

## RESOLUTION 08-01-2020

### TEXT OF RESOLUTION

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Government Code section 11517, to read as follows:

1 § 11517

2 (a) A contested case may be originally heard by the agency itself and subdivision (b)  
3 shall apply. Alternatively, at the discretion of the agency, an administrative law judge may  
4 originally hear the case alone and subdivision (c) shall apply.

5 (b) If a contested case is originally heard before an agency itself, all of the following  
6 provisions apply:

7 (1) An administrative law judge shall be present during the consideration of the case and,  
8 if requested, shall assist and advise the agency in the conduct of the hearing.

9 (2) No member of the agency who did not hear the evidence shall vote on the decision.

10 (3) The agency shall issue its decision within 100 days of submission of the case.

11 (c) (1) If a contested case is originally heard by an administrative law judge alone, he or  
12 she shall prepare within 30 days after the case is submitted to him or her a proposed decision in a  
13 form that may be adopted by the agency as the final decision in the case. Failure of the  
14 administrative law judge to deliver a proposed decision within the time required does not  
15 prejudice the rights of the agency in the case. Thirty days after the receipt by the agency of the  
16 proposed decision, a copy of the proposed decision shall be filed by the agency as a public record  
17 and a copy shall be served by the agency on each party and his or her attorney. The filing and  
18 service is not an adoption of a proposed decision by the agency.

19 (2) Within 100 days of receipt by the agency of the administrative law judge's proposed  
20 decision, the agency may act as prescribed in subparagraphs (A) to (E), inclusive. If the agency  
21 fails to act as prescribed in subparagraphs (A) to (E), inclusive, within 100 days of receipt of the  
22 proposed decision, the proposed decision shall be deemed adopted by the agency. The agency  
23 may do any of the following:

24 (A) Adopt the proposed decision in its entirety.

25 (B) Reduce or otherwise mitigate the proposed penalty and adopt the balance of the  
26 proposed decision.

27 (C) Make technical or other minor changes in the proposed decision and adopt it as the  
28 decision. Action by the agency under this paragraph is limited to a clarifying change or a change  
29 of a similar nature that does not affect the factual or legal basis of the proposed decision.

30 (D) Reject the proposed decision and refer the case to the same administrative law judge  
31 if reasonably available, otherwise to another administrative law judge, to take additional  
32 evidence. If the case is referred to an administrative law judge pursuant to this subparagraph, he  
33 or she shall prepare a revised proposed decision, as provided in paragraph (1), based upon the  
34 additional evidence and the transcript and other papers that are part of the record of the prior  
35 hearing. A copy of the revised proposed decision shall be furnished to each party and his or her  
36 attorney as prescribed in this subdivision.

37 (E) Reject the proposed decision, and decide the case upon the record, including the  
38 transcript, or upon an agreed statement of the parties, with or without taking additional evidence.  
39 If the agency elects to proceed under this subparagraph, the rejection of the proposed decision

40 shall be based upon substantial evidence in the record. Substantial evidence is more than a mere  
41 scintilla of evidence, and is such relevant evidence as a reasonable mind might accept as  
42 adequate to support a conclusion. Further, the decision of the agency must state in writing its  
43 reasons for rejection of the proposed decision, with reference to supporting evidence. By  
44 stipulation of the parties, the agency may decide the case upon the record without including the  
45 transcript. If the agency acts pursuant to this subparagraph, all of the following provisions apply:  
46 (i) A copy of the record shall be made available to the parties. The agency may require  
47 payment of fees covering direct costs of making the copy.  
48 (ii) The agency itself shall not decide any case provided for in this subdivision without  
49 affording the parties the opportunity to present either oral or written argument before the agency  
50 itself. If additional oral evidence is introduced before the agency itself, no agency member may  
51 vote unless the member heard the additional oral evidence.  
52 (iii) The authority of the agency itself to decide the case under this subdivision includes  
53 authority to decide some but not all issues in the case.  
54 (iv) If the agency elects to proceed under this subparagraph, the agency shall issue its  
55 final decision not later than 100 days after rejection of the proposed decision. If the agency elects  
56 to proceed under this subparagraph, and has ordered a transcript of the proceedings before the  
57 administrative law judge, the agency shall issue its final decision not later than 100 days after  
58 receipt of the transcript. If the agency finds that a further delay is required by special  
59 circumstance, it shall issue an order delaying the decision for no more than 30 days and  
60 specifying the reasons therefor. The order shall be subject to judicial review pursuant to Section  
61 11523.  
62 (d) The decision of the agency shall be filed immediately by the agency as a public record  
63 and a copy shall be served by the agency on each party and his or her attorney.

