report of Dr. Childers and the consultant's report. Respondent argued this violated board policy regarding the information that was to be provided to experts. As far as Dr. Childers' report is concerned, that was a chart note and he was a subsequent treating physician. It is common for the treatment records of subsequent treating physicians to be provided to experts. As far as the consultant's report is concerned, it is common for one expert to be given the report of another. In fact, both Dr. Yoho and Dr.

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<sup>1</sup> See <http://www.quackwatch.org/11Ind/steenblock2.html>.

Berman received the reports of Dr. Stone and Dr. Rosenfeld. There was no evidence to suggest either board expert was influenced in any way by the consultant's report.

45. Attached hereto as Exhibit "E" is a true and correct copy the Table of Contents page for Chapter 7.4 of the CMB's public version of its Enforcement Operations Manual, which is incorporated herein by this reference as though set forth in full, which reads, "Standards for Case Submission to the Expert Reviewer - disclose Policy only".

46. Attached hereto as Exhibit "F" is a true and correct copy of the CMB's public version of its Enforcement Operations Manual, which is incorporated herein by this reference as though set forth in full, which reads:

"CHAPTER 7, INVESTIGATION REPORTS ...

"SECTION 7.4

"POLICY

"Whenever Medical Board of California (MBC) investigators submit a case to the expert reviewer they shall adhere to the evidentiary standards set forth in this section.

COMMENTS"

[Blank]

47. The COMMENTS section had been redacted in the public version obviously under the California Public Records Act police authority investigation procedures do not have to be disclosed and, apparently, the

CMB wrongly believes that in this capacity it is using police powers (See GovCode §6254(f)). I believe wrongly because using traditional concepts of evenhandedness and fair play it is only right for an agency like the CMB to disclose to doctors subject to its disciplinary processes the “rules of the game.” However, it chooses not to.

48. This is where the CMB’s Enforcement Monitor comes into the scene.

49. One of the Findings of the Enforcement Monitor can be found in its report at page 7:

“Litigation surprise over expert testimony is very costly to respondents, as it often means unnecessary trial preparation and hearing expenses because potential early case dispositions, including possible dismissals of accusations, cannot take place (in the absence of expert views raising doubts about MBC’s case). This surprise is equally costly to MBC and the public, as scarce investigator and attorney resources are often allocated to preparation and trial of matters which could have been resolved more expeditiously.”<sup>2</sup>

50. Apparently not cognizant of the secrecy in which the CMB had cloaked its §7.4 of the Operations Enforcement Manual, she published an excerpt of it in the same Finding, *supra*, at page 5, as follows:

“In a deliberate effort not to bias expert witnesses, MBC’s Enforcement Operations Manual instructs investigators, MCs, and DAGs to ensure that the materials given to expert witnesses at the outset of their review do not contain information that might bias the expert (such as prior disciplinary action or malpractice history of the subject physician) or the opinion of

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<sup>2</sup> [http://www.medbd.ca.gov/Pubs\\_Enforcementrept\\_Chp8.pdf](http://www.medbd.ca.gov/Pubs_Enforcementrept_Chp8.pdf)

any other physician who has reviewed the case. [footnote reference to §7.4 of the MBC's Enforcement Operations Manual omitted] The Manual directs investigators, MCs, and DIDO DAGs to ensure that the reports of the CCU reviewer and district office medical consultant do not contain explicit opinions about whether the subject physician's conduct departed from the standard of care. Also, in section 801 cases following a civil judgment or settlement, the Manual instructs MCs and investigators to withhold depositions of expert witnesses in the civil case from the MBC expert until after he has had an opportunity to review all the evidence and reach his own conclusion. After the MBC expert has opined, he may be shown the civil depositions or other expert opinions in the matter and asked if those opinions change his opinion. But at the outset, MBC wants its experts to render an independent and unbiased opinion."

51. The Nambiar hearing, referred to *supra*, before the CMB was in concluded in September of 2004. As explained in Enforcement Monitor Fellmeth's explanation of §7.4, the plain policy of the CMB was not to disclose "...the opinion of any other physician who has reviewed the case..." to its outside expert case reviewers. The ALJ in the Nambiar case states that this is common practice. The result of this "common practice" could well be the overturning of legions of CMB adopted decisions that were predicated upon the violations of its own Enforcement Operations Manual provision §7.4.

52. In October of 2004 the CMB initiated disqualification proceedings against Petitioner in Los Angeles in which procedure I represented Petitioner (see Petitioner's Exhibit 3, pages 75-84).

53. In December of 2004 the CMB initiated disqualification proceedings against Petitioner in San Diego (see Petitioner's Exhibit 3, pages 60-74).

54. It would appear that the disqualification proceedings were purely vindictive reprisals against Petitioner for exposing the wrongdoing of the CMB in the Nambiar case. The entire fabric of the case against Petitioner is woven of distortions and half-truths designed to quiet a voice calling only for fair play and evenhandedness in accusatory proceedings against medical doctors.

