

BOLEN REPORT

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April 17, 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
Supreme Court Number: S141459

Dear Chief Justice George and Associate Justices:

I am an investigational reporter and a nationally known health freedom advocate. You can find some of my work at www.bolenreport.net. I have been doing this work for about 15 years and, as a result, have been featured on such programs as George Noory's Coast-to-Coast radio show. I have the largest internet newsletter on the "politics of health care" in the world. I am a sought after speaker on the health care circuit.

Attached is an article that I wrote for the California Public Policy Foundation (CPPF) and which was published on it site, www.cppf.us. It was also published in the CPPF's magazine named the *California Political Review* in its March/April 2006 edition for distribution to the Republican Statewide Convention held in March in San Jose.

The article is about Charles Benninghoff and what I know about his case. It deserves being read, and considered, while making your determination to review his case. Mr. Benninghoff's case is about much more than just him. It is about two things (1) the rights of all of the people of the state to pursue work allowed to them by law without being bullied by the State Bar, and (2) the rights of licensed California professionals to avail themselves of low cost "lay representatives" as allowed, and intended, by the 1995 revision of the Administrative Practices Act.

Do you realize that Mr. Benninghoff, nor any other resigned attorney, could not even go to work in public relations because there would be the "representation" of a person before news outlets, public opinion and – yes – even governmental agencies. And, if he or any resigned attorney, wanted to even influence public opinion to change the current laws surrounding their existence, they would thereby be violating the holding of *Benninghoff v Superior Court* and then could be charged by the Bar as a felon.

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To: California State Supreme Court
SUBJECT: Benninghoff v Superior Court
DATE: April 17, 2006
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This case is a clear example of government idiocy, tyranny and oppression. Accordingly, I urge you to review this case and overturn it.

I have recently read a copy of a letter, to you, from California State Assemblyman Chuck DeVore. He is a brilliant public servant. His reference to the ruling so far in this case is correct: the trial and appellate courts have adopted a Soviet-style approach to human rights.

According to District Appeals Court – *“Anything that is not expressly allowed is forbidden.”*

The Legislative Counsel of the State of California gave Mr. Benninghoff a complete go ahead to do agency work in its Opinion #18108. And, it should have, because that is correct.

While Mr. Benninghoff may never be allowed to go to court and do court trials, but there is nothing stopping his from going to a government agency. Anybody can do it; even I can do it.

Now, if a law is passed by the legislature, or a rule or regulation properly adopted during a public hearing process for rulemaking, and this law or rule forbids it – then Mr. Benninghoff and any other resigned attorney would be forbidden. But, this public process allows him and every one else to know the rules of the road in advance. The way it is, you have a clear case of *ex post factor* being applied.

Combining Opinion 18108 with the holding of *Benninghoff v Superior Court* would be like the government throwing water on you and then arresting you for being wet. This is good law, this is great logical thinking, this is the stuff that legends are made of – **in the Soviet Union of old** but it is totally inappropriate here in the United States.

Thank you for the opportunity to express my opinion and as I said, review and reverse. Remember this mantra: review and reverse. Our State, and our country deserve it and the citizenry of this country deserve the maintenance of their freedoms.

Respectfully,



Tim Bolen

PROOF OF SERVICE

I, Nancy L. Benninghoff, am not a party to this action. My business address is P. O. Box 1355, San Juan Capistrano, CA 92693.

On the date set forth below, I served the within described letter 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 Postal Service Box at San Juan Capistrano, California, 92693, addressed as follows:

Richard J. Zanassi	Presiding Judge	James Link, Esq.
State Bar of California/OGC	Orange County Superior Court	215 North Marengo
180 Howard Street	700 Civic Center Drive West	Third Floor
San Francisco, CA 94105-1639	Santa Ana, CA 92701	Pasadena, CA 91101

Description: *Amicus* letter from Tim Bolen, dated April 17, 2006, in Support of reviewing the case of *Benninghoff v Superior Court* in California Supreme Court

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: April 19, 2006


Nancy L. Benninghoff

The state moves to squash an advocate for the little guy



by Tim Bolen

I AM AN advocate for change in the U.S. health care system: a system rated 72nd worldwide in quality, but number one in cost. It has recently been determined, also, to be the number one killer of Americans: ahead of heart disease and cancer. Almost all of my “crisis management” work, in North America, surrounds the unique problems of cutting-edge health care professionals, representing them before the press and public, and — when their right to practice their paradigm is challenged by public agencies — organizing their defense, and offense, and helping their legal defense teams by providing experts, etc.

