

State of California
State and Consumer Services Agency

MEDICAL BOARD OF CALIFORNIA
Board Member Administrative
Procedure Manual



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Board Member Administrative Procedure Manual

Updates to Manual – April 2009

Table of Contents

	Page
Chapter 1. Introduction	
Overview	1
Definitions	1
General Rules of Conduct	2
Chapter 2. Board Meeting Procedures	
Frequency of Meetings	3
Board Member Attendance at Board Meetings	3
Public Attendance at Board Meetings/Open Meetings Act	3
Quorum	3
Agenda Items	4
Notice of Meetings	4
Notice of Meetings to be Posted on Internet	4
Record of Meetings	4
Tape Recording	4
Meeting Rules	4
Public Comment	4
Chapter 3. Travel & Salary Policies & Procedures	
Travel Approval	6
Travel Arrangements	6
Out-of-State Travel	6
Travel Claims	6
Salary Per Diem	6
Chapter 4. Selection of Officers & Committees	
Officers of the Board	8
Election of Officers	8
Panel Members	8
Election of Panel Members	8
Officer Vacancies	8
Committee Appointments	8
Attendance at Committee Meetings	8

Chapter 5. Board Administration & Staff

Board Administration	9
Strategic Planning	9
Executive Director Evaluation	9
Board Staff	9
Business Cards	9

Chapter 6. Other Policies & Procedures

Board Member Disciplinary Actions	10
Removal of Board Members	10
Resignation of Board Members	10
Conflict of Interest	10
Gifts from Candidates	10
Request for Records Access	11
<i>Communications with Interested Parties</i>	<i>11</i>
<i>Ex Parte</i> Communications	11
Board Member Training Requirements	12

Chapter 1. Introduction

Overview The Medical Board of California (MBC) was created by the California Legislature in 1876. Today the MBC is one of the boards, bureaus, commissions, and committees within the Department of Consumer Affairs (DCA), part of the State and Consumer Services Agency under the aegis of the Governor. The Department is responsible for consumer protection and representation through the regulation of certain licensed professions and the provision of consumer services. While the DCA provides oversight in various areas including, but not limited to, budget change proposals, regulations, and contracts, and also provides support services, MBC has policy autonomy and sets its own policies procedures, and initiates its own regulations. (See Business and Professions Code sections 108, 109(a), and 2018.)

The MBC is presently comprised of 15 Members. By law, seven are public Members, and eight are physicians. The Senate Rules Committee and the Speaker of the Assembly each appoint one public member. Board Members may serve two full four-year terms. Board Members fill non-salaried positions, and are paid \$100 per day for each meeting day and are reimbursed travel expenses.

This procedure manual is provided to Board Members as a ready reference of important laws, regulations, and Board policies, to guide the actions of Board Members and ensure Board effectiveness and efficiency.

Due notice of each meeting and the time and place thereof shall be given each member in the manner provided by law.

Definitions	B&P	Business and Professions Code
	SAM	State Administrative Manual
	President	Where the term “President” is used in this manual, it includes “his or her designee”

**General Rules
of Conduct**

Board Members shall not speak to interested parties (such as vendors, lobbyists, legislators, or other governmental entities) on behalf of the Board or act for the Board without proper authorization.

Board Members shall maintain the confidentiality of confidential documents and information.

Board Members shall commit time, actively participate in Board activities, and prepare for Board meetings, which includes reading Board packets and all required legal documents.

Board Members shall respect and recognize the equal role and responsibilities of all Board Members, whether public or licensee.

Board Members shall act fairly and in a nonpartisan, impartial, and unbiased manner.

Board Members shall treat all applicants and licensees in a fair and impartial manner.

Board Members' actions shall uphold the Board's primary mission – protection of the public.

Board Members shall not use their positions on the Board for political, personal, familial, or financial gain.

Chapter 2. Board Meeting Procedures

Frequency of Meetings *(B&P Code sections 2013, 2014)*

The Board shall meet at least once each calendar quarter in various parts of the state for the purpose of transacting such business as may properly come before it.