(Proposed new language underlined; language to be deleted stricken)

**PROPONENT:** San Diego County Bar Association

## **STATEMENT OF REASONS**

The Problem: Various governmental agencies are tasked with the issuing and regulation of professional licenses in California. The Administrative Procedures Act, the Government Code, the Business & Professions Code, and the California Code of Regulations collectively govern how these agencies issue and discipline professional licenses.

Currently, once formal disciplinary proceedings are initiated against licensed professionals and/or license applicants, those individuals are entitled to have a hearing before an Administrative Law Judge (“ALJ.”) The ALJ is the neutral arbiter of the facts and provides a rational and logical Proposed Decision and Order to the governmental agency after the hearing on the merits, which is based on the facts and evidence adduced at trial.

However, Government Code §11517(c)(2)(E) permits the agencies to entirely reject the ALJ’s Proposed Decision and Order without providing justification or meeting any legal standard. Because licensing agencies are permitted to recoup all of the costs of handling these cases when any level of discipline is imposed on the licensees, it is becoming more frequent that the governmental agencies entirely disregard and usurp an ALJ’s rational and logical Proposed Decision and Order and impose harsher discipline despite the ALJ’s Findings and Order. When

this happens, the agency's actions completely undermine the fairness and validity of the entire administrative disciplinary hearing process. This is especially more egregious given the fact that many of these Board and Committee members are individuals with very little to no legal experience or training.

The Solution: Enact legislation that requires governmental agencies to identify "substantial evidence" in the record to support their rejection of the ALJ's Proposed Decision and Order after a hearing on the merits of the case to ensure that there is no incorrect or erroneous legal basis for their decision, and that their decision is consistent with, and supported by the facts.

### **IMPACT STATEMENT**

This resolution may require additional statutory changes. This statutory change would require state agencies to adopt conforming changes to applicable sections of the California Code of Regulations and Business and Professions Code.

### **CURRENT OR PRIOR RELATED LEGISLATION**

None known.

### **AUTHOR AND/OR PERMANENT CONTACT:**

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**RESPONSIBLE FLOOR DELEGATE:** Kevin C. Murphy, Esq. & Heather A. Melone, Esq.

## RESOLUTION 08-02-2020

### TEXT OF RESOLUTION

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Government Code section 11517 and Business and Professions Code section 2335, to read as follows:

1 Government Code, § 11517

2 (a) A contested case may be originally heard by the agency itself and subdivision (b)  
3 shall apply. Alternatively, at the discretion of the agency, an administrative law judge may  
4 originally hear the case alone and subdivision (c) shall apply.

5 (b) If a contested case is originally heard before an agency itself, all of the following  
6 provisions apply:

7 (1) An administrative law judge shall be present during the consideration of the case and,  
8 if requested, shall assist and advise the agency in the conduct of the hearing.

9 (2) No member of the agency who did not hear the evidence shall vote on the decision.

10 (3) The agency shall issue its decision within 100 days of submission of the case.

11 (c) (1) If a contested case is originally heard by an administrative law judge alone, he or  
12 she shall prepare within 30 days after the case is submitted to him or her a proposed decision in a  
13 form that may be adopted by the agency as the final decision in the case. Failure of the  
14 administrative law judge to deliver a proposed decision within the time required does not  
15 prejudice the rights of the agency in the case. Thirty days after the receipt by the agency of the  
16 proposed decision, a copy of the proposed decision shall be filed by the agency as a public record  
17 and a copy shall be served by the agency on each party and his or her attorney. The filing and  
18 service is not an adoption of a proposed decision by the agency.

