

Hon. Jerre David VanGorder

3906 South Birch Street
Santa Ana, CA 92707

Sunday, March 26, 2006

Hon. Ronald M. George, Chief Justice
Hon. Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: Charles Benninghoff v. Superior Court
Real Party in Interest: The California Bar

Appellate Number: G035923
Supreme Court Number: S141459

Dear Chief Justice George and Honorable Associates Justices:

This letter is my request that you accept *Benninghoff v Superior Court* for review.

I am a Member of the California Bar with Bar Number 73008. I first joined the Bar on December 22, 1976 and practiced in a variety of settings over the years until I became inactive as a Bar Member on February 26, 1989 when I took the Bench of the Workers Compensation Appeals Board (WCAB) which is a court of record. I sat as such on a full time basis up until a few years ago at which time I retired. I was called back to serve the People of the State of California as a Retired Annuitant Judge, which I now do three days a week in the WCAB's Anaheim Facility.

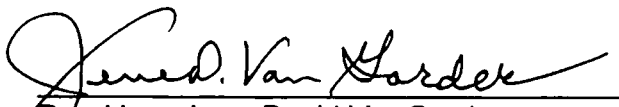
Thus, my interest in this case is from the perspective of being a "sitting" judge of a court of record. The WCAB has a procedure whereby nonattorney representatives come before it. Although there have been over the years many changes to the "rights" of these nonattorney representatives, at least I have the perspective of having worked with them in a court of record setting.

I do not know Mr. Benninghoff and have never met him although we had talked a couple of times of the telephone. I am not being paid in any way to submit this letter.

Because of the compelling public interest involved in his case I submitted a "Friend of the Court Brief" in the Superior Court case. Attached is a true and correct copy of it for your review should you wish to do so.

Mr. Benninghoff is completely legal in acting as an authorized representative until there is a law, or regulation, that would act to prohibit him, all as set forth in Legislative Counsel Opinion 18108.

Sincerely,


By: Hon. Jerre David VanGorder

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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

JUN 03 2005

ALAN SLATER, Clerk of the Court
BY *O. Moreno*
O. MORENO

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE**

In the Matter of the Assumption of Jurisdiction)
Over the Law Practice of)

CHARLES F. BENNINGHOFF III)
State Bar Membership No. 63634)

A Resigned Member of the State Bar)

Case No.: 05CC00971

**FRIEND OF THE COURT BRIEF BY HON.
JERRE DAVID VANGORDER IN
OPPOSITION TO THE STATE BAR'S
APPLICATION FOR ASSUMPTION OF
JURISDICTION OVER LAW PRACTICE**

(Opposition to State Bar's Application;
Supporting Declarations; Notice of Lodging;
and Exhibits in Support of this Opposition
filed concurrently herewith)

Hearing: June 17, 2005
Time: 9:00 a.m.
Department: C20

1 5. As a working judge of the WCAB over these many years I have learned most every
2 nook and cranny of our court's system, which is most unique when it is considered in light of what a
3 Superior Court might be considered to properly consist of.

4 6. Part of our uniqueness is that while the WCAB is thought of as an agency of the
5 State, it is in actuality a Court of Record and has been considered such for many years.

6 7. As such, many generally accepted practices before regular agencies in general will
7 not serve before the WCAB. For example, the WCAB is a "Court of Record" and has been
8 determined to be so, exercising judicial functions and vested with a portion of the judicial power of
9 this state even since shortly after the turn of the last century; see, e.g., the case of *Western Metal*
10 *Supply Co. v. Pillsbury* (1916) 172 Ca. 407, 410-413.

11 8. In 1974 the WCAB issued its "W.C.A.B. Misc. No. 11 – Opinion and Order of
12 Revocation and Suspension" ("Rule 11") (see Exhibit "53") which is one of its "unique"
13 characteristics as a Court of Record because it controlled how it treats disbarred, suspended or
14 resigned attorneys (with charges pending). Rule 11 states:

15 "In the first place, we are convinced that any attempt to appear in a representative capacity
16 before this Board by an attorney whose privilege to practice has been revoked or suspended
17 will likely violate the terms of such revocation or suspension. This is because this Board is
in fact and in law a 'Court of Record' of the State of California."

18 9. Therefore, while an attorney whose privilege to practice by the State Bar had been
19 revoked or suspended he, or she, couldn't practice before a Court of Record – including the WCAB.
20 But that does not mean he can't work before an administrative agency.

21 10. Rule 11 stated, also, on its third page (page 410) went further by stating:

22 "Should any attorney deem himself qualified to practice as a representative before this Board
23 despite the fact that his privilege to practice before other Courts of Record of this State has
24 been suspended or revoked, this Board will entertain a Petition for Reinstatement of the
privilege of appearing as a representative before this Board. ... The petition will be decided
by this Board sitting en banc."

25 11. Rule 11 was published, among other places, in *California Compensation Cases* at
26 Volume 39 in its June, 1974 edition; thus, this Rule 11 was public information and easily obtainable
27 by any person with reasonable diligence. No one had to guess what the role of a resigned attorney
28 was before the WCAB after Rule 11!

1 12. The WCAB subsequently “enshrined” Rule 11 in its portion of the California Code of
2 Regulations at 8 CCR 10779 (herein “Regulation”), the most recent version of which is found in
3 Exhibit “23”. The Regulation simply restated and summarized Rule 11 and the provision allowing
4 a resigned attorney to petition for reinstatement before the WCAB is present there, requiring the
5 petition to be filed with the WCAB along with a copy to the State Bar as was found in the original
6 version in 1974.