Special meetings of the Board may be held at such times as the Board deems necessary.

Four Members of a panel of the Board shall constitute a quorum for the transaction of business at any meeting of the panel.

Eight Members shall constitute a quorum for the transaction of business at any Board meeting.

Due notice of each meeting and the time and place thereof shall be given each member in the manner provided by the law.

Board Member Attendance at Board Meetings *(B&P Code sections 106, 2011)*

Board Members shall attend each meeting of the Board. If a member is unable to attend, he or she must contact the Board President and ask to be excused from the meeting for a specific reason. The Governor has the power to remove from office any member appointed by him for continued neglect of duties, which may include unexcused absences from meetings.

Board Members shall attend the entire meeting and allow sufficient time to conduct all Board business at each meeting.

Public Attendance at Board Meetings *(Government Code section 11120 et. seq.)*

Meetings are subject to all provisions of the Bagley-Keene Open Meetings Act. This act governs meetings of state regulatory boards and meetings of committees of those boards where the committee consists of more than two Members. It specifies meeting notice and agenda requirements and prohibits discussing or taking action on matters not included on the agenda.

If the agenda contains matters which are appropriate for closed session, the agenda must cite the particular statutory section and subdivision authorizing the closed session.

Quorum *(B&P Code section 2013)*

Eight of the Members of the Board constitute a quorum of the Board for the transaction of business. The concurrence of a majority of those Members of the Board present and voting at a duly noticed meeting at which a quorum is present shall be necessary to constitute an act or decision of the Board.

Agenda Items
(Board Policy)

Any Board Member may submit items for a meeting agenda to the Executive Director not fewer than 30 days prior to the meeting with the approval of the Board President or Chair of the Committee.

Notice of Meetings
(Government Code section 11120 et seq.)

In accordance with the Open Meetings Act, meeting notices (including agendas for Board, Committee, or Panel meetings) shall be sent to persons on the Board's mailing list at least 10 calendar days in advance. The notice shall include the name, work address, and work telephone number of a staff person who can provide further information prior to the meeting.

Notice of Meetings to be Posted on the Internet
(Government Code section 11125 et seq.)

Notice shall be given and also made available on the Internet at least 10 days in advance of the meeting and shall include the name, address, and telephone number of any person who can provide further information prior to the meeting, but need not include a list of witnesses expected to appear at the meeting. The written notice shall additionally include the address of the Internet site where notices required by this article are made available.

Record of Meetings
(B&P Code section 2017)

The Board and each Committee or Panel shall keep an official record of all their proceedings. The minutes are a summary, not a transcript, of each Board or Committee meeting. They shall be prepared by staff and submitted to Members for review before the next meeting. Minutes shall be approved at the next scheduled meeting of the Board, Committee, or Panel. When approved, the minutes shall serve as the official record of the meeting.

Tape Recording
(Board Policy)

The meeting may be tape-recorded if determined necessary for staff purposes. Tape recordings will be disposed of upon approval of the minutes in accordance with record retention schedules.

Meeting Rules
(Board Policy)

The Board will use Robert's Rules of Order, to the extent that it does not conflict with state law (e.g. Bagley-Keene Open Meeting Act), as a guide when conducting its meetings.

Public Comment
(Board Policy)

Due to the need for the Board to maintain fairness and neutrality when performing their adjudicative function, the Board shall not receive any substantive information from a member of the public regarding any matter that is currently under or subject to investigation or involves a pending criminal or administrative action.