In short, I’ve been around. I know the problems, and I know the players. Let me tell you: it’s bloody on the cutting edge. I’m about to give you an example.

One of the biggest problems in the U.S. health care system is the way we

Tim Bolen is editor and founder of The Bolen Report, a publication chronicling the battle between “health” and “medicine.” As a Crisis Management Consultant, he also directs the operations of JuriMed Public Relations & Research Group, Inc., which provides “Strategies for Government Besieged Health Professionals.” He is a nationally-known expert in the field of health care politics. His work is found at <http://www.bolenreport.net>.

regulate it. I believe the federal Food and Drug Administration should be radically overhauled — as, under Dwight David Eisenhower, the relationship between the Defense Department and the defense industry was radically overhauled. Worse than the FDA, however, is America's administrative law system, slightly different in every state, that supposedly disciplines health care professionals. It's brutal, stupid, attracts petty despots to its ranks, costs a fortune to defend against, and has zero guidelines. The system is so bad you have lower level bureaucrats deciding what's good and bad health care, and forcing health professionals through a minefield-like hearing process. This system is one reason we're 72nd in quality: the regulators haven't a clue.

THE SYSTEM is not about whether the health professional did something wrong; this is a "numbers game," a game of quotas, and these public employees are expected to make their numbers. One trick is to make the "defense" so costly that a "settlement" can be reached quickly, avoiding further costs. Taking a case completely through this process, using an attorney, usually will cost the health professional in the range of \$250,000 in attorney fees. Few, if any, of them can afford that these days. But suppose health professionals were provided a way to defend themselves at much lower cost by using, instead of an attorney, a qualified "lay representative." What do you think the state agency and the attorney's "association" would do?

That's what this story is about. It happened in California and here's what the players did.

About 1991, when I began doing this "crisis" work, I was introduced to the predicament afflicting many health professionals by then-lawyer Charles Benninghoff. I say "then-lawyer" because Mr. Benninghoff, at the time, was a California attorney. I was there when he was indicted by the federal government in 1998 on two charges of making a false statement to a financial institution and one charge of making a false statement to an IRS agent. Due to circumstances which I describe below, he pled guilty to the charges and resigned from the California State Bar Association in 1999.

Before that, Mr. Benninghoff and I worked on quite a few cases together involving many medical and other professionals. One such case — that of David Steenblock D.O. (Doctor of Osteopathy) — showed Mr. Benninghoff's abilities. That case, still reported on the web, continues to rankle the administrative power structure of California. In the course of a dispute over Dr. Steenblock's hyperbaric oxygen treatment for rehabilitating stroke victims, the California Osteopathic Board literally "sealed" shut his hyperbaric oxygen chambers with paper seals. Mr. Benninghoff responded by taking the entire case off to the Federal Bankruptcy Court where he succeeded in having the Osteopathic Board's action declared illegal and the seals removed. In doing so, we acquired worldwide support for Steenblock and his alternative health care methods, which, I might add, are now so mainstream that competing medical doctors advertise hyperbaric oxygen on television.



Charles Benninghoff

Besides his hyperbaric work for stroke rehabilitation, Steenblock is now perhaps the number one researcher in umbilical cord blood stem cell therapies. Look for his book at your favorite bookstore or online.