### **The Corpus of an Administrative Case**

55. Perhaps the most compelling difference between a proceeding in a court of record and one, say, before the OAH is the procedural steps that are completed to get a case into the administrative hearing room and out. This process differs radically from a court of record. All cases that are brought are generated through the act of a government agency. Distinctly different from the WCAB – where cases can be brought by an injured worker and therefore more scrutiny is appropriate – in an OAH case there is no known vehicle for a citizen to initiate a case absent some adverse agency action. Thus, all of the issues to be decided are government issues concerned about,

for example, health care quality rendered by a physician, impermissible sales of alcohol by a liquor licensee, shoddy construction techniques by a licensed contractor. Therefore there is a one-sided “check” involved at the very outset limiting the cases that can be brought and there is thusly no possibility that a nonlawyer representative could defraud the system by bringing frivolous actions as actually did happen before the WCAB by lay advocates and which resulted in legislation that imposed attorney-control over their activities, a solution which itself was not entirely satisfactory because problems persisted.

56. Prior to the hearing there is normally taken every opportunity to resolve the case informally. Such is done between the agency and licensee(s) involved and any settlement terms do not need the input from any ALJ. The settlement – even a settlement reached during the middle of a hearing if either the agency or the licensee begins to see their case lacks merit – does not need the approval of an ALJ. As the agency in all administrative cases has the final administrative decision whether to accept a stipulation or decision of an ALJ, the agency remains in complete control of the process up to the conclusion. If the licensee doesn’t like the agency’s final decision the only recourse is for him, or her, to file an action using an attorney at law in the appropriate court of record.

57. In some cases, an ALJ may decide to continue to hold hearing jurisdiction over the matter in case the settlement is later rejected by either the agency or the licensee.

58. During the hearing, while the general rules of evidence are observed, there is many times a great laxity and informality. The APA and the regulations of the OAH or any particular agency involved are also controlling, and this law is easily obtained by the licensee so there is more of an even playing field in terms of fair play and equity. Thus, the corpus of law involved is generally much less complex and more understandable than in a court of record. For example, the concept of “administrative hearsay” allows evidence to come into a Hearing that would never be admitted in a civil or criminal trial.

59. Of course, in cases where the agency may believe that the public needs protection from a wayward licensee it will vigorously protect that public need. Nevertheless there generally is less rancor and infighting than in a court of record in my experience.

60. The aspect of who the “players” are on the OAH and agency roster is also important. A large number of ALJs received their training as Deputy Attorneys General or some similar enforcement agency training (for example coming from the Department of Real Estate or Insurance

Department) and, in any case, are all highly qualified and well trained lawyers. The same can be said of the prosecuting attorneys, normally Deputy Attorneys General or staff attorneys from such agencies as the Department of Real Estate, the Insurance Department, the Department of Corporations and the like. All are well trained, industrious and intelligent folks in my experience. So this corpus of protection exists both for the People and the licensee.

61. Taken together then, all of these aspects of the corpus of an administrative case coalesce to provide a setting for authorized lay representation.

62. Then, on the other side of the body are the licensees. Many of these licensees are the ordinary citizens we find diligently at work every day and upon whom we all depend so heavily. Such can be beauticians, carpenters, insurance salespersons, our real estate agent, the appraiser coming out to help us get a loan, bedside attendants licensed as vocational nurses, or even midwives helping to deliver babies out in our expansive countryside, many times rendering their services for free to be neighborly.

63. These citizens constitute the bulk of the cases heard by the OAH and other agencies. It is a clear picture to envision: administrative cases don't involve highly-paid inter-city plastic surgeons with 7-figure incomes except

in a very limited percentage of the cases. And, these high profile cases are not what lay representatives are intended to serve. Lay representatives are intended for the beautician, the nurse, LVN, midwife, electrician – all of whom are in the constant economic struggle of our middle class. For these people there is no right to competent counsel paid for by the state even though the result of the administrative hearing may be a criminal prosecution. And, even though the result of the administrative hearing may be the complete loss of the right to make a living doing something one may have done for 40 years there is no right in California for any state-paid representation.

64. Thus, the burning need exists to help the various licensees in the administrative setting and the only way to do that is to continue to uphold their right to obtain lay representation from any person willing to devote the time and energy to provide the assistance.

### **Recommendations**

65. Upon the above bases, it is respectfully urged that this Honorable Court grant the relief sought by Mr. Benninghoff and cause the Superior Court to return his business to him. He, like every other person in the State

of California, has the right under our law and rules to be a lay representative until, and unless, there is a new statute or rule stating that resigned attorneys cannot provide this service. If such were to happen, a valuable resource would be lost to serve those individuals Mr. Benninghoff has spent the last four years serving.

66. The only proper resolution of this case insofar as Mr. Benninghoff is concerned – if continued resistance on the part of those concerned exist – is for the OAH, and indeed each agency, to promulgate a rule or induce a legislator to carry a new statute saying the resigned attorneys are not permitted to be lay representatives, as did the WCAB. And, in the WCAB case, its regulation clearly states that a resigned attorney such as Mr. Benninghoff can demonstrate rehabilitation. From a due process viewpoint that is the least one would expect from a fair society.

67. Finally, I urge that this Honorable Court of Appeals concern itself with the underlying ethics in this case on the part of the Attorney General and the CA State Bar in its efforts to seek a permanent ban on lay representation when this right has been codified into our State's statutes and agency regulations as well as approved in concept by the U.S. Supreme Court.

Respectfully submitted this 8<sup>th</sup> day of September, 2005 by Roger Diefendorf,  
ALJ (Ret.)