1. If, during a Board meeting, a person attempts to provide the Board with substantive information regarding matters that are currently under or subject to investigation or involve a pending administrative or criminal action, the person shall be advised that the Board cannot properly consider or hear such substantive information, and the person shall be instructed to refrain from making such comments.
2. If, during a Board meeting, a person wishes to address the Board concerning alleged errors of procedure or protocol or staff misconduct, involving matters that are currently under or subject to investigation or involve a pending administrative or criminal action, the Board will address the matter as follows:
 - a. Where the allegation involves errors of procedure or protocol, the Board may designate either its Executive Director or a Board employee to review whether the proper procedure or protocol was followed and to report back to the Board.
 - b. Where the allegation involves significant staff misconduct, the Board may designate one of its Members to review the allegation and to report back to the Board.
3. The Board may deny a person the right to address the Board and have the person removed if such person becomes disruptive at the Board meeting.

(Government Code section 11120 et seq.)

4. Persons wishing to address the Board or a Committee of the Board shall complete a speaker request slip. At the discretion of the Board President or Chair of the Committee, speakers may be limited in the amount of time to present to give adequate time to everyone who wants to speak. In the event the number of people wishing to address the Board exceeds the allotted time, the Board President or Chair of the Committee may limit each speaker to a statement of his/her name, organization, and whether they support or do not support the proposed action

Chapter 3. Travel & Salary Policies & Procedures

Travel Approval

(DCA Memorandum 96-01)

The Board President's approval is required for all Board Members for travel, except for travel to regularly scheduled Board and Committee meetings to which the Board Member is assigned.

Travel Arrangements

(Board Policy)

Board Members should make their own travel arrangements through Giselle's Travel but are encouraged to coordinate with the Executive Director's Executive Assistant on lodging accommodations.

Out-of-State Travel

(SAM section 700 et seq.)

For out-of-state travel, Board Members will be reimbursed for actual lodging expenses, supported by vouchers, and will be reimbursed for meal and supplemental expenses. Out-of-state travel for all persons representing the State of California is controlled by and must be approved by the Governor's Office.

Travel Claims

(SAM section 700 et seq. and DCA Memorandum 96-01)

Rules governing reimbursement of travel expenses for Board Members are the same as for management-level state staff. All expenses shall be claimed on the appropriate travel expense claim forms. The Executive Director's Executive Assistant maintains these forms and completes them as needed. Board Members should submit their travel expense forms immediately after returning from a trip and no later than two weeks following the trip.

For the expenses to be reimbursed, Board Members shall follow the procedures contained in DCA Departmental Memoranda, which are periodically disseminated by the Executive Director and are provided to Board Members.

Salary Per Diem

(B&P Code section 103)

Compensation in the form of salary per diem and reimbursement of travel and other related expenses for Board Members is regulated by B&P Code Section 103.

In relevant part, this section provides for the payment of salary per diem for Board Members "for each day actually spent in the discharge of official duties," and provides that the Board Member "shall be reimbursed for traveling and other expenses necessarily incurred in the performance of official duties."

(Board Policy)

Accordingly, the following general guidelines shall be adhered to in the payment of salary per diem or reimbursement for travel:

1. No salary per diem or reimbursement for travel-related expenses shall be paid to Board Members, except for attendance at an official Board, Committee, or Panel meeting, unless a substantial official service is performed by the Board Member. Attendance at gatherings, events, hearings, conferences, or meetings other than official Board, Committee, or Panel meetings, in which a substantial official service is performed, shall be approved in advance by the Board President. The Executive Director shall be notified of the event and approval shall be obtained from the Board President prior to Board Member's attendance.
2. The term "day actually spent in the discharge of official duties" shall mean such time as is expended from the commencement of a Board, Committee, or Panel meeting to the conclusion of that meeting. Where it is necessary for a Board Member to leave a meeting early, the Board President shall determine if the member has provided a substantial service during the meeting and, if so, shall authorize payment of salary per diem and reimbursement for travel-related expenses.

For Board-specified work, Board Members will be compensated for actual time spent performing work authorized by the Board President. That work includes, but is not limited to, authorized attendance at other gatherings, events, meetings, hearings, or conferences. It includes preparation time for Board, Committee, or Panel meetings.

Chapter 4. Selection of Officers & Committees

Officers of the Board

(B&P Code Section 2012)

The Board shall select a President, Vice President, and Secretary from its Members.