In another case with Benninghoff, we took on an entire water district in South Orange County. It seemed clear to us that this water district's antiquated sewage treatment plant was the source of contamination at the city of Dana Point's Doheny Beach, the spot where the sport of surfing was born. But pollution had made surfing impossible at Doheny Beach. We filed suit against the Board and worked with the media to stir up public awareness of the problem. As a result of this effort, most of the water district's board was thrown out in one election, the water district was subsequently disbanded and absorbed by a neighboring, well-managed regional agency, a \$17 million bond issue was passed to pay to correct the damage, and the sewage plant was shut down permanently.

And you can now use the beach. Then disaster struck for Benninghoff. It was the indictment I mentioned earlier. Years after some loans he had obtained were paid off, the IRS began investigating him and discovered that "he had not adequately disclosed his method of accounting he had used in his loan

applications." While the IRS claimed there was gross overstatement of income, Benninghoff countered that in his understanding of accounting he had justification for the figures he used. He further pointed out that he had paid off the loans in question years before the IRS came knocking at his door. During the investigation, in about 1997, an IRS agent asked him about a document he had received in 1991. He said it was given to him. Actually it was sent to him by FedEx. Because of this, he was charged with three felonies and offered an all-or-nothing plea agreement by a federal prosecutor. All of this conflict coalesced into a major heart attack. Benninghoff suffered while signing the plea agreement in 1999.

Along the way towards "paying his debt to society," Benninghoff sought, through a legislator's office, an answer to the question "could he, as a resigned attorney, provide representation before administrative agencies" under provisions of California's Administrative Procedure Act (APA) that permit alternatives to representation by an attorney in actions before these agencies? The California APA was rewritten in 1995 (following UCLA Professor Emeritus Michael Asimow's research) to allow non-attorneys to provide representation services. The legislator whom Benninghoff had first asked his question forwarded it to the California Legislative Counsel which assigned the question to a lawyer on its staff.

AFTER APPROXIMATELY SIX MONTHS of consideration, the Legislative Counsel issued its Opinion 18108 on July 17, 2001, stating that "any resigned attorney could provide lay representation in California so long as she, or he, did not claim to be a lawyer and there was no statute, regulation, or other rule against it." In the 1970s, the Workers Compensation Appeals Board (WCAB) issued a rule forbidding representation by a resigned attorney unless the resigned attorney showed the WCAB evidence of rehabilitation. No other agency has issued such a rule, so Opinion 18108 cleared the way for Benninghoff to work as a representative before any agency controlled by the state Administrative Procedure Act (unless it issued something similar to the WCAB rule).

But, Benninghoff didn't rely on Opinion 18108 alone. Before starting to work as a representative before agencies, he also obtained permission for what he intended to do from his sentencing judge and his probation officers. In addition, court filings show that his sentencing judge gave him an early termination of federal probation based upon outstanding efforts at self-rehabilitation because of his work as a representative before California and federal agencies.

Thus entitled, Benninghoff began representing people before California administrative agencies in 2001. By May 2005, he had undertaken about 400 cases. Most had settled. About 100 had gone to full hearing. Then, early last May, State Bar Counsel Bill Cox placed a call to Mr. Benninghoff's lawyer. Instead of leaving a message with the lawyer's secretary, receptionist, or any of the other lawyers in the office, Mr. Cox left a voice mail

message. It was that at 9 the next morning Cox was going to court in Orange County to try to seize Benninghoff's business. When Mr. Benninghoff's attorney returned to his office from court, he discovered he had only a few hours to prepare opposition to a voluminous filing by the Bar, an early dirty trick in a series employed by our humble civil servants from the State Bar.

Such thuggish abuse of its power as a public agency is not unusual from State Bar employees. No other state licensing agency shares the California's state Bar's tradition of mixing narrow political causes into its official duties. Recall 1997, when Governor Pete Wilson vetoed funding for the Bar precisely on grounds it had not only become bloated and inefficient, but was in the habit of intruding itself into divisive political issues. As *Sacramento Bee* columnist Dan Walters reported at the time, "the State Bar, for example, supported legislation to change California's medical malpractice law — siding with a private lawyer lobby, Consumer Attorneys of California, against the CMA, the private doctor lobby." Under-handed dealings had become so much a staple of state Bar activity that then-Assemblyman Bill Morrow of Oceanside, during negotiations on a new, more restrictive law to reign in the Bar, said "I want to make sure the bill is airtight. If it was any other organization, maybe I could trust them." Eventually, the Bar was forced to curb some of its more egregious abuses. But



dirty tricks and foul tactics die hard where they are deeply ingrained, as the rest of this article will reveal.