19 (2) Within 100 days of receipt by the agency of the administrative law judge's proposed  
20 decision, the agency may act as prescribed in subparagraphs (A) to (E), inclusive. If the agency  
21 fails to act as prescribed in subparagraphs (A) to (E), inclusive, within 100 days of receipt of the  
22 proposed decision, the proposed decision shall be deemed adopted by the agency. The agency  
23 may do any of the following:

24 (A) Adopt the proposed decision in its entirety.

25 (B) Reduce or otherwise mitigate the proposed penalty and adopt the balance of the  
26 proposed decision.

27 (C) Make technical or other minor changes in the proposed decision and adopt it as the  
28 decision. Action by the agency under this paragraph is limited to a clarifying change or a change  
29 of a similar nature that does not affect the factual or legal basis of the proposed decision.

30 (D) Reject the proposed decision and refer the case to the same administrative law judge  
31 if reasonably available, otherwise to another administrative law judge, to take additional  
32 evidence. If the case is referred to an administrative law judge pursuant to this subparagraph, he  
33 or she shall prepare a revised proposed decision, as provided in paragraph (1), based upon the  
34 additional evidence and the transcript and other papers that are part of the record of the prior  
35 hearing. A copy of the revised proposed decision shall be furnished to each party and his or her  
36 attorney as prescribed in this subdivision.

37 (E) ~~Reject~~ Adopt the proposed decision, and reject the proposed penalty or discipline, and  
38 decide the ~~case~~ penalty or discipline upon the record, including the transcript, or upon an agreed

39 statement of the parties, with or without taking additional evidence. By stipulation of the parties,  
40 the agency may decide the ~~ease~~ question of penalty or discipline upon the record without  
41 including the transcript. If the agency acts pursuant to this subparagraph, all of the following  
42 provisions apply:

43 (i) A copy of the record shall be made available to the parties. The agency may require  
44 payment of fees covering direct costs of making the copy.

45 (ii) The agency itself shall not decide any ~~ease~~ the question of penalty or discipline  
46 provided for in this subdivision without affording the parties the opportunity to present either  
47 oral or written argument before the agency itself. If additional oral evidence is introduced before  
48 the agency itself, no agency member may vote unless the member heard the additional oral  
49 evidence.

50 ~~(iii) The authority of the agency itself to decide the case under this subdivision includes~~  
51 ~~authority to decide some but not all issues in the case.~~

52 ~~(iv iii)~~ (iii) If the agency elects to proceed under this subparagraph, the agency shall issue its  
53 final decision not later than 100 days after rejection of the proposed ~~decision~~ penalty or  
54 discipline. If the agency elects to proceed under this subparagraph, and has ordered a transcript  
55 of the proceedings before the administrative law judge, the agency shall issue its final decision  
56 not later than 100 days after receipt of the transcript. If the agency finds that a further delay is  
57 required by special circumstance, it shall issue an order delaying the decision for no more than  
58 30 days and specifying the reasons therefor. The order shall be subject to judicial review  
59 pursuant to Section 11523.

60 (d) The decision of the agency shall be filed immediately by the agency as a public record  
61 and a copy shall be served by the agency on each party and his or her attorney.

62

63 Business and Professions Code, § 2335

64 (a) All proposed decisions and interim orders of the Medical Quality Hearing Panel  
65 designated in Section 11371 of the Government Code shall be transmitted to the executive  
66 director of the board, or the executive director of the California Board of Podiatric Medicine as  
67 to the licensees of that board, within 48 hours of filing.

68 (b) All interim orders shall be final when filed.

69 (c) A proposed decision shall be acted upon by the board or by any panel appointed  
70 pursuant to Section 2008 or by the California Board of Podiatric Medicine, as the case may be, in  
71 accordance with Section 11517 of the Government Code, except that all of the following shall  
72 apply to proceedings against licensees under this chapter:

73 (1) When considering a proposed decision, the board or panel and the California Board of  
74 Podiatric Medicine shall give great weight to the findings of fact of the administrative law judge,  
75 except to the extent those findings of fact are controverted by new evidence.