Election of Officers

(Board Policy)

The Board shall elect the officers at the last meeting of the calendar year. Officers shall serve a term of one year beginning the next calendar year. All officers may be elected on one motion or ballot as a slate of officers unless more than one Board Member is running per office. An officer may be re-elected and serve for more than one term.

Panel Members

(B&P Code section 2008)

A Panel of the Board shall at no time be composed of less than four Members and the number of public Members assigned shall not exceed the number of licensed physician and surgeon Members assigned to the Panel. The Board President shall not be a member of any Panel. The Board usually is comprised of two panels, however, if there is an insufficient number of Members, there may only be one Panel.

Election of Panel Members

(B&P Code section 2008)

Each Panel shall annually, at the first meeting of the calendar year, elect a Chair and a Vice Chair.

Officer Vacancies

(Board Policy)

If an office becomes vacant during the year, an election shall be held at the next meeting. If the office of the President becomes vacant, the Vice President shall assume the office of the President. Elected officers then shall serve the remainder of the term.

Committee Appointments

(Board Policy)

The Board President shall establish Committees, whether standing or special, as he or she deems necessary. The composition of the Committees and the appointment of the Members shall be determined by the Board President in consultation with the Vice President, Secretary, and the Executive Director. Committees may include the appointment of non-Board Members.

Attendance at Committee Meetings

(Government Code section 11120 et seq.)

If a Board Member wishes to attend a meeting of a Committee of which he or she is not a member, that Board Member should notify the Committee chair and staff. Board Members who are not Members of the Committee that is meeting cannot vote during the Committee meeting and may participate only as observers if a majority of the Board is present at a Committee meeting.

Chapter 5. Board Administration & Staff

Board Administration

(DCA Reference Manual)

Board Members should be concerned primarily with formulating decisions on Board policies rather than decisions concerning the means for carrying out a specific course of action. It is inappropriate for Board Members to become involved in the details of program delivery. Strategies for the day-to-day management of programs and staff shall be the responsibility of the Executive Director. Board Members should not interfere with day-to-day operations, which are under the authority of the Executive Director.

Strategic Planning

The Board will conduct periodic strategic planning sessions.

Executive Director Evaluation

(Board Policy)

Board Members shall evaluate the performance of the Executive Director on an annual basis.

Board Staff

(DCA Reference Manual)

Employees of the Board, with the exception of the Executive Director, are civil service employees. Their employment, pay, benefits, discipline, termination, and conditions of employment are governed by a myriad of civil service laws and regulations and often by collective bargaining labor agreements. Because of this complexity, it is most appropriate that the Board delegate all authority and responsibility for management of the civil service staff to the Executive Director. Board Members shall not intervene or become involved in specific day-to-day personnel transactions.

Business Cards

Business cards will be provided to each Board Member with the Board's name, address, telephone and fax number, and Web site address.

Chapter 6. Other Policies & Procedures

Board Member Disciplinary Actions

(Board Policy)

A member may be censured by the Board if, after a hearing before the Board, the Board determines that the member has acted in an inappropriate manner.

The President of the Board shall sit as chair of the hearing unless the censure involves the President's own actions, in which case the Vice President of the Board shall sit as President. In accordance with the Open Meeting Act, the censure hearing shall be conducted in open session.

Removal of Board Members

(B&P Code sections 106 & 2011)

The Governor has the power to remove from office, at any time, any member of any Board appointed by him or her for continued neglect of duties required by law or for incompetence or unprofessional or dishonorable conduct.

Resignation of Board Members

(Government Code section 1750)

In the event that it becomes necessary for a Board Member to resign, a letter shall be sent to the appropriate appointing authority (Governor, Senate Rules Committee, or Speaker of the Assembly) with the effective date of the resignation. Written notification is required by state law. A copy of this letter also shall be sent to the director of the Department, the Board President, and the Executive Director.