Benninghoff's business consisted of two elements: a state (administrative hearings) element that he started after Legislative Counsel Opinion 18108 was issued, and a federal element that consisted of representing federal prisoners from foreign countries wishing to return to their homelands to serve their sentence close to their family under the Carter Treaty. This federal "treaty" work fell under a broad international web of treaties intended to promote prisoner rehabilitation. Part of Benninghoff's reason for this aspect of his business was to "rehabilitate" himself so he could rejoin the Bar.

THIS is where the whole case starts getting Byzantine — and a little explanation is called for. Benninghoff's "state" work included representing, as a "lay representative," medical doctors before their licensing agency, the California Medical Board. During his work before the Board from 2001 through 2005, he undertook several cases that resulted in extremely favorable outcomes for his medical clients. In one case, that of Dr. James Long, M.D., the Board was seeking license revocation where a patient suffered debilitating brain damage and was put into a vegetative state. Benninghoff proved that this tragic medical result was not his physician client's fault — as the Medical Board maintained — but the result of a certified nurse anesthetist's possibly-intentional behavior.

Instead of license revocation this physician received a public reprimand. In street language, that means that instead of the death sentence, the doc received a severe warning about supervising his helpers. Benninghoff obtained similar results in cases throughout California. His victories brought in increasing business, until Benninghoff reached a point where he was handling more agency administrative cases than anyone else in the state. Faced with this, the State Bar evidently believed it could not sit still. It didn't.

The Bar's first strike came during a hearing for a physician's assistant named Jocelyn Gordon who had erred in her practice shortly after entering the profession while being tutored by an inattentive physician. Benninghoff struggled with the Physician's Assistant Committee, a sub-agency of the Medical Board, for almost two years asking for a reasonable reprimand rather than some draconian punishment. Finally, just before Ms. Gordon's administrative hearing, the Committee brought a motion asking to disqualify Mr. Benninghoff.

Such motions are heard and ruled upon by an ad-

Reyes' 'opinion' disqualifying Benninghoff was so over the line, it was labeled 'renegade' by California's most prominent administrative law attorney, Bob Sullivan, of Sacramento.

ministrative law judge (ALJ). In this case, ALJ Sam Reyes sided with the Physician's Assistant Committee, disqualifying Benninghoff. Reyes specified his grounds for the disqualification in an "opinion" later called unenforceable as an "underground regulation" by the executive director of California's Office of Administrative Law. An "underground regulation" is a rule or policy of an agency that has the effect of a regulation, but that was not adopted pursuant to the Administrative Procedures Act. In simple terms, these "underground regulations" are manufactured by bureaucrats over-stepping their authority. They are specifically held to be illegal in California. Reyes' "opinion" disqualifying Benninghoff was so over the line, it was labeled "renegade" by California's most prominent administrative law attorney, Bob Sullivan, of Sacramento. Sullivan is the widely-respected lawyer who first identified the abusive practice of "underground regulations" by out-of-control bureaucrats like Reyes.

On June 13, 2005, Office of Administrative Law Executive Director Bill Causewitz issued his ruling holding the Reyes "opinion" unenforceable. Nonetheless, the Bar held up this renegade document as one of the original Ten Commandments in its effort to put Benninghoff out of business.

The next strike came in an MD case in San Diego involving well-known and highly-respected physician Phillip Rand. This "baby doctor," over a 55-year career, had overseen tens of thousands of deliveries. Benninghoff likes to tell the story of hiring a secretary, age 33, who, upon hearing the name Dr. Rand, shouted with glee "Oh my! Dr. Rand delivered *me*."