7 13. The WCAB is the *only* agency in the entire State of California to issue such a
8 regulation! See page the second sentence of the first full paragraph on page 3 of the *Legislative*
9 *Counsel Opinion* 18108 (Exhibit “1”).

10 14. I have reviewed the Administrative Procedure Act (APA) applicable to most agencies
11 (not the WCAB) and the regulations which the Office of Administrative Hearings (OAH)
12 promulgated under its authority to do so given to it by the APA. The APA is functionally very
13 similar to the same for the WCAB, although the regulations are much simpler as the WCAB has had
14 its matured over many years.

15 15. Nowhere in the APA is there any pronouncement such as our Rule 11 giving a
16 resigned attorney an advance warning that he or she would not be treated like any other person who
17 came before an agency covered by the APA appearing as a lay representative. The only provision
18 for “Orders and Sanctions” is found in Chapter 4.5, Article 12, §§ 11455.10, 11455.20 and 1145.30
19 and nothing in those sections gives the OAH or any Administrative Law Judge (ALJ) therein any
20 power to create an “on-the-fly” felony such as may occur in the case of Mr. Benninghoff who the
21 State Bar is now prosecuting for unauthorized practice of law. The only power enumerated in
22 Article 12 of the APA is to give and enforce contempt sanctions for wrongful sorts of conduct before
23 an ALJ.

24 16. The regulations of the OAH are even weaker. There, only §1040 gives the ALJ power
25 to sanction. Lay representation is so universal under agency practice, including before the WCAB in
26 many instances, that it might be observed that OAH regulation §1040 states, “The ALJ may order a
27 party, a party’s representative or both, to pay reasonable expenses,”. It is clear that a party can
28 have a lay representative.

1 17. I have read Professor Emeritus Michael R. Asimow's Friend of the Court Brief (see
2 Exhibit "40") in behalf of lay representation in general, and Mr. Benninghoff in particular, and agree
3 completely with him. He stated, and I believe it to be entirely proper, that if the OAH wants the
4 appearances of resigned attorneys before it limited then it must properly promulgate rulemaking by
5 issuing a regulation under Chapter 3.5 of the APA exactly like the WCAB did with its 1974 Rule 11
6 (which was then followed up by Rulemaking through its publication as 8 CCR 10779). It cannot rely
7 on ALJ "orders" made without notice or input from the affected class of lay representatives. Less
8 than that is selective prosecution of Mr. Benninghoff in an inappropriate and wrongful manner for a
9 "felony" he has not committed. Less than that would be giving any ALJ a right to create a "crime"
10 at will. Doing that is morally wrong, legally wrong and violative of common concepts of agency
11 rulemaking found in APA Chapter 3.5 and stated by Professor Asimow.

12 18. It also seems clear that if such agencies as the OAH decide to properly promulgate a
13 regulation restricting the conduct of resigned attorneys, then traditional notions of fair play and
14 substantial justice would require that such agencies permit a resigned lawyer such as Mr.
15 Benninghoff to prove to them that he is qualified to appear before it as a representative despite the
16 resignation exactly like the WCAB's Rule 11 and 8 CCR 10779 provide.

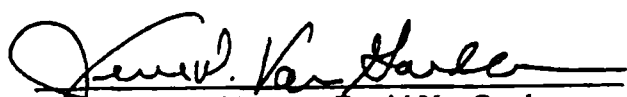
17 19. I have also read Opinion 18108 of the California Legislative Counsel (see Exhibit
18 "1") which states a resigned attorney can represent a person in an administrative hearing if a statute,
19 law or regulation allows a nonattorney to do so if there is no statute, law or regulation prohibiting a
20 resigned attorney from doing so. The APA provides for lay representation – Professor Asimow is
21 perfectly clear in that – and there is no provision in the APA or the OAH's regulations.

22 20. Mr. Benninghoff is thus completely legal in acting as a lay representative until there
23 is a law or regulation that would act to prohibit him. That is the only correct, just and fair way to
24 resolve this case before the Orange County Superior Court.

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The above is true and correct and this DECLARATION is executed under the penalty of perjury under the Laws of the State of California on June 1, 2005 by:


By: Honorable Jerre David VanGorder

PROOF OF SERVICE

In Orange County

STATE OF CALIFORNIA

I, Nancy L. Benninghoff, declare:

I am a citizen of the United States, a resident of Orange County, and am over 18 years of age. I am not a party to the within entitled action. My business/residence address is:

Street: P. O. Box 1355
City, State, ZIP: San Juan Capistrano, CA 92693

On March 30, 2006 I served a copy of the attached:

Letter of Hon. Jerre David VanGorder and Dated March 26, 2006

by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Mission Viejo, California, addressed as follows to:

Party or Attorney At Law

JAMES S. LINK
Attorney at Law
215 N Marengo 3rd Fl
Pasadena, CA 91101

ORANGE COUNTY SUPERIOR COURT
Presiding Judge
700 Civic Center Drive West
Santa Ana, CA 92701

RICHARD J. ZANASSI
State Bar Of California / OGC
180 Howard St
San Francisco, CA 94105-1639

I declare, under penalty of perjury, that the foregoing is true and correct.

DATE: March 30, 2006


Nancy L. Benninghoff