76 (2) The board's staff or the staff of the California Board of Podiatric Medicine shall poll  
77 the members of the board or panel or of the California Board of Podiatric Medicine by written  
78 mail ballot concerning the proposed decision. The mail ballot shall be sent within 10 calendar  
79 days of receipt of the proposed decision, and shall poll each member on whether the member  
80 votes to approve the decision, to approve the decision with an altered penalty, to refer the case  
81 back to the administrative law judge for the taking of additional evidence, or to defer final  
82 decision pending discussion of the case by the panel or board as a whole, ~~or to nonadopt the~~  
83 ~~decision~~. No party to the proceeding, including employees of the agency that filed the  
84 accusation, and no person who has a direct or indirect interest in the outcome of the proceeding

85 or who presided at a previous stage of the decision, may communicate directly or indirectly,  
86 upon the merits of a contested matter while the proceeding is pending, with any member of the  
87 panel or board, without notice and opportunity for all parties to participate in the communication.  
88 The votes of a majority of the board or of the panel, and a majority of the California Board of  
89 Podiatric Medicine, are required to approve the decision with an altered penalty, or to refer the  
90 case back to the administrative law judge for the taking of further evidence, ~~or to nonadopt the~~  
91 ~~decision~~. The votes of two members of the panel or board are required to defer final decision  
92 pending discussion of the case by the panel or board as a whole; except that, in the case of the  
93 California Board of Podiatric Medicine, the vote of only one member of that board is required to  
94 defer final decision pending discussion of the case by the board as a whole. If there is a vote by  
95 the specified number to defer final decision pending discussion of the case by the panel or board  
96 as a whole, provision shall be made for that discussion before the 100-day period specified in  
97 paragraph (3) expires, but in no event shall that 100-day period be extended.

98 (3) If a majority of the board or of the panel, or a majority of the California Board of  
99 Podiatric Medicine vote to do so, the board or the panel or the California Board of Podiatric  
100 Medicine shall issue an order of nonadoption of a proposed ~~decision~~ penalty or discipline within  
101 100 calendar days of the date it is received by the board. If the board or the panel or the  
102 California Board of Podiatric Medicine does not refer the case back to the administrative law  
103 judge for the taking of additional evidence or issue an order of nonadoption concerning the  
104 proposed penalty or discipline within 100 calendar days, the decision shall be final and subject to  
105 review under Section 2337. Members of the board or of any panel or of the California Board of  
106 Podiatric Medicine who review a proposed decision or other matter and vote by mail as provided  
107 in paragraph (2) shall return their votes by mail to the board within 30 days from receipt of the  
108 proposed decision or other matter.

109 (4) The board or the panel or the California Board of Podiatric Medicine shall afford the  
110 parties the opportunity to present oral argument before deciding a case after nonadoption of the  
111 administrative law judge's penalty or discipline ~~decision~~.

112 (5) A vote of a majority of the board or of a panel, or a majority of the California Board  
113 of Podiatric Medicine, are required to increase the penalty from that contained in the proposed  
114 administrative law judge's decision. No member of the board or panel or of the California Board  
115 of Podiatric Medicine may vote to increase the penalty except after reading the entire record and  
116 personally hearing any additional oral argument and evidence presented to the panel or board.

(Proposed new language underlined; language to be deleted stricken)

**PROPONENT:** Los Angeles County Bar Association

### **STATEMENT OF REASONS**

The Problem: Administrative agencies, e.g., Medical Board, may hear and decide contested licensing and disciplinary cases itself, or, as more commonly occurs, delegate the hearing and decision to an experienced administrative law judge with the Office of Administrative Hearings. When that occurs, the ALJ conducts a hearing, judging witnesses and evidence under the Administrative Procedure Act, then issues a proposed decision summarizing the evidence, the judge's findings of fact and conclusions of law, and recommendation for any penalty or discipline if finding against the respondent licensee. The agency currently may adopt the PD as

