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 Director



June 13, 2005

The Honorable Bill Morrow
 State Capitol, Room 4048
 Sacramento, CA 95814

Dear Senator Morrow:

Thank you for your letter of June 7. In this letter you request my analysis of the regulatory law implications of the legal action involving your constituent, Mr. Charles Benninghoff. In response to your request I have spoken to Mr. Benninghoff and I have reviewed materials that he provided to me. I hope that the following analysis responds adequately to your request.

FACTUAL SUMMARY

Mr. Benninghoff is accused of the unlicensed practice of law in violation of Business and Professions Code section 6125. The activity alleged to constitute the unlicensed practice of law is his employment as an authorized representative in administrative hearings conducted pursuant to the administrative adjudication provisions of the Administrative Procedure Act (APA)¹. The argument that Mr. Benninghoff's conduct constituted the unlicensed practice of law is contained in an order issued by Samuel D. Reyes, an administrative law judge employed by the Office of Administrative Hearings, dated January 28, 2005.

OPINION

As I will explain hereafter, I believe that the Reyes order meets the legal definition of "regulation" found in section 11342.600². This regulation was not adopted pursuant to the administrative regulations and rule rulemaking provisions of Chapter 3.5 of the APA. Since it was not properly adopted, it cannot lawfully be enforced as a rule of general application. Enforcing the order as a rule of general application would violate section 11340.5 of the Government Code³.

¹ The California Administrative Procedure Act comprises four chapters in Part 1 of Division 3 of Title 2 of the Government Code. Chapter 3.5 (sections 11340-11361) establishes procedures that must be followed by a state agency adopting a regulation and it prohibits state agencies from enforcing regulations not adopted through these procedures. Chapter 4 governs the Office of Administrative Hearings. Chapters 4.5 and 5 govern administrative adjudication. Unless stated otherwise, all section references are to the Government Code.

² Section 11342.600 provides as follows: "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure."

³ Section 11340.5(a) provides as follows: "No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined

The Honorable Bill Morrow
June 13, 2005
Page 2 of 5

DISCUSSION

The question of whether a particular rule, guideline, etc. is a "regulation" is answered based upon the effect of the directive, not the form. The fact that a directive may be structured as a letter from a state official, an opinion of legal counsel, or an order in an administrative adjudication is of no legal significance. If the directive meets the definition of a "regulation" as defined by section 11342.600, and it is not expressly exempt from the APA rulemaking provisions, then it is unenforceable unless it been properly adopted pursuant to chapter 3.5 of the APA.

In determining whether a state agency⁴ directive or rule is subject to the APA rulemaking requirements, the OAL and the courts employ a three-step analysis:

1. Is the provision that the agency seeks to enforce a "rule, regulation, order, or standard of general application"? If so,
2. Does the provision "implement, interpret, or make specific the law enforced or administered by that the agency, or does it govern that agency's procedures? If so,
3. Is there an express statutory exemption from the APA applicable to this provision?

If the answer is "yes" to the first two questions and "no" to the third, then the rule in question is subject to the APA and must be adopted pursuant to APA rulemaking procedures if it is to have the force of law. Any such rule that has not been adopted pursuant to APA rulemaking is commonly called an "underground regulation" and would not have the force of law. This three-part legal analysis is derived from case law interpretations of the APA by the California courts. It is formalized in an explicit prohibition on the use of underground regulations found in section 11340.5

Is the Reyes order of 1/28/05 a "rule, regulation, order, or standard of general application"? The Reyes order is drafted as a case-specific adjudication of a motion to prohibit Mr. Benninghoff from serving as an authorized representative in an administrative adjudication before the Physician Assistant Committee of the Medical Board of California. As such, it would not appear to be a "rule . . . of general application." But, as noted earlier, the form is not determinative in these issues. It is the legal effect, not the form, which determines whether or not a state agency's directive meets the definition of a "regulation".

In the case of the Reyes order, the conclusion is based exclusively upon legal reasoning which is equally applicable to all people wishing to appear as "authorized representatives" in

in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter."

⁴ Section 11000 generally defines "state agency" as "every state office, officer, department, division, bureau, board, and commission."

The Honorable Bill Morrow
June 13, 2005
Page 3 of 5

administrative adjudication subject to chapters 4.5 and 5 of the APA. Specifically, the conclusion of the Reyes order is that "[t]he APA cannot be read to authorize representation by nonattorneys" (Reyes order, page 8). There is nothing in this conclusion, nor in the discussion from which the conclusion was derived, that is specific to the facts in Mr. Benninghoff's case. The conclusion in the Reyes order would apply equally to any nonattorney seeking to serve as an authorized representative under the administrative adjudication provisions of the APA.

The Reyes order effectively enforces the following rule: No person other than a licensed attorney may be a representative in an administrative hearing. This rule is in no way unique in application to Mr. Benninghoff. The only conclusion, therefore, is that the prohibition against any nonattorney representation under the APA is a rule of general application.

Does the Reyes order of 1/28/05 "implement, interpret, or make specific the law enforced or administered by [the Office of Administrative Hearings]"? The Office of Administrative Hearings, which is the state agency that issued the Reyes order, is responsible for implementation and administration of the administrative adjudication provisions of the APA, chapters 4, 4.5, and 5. The bulk of the Reyes order is an explicit interpretation of these chapters of the APA, reaching the conclusion that the APA does not permit nonattorney representation. There can be no question that the Reyes order interprets the APA.