In the Rand case, Presiding ALJ Stevie Adler had ruled on at least two separate occasions in Benninghoff's favor after the Medical Board sought to disqualify him. At that point, the Medical Board brought in the state Bar.

To maintain their independence, California's Superior and Appellate Court judges are not allowed to be

members of the Bar. In contrast, however, ALJs are all lawyers, and thus *must* belong to the Bar. In addition, the law forbids communications outside of official court proceedings between parties involved in a case and the case's presiding Superior Court or Court of Appeals judges for the obvious purpose of avoiding efforts to influence the judge on any grounds other than those presented in court. But the Administrative Procedure Act (APA) and the regulations issued under it allow agency employees not directly involved in a prosecution (such as Dr. Rand's) to call an administrative law judge. This provision affords an opportunity to cajole or pressure the ALJ in private to rule in the agency's favor. Is it possible that both the Bar and the

Medical Board influenced Stevie Adler? Could be! In any case, after twice ruling on identical issues in Benninghoff's favor, after the Bar came in, Adler reversed himself, deciding that Benninghoff's work was now somehow illegal.

ARMED WITH Reyes' renegade, and Adler's waffling, decisions, the Bar proceeded to Orange County Superior Court where it succeeded in convincing Presiding Judge Michael Brenner to allow it to seize Benninghoff's business. The order signed by Judge Brenner allowed the Bar to cart off Benninghoff's private financial information, seize his bank accounts, walk out with all of his files, computers — even his telephone numbers. All this was done in the name of protecting the public.

What did Benninghoff have with which to fight back? Quite a bit, actually. In addition to Opinion 18108, two judges (one on the bench and one retired) wrote *amicus curiae* (friend of the court) briefs, about 30 of his clients came forward with supporting declarations attesting to the fine work Benninghoff provided them along with statements that he had told them up front he was a resigned attorney, and the OAL decision declaring the Reyes Opinion invalid.

In response, Bar prosecutor Cox, in writing, threatened the sitting judge who had contributed an *amicus* brief with prosecution for practicing law without a license. How is that for subtle? Cox's rationale: since the judge was a "real" judge and, thus, not a member of the

Bar, writing a friend of the court brief constituted an unlicensed practice of law. Sorry! State Rules of Court say anyone can file a friendly brief; you don't have to be an attorney.

As to Benninghoff's work with federal agencies, it appears that Cox misrepresented the law to Judge Brenner and convinced the Judge to allow him to seize Benninghoff's federal business in addition to the state work. Cox did not disclose to Judge Brenner that *Augustine v. Veterans Administration* — a federal case decided in California — specifically held that the Bar has no jurisdiction over federal agency work.

In addition, as early as 1994, the California Bar, through a position paper issued by the Bar's Office of Professional Competence, Planning & Development, stated that the bar does not view the State Bar Act as covering federal administrative proceedings:

"The State Bar takes the general position that where a non-member is permitted to practice before a federal court (district, appellate, admiralty) or a federal agency (INS, Patent Office), such individual is not engaged in the unauthorized practice of law while performing activities before such federal courts or agencies in California on behalf of clients."

This is exactly what Benninghoff was doing: representing clients before federal agencies (the United States Department of Justice) where he had been specifically permitted to do so by that Department's Probation Unit and his federal sentencing judge. Nevertheless, relying on Cox's word, Judge Brenner allowed Cox to port Benninghoff's business away in a moving van: lock, stock, and barrel.

So, what did the bar do after seizing Benninghoff's clients' records? They completely abandoned every one of the clients, mailing them their papers that they had seized from Benninghoff's office, and, figuratively, telling them to "take a hike." Only God knows how many of these people lost their licenses or otherwise suffered due to the heavy-handed bar tactics.

Benninghoff's case will continue until it is settled by the California Supreme Court. If you wish to assist Mr. Benninghoff in defending himself in this fight, please e-mail me: bolen@bolenreport.net You can follow what happens by keeping an eye on *The Bolen Report* (at: <http://www.bolenreport.net>).



The author