the final decision and order, or nonadopt and issue a completely different decision. The final decision is then to judicial review on writ petition. While the agency should retain prerogative regarding the nature and extent of any disciplinary order, it is fundamentally unfair to respondent licensee to allow an agency to completely reject the ALJ's PD on the merits simply because it may not like the outcome based on preconceived ideas. It's an anathema to principles of fairness and justice to permit the agency to then purport to redecide the facts of the case in its favor, based on its supposed reading of the cold record, after an ALJ determined the case in favor of the respondent and against the agency following a full due process hearing on the merits with all the parties, witnesses and evidence before it. With the agency having the plenary power to completely reject the ALJ's proposed decision, the agency is allowed to decide controversies based on agenda and politics rather than facts, it tramples on the rights of the licensee, and it has no incentive to settle since it knows and can control the outcome regardless of the hearing and what the ALJ finds. Even the OAH favors finality of its decisions.

The Solution: The agency may retain full authority over the decision in contested cases by conducting the hearing itself. But where it delegates the controversy for a full statutory hearing by an OAH ALJ, barring judicial review by the courts, both the agency and licensee should be required to accept the ALJ's PD as the outcome for the case. The resolution would end the agency's practice of summarily nonadopting PDs it doesn't like, irrespective of it being the product of a due process hearing conducted by an experienced ALJ who personally passed upon all the evidence presented at the trial. When both sides had their day in court, it is unfair for the agency to simply nonadopt it purport to redecide the case on the record, issuing the decision it wanted irrespective of the decision of the ALJ following a full, live trial on the merits. The resolution ends a practice repugnant to traditional notions fairness and jurisprudence, and may foster an interest in settlement that does not exist where the agency can arbitrarily control the outcome. The resolution would retain the agency's power to change any penalty or decision, otherwise recommended in the PD, which the agency determines is not appropriate.

#### **IMPACT STATEMENT**

This resolution does not affect any other law, statute, or rule.

#### **CURRENT OR PRIOR RELATED LEGISLATION**

None known.

#### **AUTHOR AND/OR PERMANENT CONTACT:**

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**RESPONSIBLE FLOOR DELEGATE:** Joel Bruce Douglas

## RESOLUTION 08-03-2020

### TEXT OF RESOLUTION

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Business and Professions Code section 6086.5, to read as follows:

1 § 6086.5

2 (a) The board of trustees shall establish a State Bar Court, to act in its place and stead in the  
3 determination of disciplinary and reinstatement proceedings and proceedings pursuant to  
4 subdivisions (b) and (c) of Section 6007 to the extent provided by rules adopted by the board of  
5 trustees pursuant to this chapter. In these proceedings the State Bar Court may exercise the  
6 powers and authority vested in the board of trustees by this chapter, including those powers and  
7 that authority vested in committees of, or established by, the board, except as limited by rules of  
8 the board of trustees within the scope of this chapter.

9 (b) Access to records of the State Bar Court shall be governed by court rules and laws  
10 applicable to records of the judiciary and not the California Public Records Act (Chapter 3.5  
11 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code).

12 (c) The State Bar of California shall provide on the Internet on its website information  
13 regarding the status of every license issued by the State Bar of California in accordance with the  
14 California Public Records Act. The public information to be provided on the Internet shall  
15 include information on administrative actions, disciplinary actions, suspensions and disbarments  
16 as part of the State Bar's licensees' State Bar profiles.

17 (d) Upon petition by a licensee accompanied by a fee sufficient to defray costs associated  
18 with consideration of a petition, filed in State Bar Court, the State Bar of California may remove  
19 from the licensee's State Bar Profile the public information described in subdivision (c) an item  
20 that has been posted on the licensee's State Bar Profile for no less than five years which  
21 constitutes an administrative action, or an item that has been posted on the licensee's State Bar  
22 Profile for no less than ten years which constitutes a disciplinary action, where the licensee  
23 provides evidence of rehabilitation indicating that the notice is no longer required in order to  
24 prevent a credible risk to members of the public utilizing licensed activity of the licensee. In  
25 evaluating a petition, the State Bar Court shall take into consideration other violations that  
26 present a credible risk to the members of the public since the administrative or disciplinary  
27 action which the licensee has petitioned to be removed from the licensee's State Bar Profile.