Is there an express statutory exemption under which the regulation is not subject to the administrative rulemaking provisions of the APA? Certain state agencies, such as the Legislature and the courts, are explicitly exempt from the administrative rulemaking provisions of the APA. In other cases, particular types of government communications are explicitly exempted. The most general exemptions are found in section 11340.9. Other exemptions applicable to specific programs are included in rulemaking provisions establishing and governing those programs. Under section 11346, there are no implied exemptions to the administrative rulemaking provisions of the APA⁵.

There are no express statutory exemptions to the APA that would apply in this case. In fact, the Office of Administrative Hearings has adopted extensive regulations⁶ to implement the administrative adjudication provisions of the APA, including regulations relating to statutes referring to "other authorized representatives⁷." There would have been no reason to adopt these regulations if they were exempt from APA rulemaking requirements.

⁵ Section 11346 provides, in pertinent part: "This chapter shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly."

⁶ The regulations for the Office of Administrative Hearings are located in Title 1 of the CA Code of Regulations, sections 1000-1440.

⁷ See, e.g., 1 CCR 1015.

The Honorable Bill Morrow
June 13, 2005
Page 4 of 5

AN ADDITIONAL LEGAL ISSUE

Although it is not directly responsive to your inquiry about whether or not enforcement of the Reyes order would violate section 11340.5(a), there is one other significant question that I would like to call to your attention. The Reyes order creates a rule prohibiting anybody who is not licensed from practicing law to serve as an authorized representative in an administrative adjudication under the APA. I think some question whether this rule could be lawfully adopted as a regulation at all. I have not done a complete review of this issue, but my initial impression is to question whether such a rule would meet the consistency standard required of regulations pursuant to section 11349.1(a)(4)⁸.

The Reyes order concludes that the APA does not authorize a nonattorney to serve as an authorized representative in administrative adjudication. However, the APA in several places refers to an "attorney or other authorized representative"⁹. The OAH regulations also have specific provisions applicable both to an "attorney" and to an "authorized representative"¹⁰. The APA unquestionably contemplates that an "authorized representative" can be something other than an attorney.

It is axiomatic of statutory construction that, in interpreting a statute, an interpretation that gives effect to the words enacted by the Legislature is to be preferred over one that renders the words a nullity. The interpretation taken in the Reyes order deprives the numerous statutory and regulatory references to "other authorized representative" of any meaning at all. The statutory structure provides for a party to an administrative adjudication to have an "attorney or other authorized representative." The phrase "other authorized representative" is deprived of all effect if it is interpreted to be synonymous with "attorney" as required by the Reyes order. The rule established by the Reyes order removes all meaning from the statutory phrase "other authorized representative".

A state agency has no authority to adopt any regulation that is not consistent with the governing statutes. "There is no agency discretion to promulgate a regulation which is inconsistent with

⁸ Section 11349.1(a) provides as follows:

The [Office of Administrative Law] shall review all regulations adopted, amended, or repealed pursuant to the procedure specified in Article 5 (commencing with Section 11346) and submitted to it for publication in the California Code of Regulations Supplement and for transmittal to the Secretary of State and make determinations using all of the following standards: . . . (4) Consistency."

"Consistency" is defined in section 11349(d) as follows: "Consistency" means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.

⁹ For example, section 11440.20 deals with the case in which a "person is a party with an attorney or other authorized representative of record in the proceeding". Section 11440.60(c) specifies when a "state agency may refuse or ignore a written communication submitted by an attorney or any other authorized representative on behalf of a client . . ."

¹⁰ For example, 1 CCR 1015 provides explicit instructions regarding how "[a]ny attorney or other representative who has assumed representation of a party after the agency has referred a Case to OAH . . ." shall notify the OAH and the other parties that he or she is the representative.

The Honorable Bill Morrow
June 13, 2005
Page 5 of 5

the governing statute. . . Administrative regulations that alter or amend the statute or enlarge or impair its scope are void." (*Henning v. Division of Occupational Safety and Health* (1990) 219 Cal.App.3d 747, 757 (emphasis added).)

Again, I have not done a full legal analysis of this issue and I cannot pass judgment upon a rule that has not been presented to the office. Whether or not a formal rulemaking on this issue pursuant to Chapter 3.5 would be approved would depend upon the language of the proposed rule and the precise statute it implemented. My initial impression, though, is that a regulation providing that "attorney or any other authorized representative" meant the same thing as "attorney" could well be a regulation that impaired the scope of the governing statute. This would present a serious question regarding consistency with the governing statute. Such a rule could well fail to satisfy the consistency standard of section 11349.1(a)(4).

CONCLUSIONS

1. The Reyes order of 1/28/05 establishes a regulation of general application providing that no nonattorney may serve as an authorized representative in an administrative adjudication.
2. This regulation has not been adopted pursuant to the administrative rulemaking provisions of Chapter 3.5 of the APA.
3. Therefore, under section 11340.5(a) of the Government Code, this regulation is unenforceable.

Additionally, although I have not researched the issue fully and express no final opinion on this issue, I question whether a rule prohibiting all nonattorneys from serving as an authorized representatives in administrative adjudications would be consistent with the governing statutes, as required by section 11349.1(a)(4).

I hope you find this to be an adequate response to your inquiry. Please do not hesitate to contact me again if I can be of further assistance.

Sincerely yours,



William L. Gausewitz
Director, Office of Administrative Law