28 (e) The State Bar of California may develop, through regulations, the amount of the fee and  
29 the minimum information to be included in a licensee's petition, including, but not limited to, a  
30 written justification and evidence of rehabilitation.

31 (f) The petition process described by subdivisions (d) and (e) shall commence January 1,  
32 2021.

33 (g) The State Bar of California shall maintain a list of all licensees whose administrative or  
34 disciplinary records are altered as a result of a petition approved under subdivision (d). The State  
35 Bar of California shall make the list accessible to other licensing bodies. The State Bar of  
36 California shall update and provide the list to other licensing bodies as often as it modifies the  
37 records displayed on its website in response to petitions approved under subdivision (d).

38 (h) For the purposes of Sections 6007, 6043, 6049, 6049.2, 6050, 6051, 6052, 6077  
39 (excluding the first sentence), 6078, 6080, 6081, and 6082, "board" includes the State Bar Court.



40 (i) Nothing in this section shall authorize the State Bar Court to adopt rules of professional  
41 conduct or rules of procedure.

42 (j) The Executive Committee of the State Bar Court may adopt rules of practice for the  
43 conduct of all proceedings within its jurisdiction. These rules may not conflict with the rules of  
44 procedure adopted by the board, unless approved by the Supreme Court.

(Proposed new language underlined; language to be deleted stricken)

**PROPONENT:** Los Angeles County Bar Association

## **STATEMENT OF REASONS**

The Problem: The State Bar Act (codified in the Business and Professions Code) provides for the licensing and regulation of lawyers by the State Bar of California. Fees charged and collected by the State Bar of California from its licensees under the Business and Professions Code are paid to the State Bar of California for the purpose of funding the discipline system and admissions. Existing law requires the State Bar of California to provide on the Internet on the State Bar website specific information regarding the status of every license issued by the State Bar of California on licensees' State Bar Profiles.

At this time any administrative action or any level of discipline against a licensee remains on a licensee's State Bar profile indefinitely, except in rare circumstances. For instance, an administrative inactive enrollment for failing to timely comply with a licensee's MCLE requirement can be expunged from a licensee's State Bar profile after seven years under certain conditions. Very remote or minor violations remain on a State Bar profile much longer than necessary to protect the public by providing full information about lawyers. This resolution would strike a balance in allowing a licensee to seek expungement where the licensee could establish the information is not necessary to ensure public protection.

The Solution: This resolution would authorize the State Bar Court, upon petition by a licensee accompanied by a specified fee, to (1) remove from the licensee's State Bar Profile an item that has been posted for at least five years which constitutes an administrative action against a licensee's license; and (2) remove from the licensee's State Bar Profile an item that has been posted for at least ten years which constitutes any level of public discipline, where the licensee can establish rehabilitation indicating that the notice is no longer required to prevent a credible risk to members of the public utilizing licensed activity of the licensee. The resolution would require the State Bar Court, in evaluating a petition, to take into consideration other violations that present a credible risk to the members of the public since the administrative or disciplinary action which the licensee is seeking to be removed occurred. The resolution would also authorize the State Bar of California to develop, through regulations, the amount of the fee and the minimum information to be included in a licensee's petition, including, but not limited to, a written justification and evidence of rehabilitation. The resolution would require the petition process to commence January 1, 2021. The resolution would require the State Bar of California to maintain a list of all licensees whose disciplinary records are altered as a result of the petition process and to update the list and make it available to other licensing bodies, as specified.

**IMPACT STATEMENT**

This resolution may require additional statutory changes.

**CURRENT OR PRIOR RELATED LEGISLATION**

In 2016, the Legislature created a pathway for licensees of the Department of Real Estate to seek expungement of remote discipline recorded on that agency's website in AB 1807, which amended Business and Professions Code, Sections 10083.2 et seq.

**AUTHOR AND/OR PERMANENT CONTACT:**

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