Conflict of Interest

(Government Code section 87100)

No Board Member may make, participate in making, or in any way attempt to use his or her official position to influence a governmental decision in which he or she knows or has reason to know he or she has a financial interest. Any Board Member who has a financial interest shall disqualify himself or herself from making or attempting to use his or her official position to influence the decision. Any Board Member who feels he or she is entering into a situation where there is a potential for a conflict of interest should immediately consult the Executive Director or the Board's legal counsel.

Board Members should refrain from attempting to influence staff regarding applications for licensure or potential disciplinary matters.

Gifts from Candidates

(Board Policy)

Gifts of any kind to Board Members from candidates for licensure with the Board shall not be permitted.

Request for Records Access
(Board Policy)

No Board Member may access the file of a licensee or candidate without the Executive Director's knowledge and approval of the conditions of access. Records or copies of records shall not be removed from the MBC's office.

Communication with Interested Parties
(Board Policy)

Board Members are required to disclose at Board Meetings all discussions and communications with interested parties regarding any item pending or likely to be pending before the Board . The Board minutes shall reflect the items disclosed by the Board Members. All agendas will include, as a regular item, a disclosure agenda item where each Member relays any relevant conversations with interested parties.

Ex Parte Communications
(Government Code section 11430.10 et seq.)

The Government Code contains provisions prohibiting *ex parte* communications. An "*ex parte*" communication is a communication to the decision-maker made by one party to an enforcement action without participation by the other party. While there are specified exceptions to the general prohibition, the key provision is found in subdivision (a) of section 11430.10, which states:

"While the proceeding is pending, there shall be no communication, direct or indirect, regarding any issue in the proceeding to the presiding officer from an employee or representative or if an agency that is a party or from an interested person outside the agency, without notice and an opportunity for all parties to participate in the communication."

Occasionally, an applicant who is being formally denied licensure, or a licensee against whom a disciplinary action is being taken, will attempt to directly contact Board Members.

If the communication is written, the member should read only enough to determine the nature of the communication. Once he or she realizes it is from a person against whom an action is pending, he or she should reseal the documents and send them to the Executive Director.

If a Board Member receives a telephone call from an applicant or licensee against whom an action is pending, he or she should immediately tell the person they cannot speak to him or her about the matter. If the person insists on discussing the case, he or she should be told that the Board Member will be required to recuse himself or herself from any participation in the matter. Therefore, continued discussion is of no benefit to the applicant or licensee.

If a Board Member believes that he or she has received an unlawful *ex parte* communication, he or she should contact the Board's assigned attorney or Executive Director.

Board Member Training Requirements

Upon initial appointment, Board Members will be given an overview of Board operations, policies, and procedures by Board Executive Staff.

(B&P Code section 453)

Every newly appointed Board Member shall, within one year of assuming office, complete a training and orientation program offered by the Department of Consumer Affairs. This is in addition to the Board orientation given by Board staff. This is a one-time training requirement.

(Government Code section 11146)

All Board Members are required to file an annual Form 700 statement of economic interest. Members must also complete an orientation course on the relevant ethics statutes and regulations that govern the official conduct of state officials. The Government Code requires completion of this ethics orientation within the first six months of appointment and completion of a refresher every two years thereafter.

(Government Code section 12950.1)

AB 1825 (Chapter 933, Statutes of 2004, Reyes) requires supervisors, including Board Members, to complete two hours of sexual harassment prevention training by January 1, 2006, and every two years thereafter.



State of California
Medical Board of California
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Memorandum

Date: April 8, 2009

To: Members,
Medical Board of California

From: Janie Cordray,
Research Program Manager

Subject: Communications of Board Members

At the November 6, 2008 Board meeting, the members had a discussion surrounding the Board's procedure manual, including the section relating to communications of Board members with interested parties (i.e. advocates, vendors, legislators, or other governmental entities). As a result of that discussion, the members directed staff to schedule a more comprehensive discussion at the January meeting.

In January, the members held a discussion and approved an amendment to the Board's procedure manual. As a result of the approved amendment, Board members are now obligated to disclose all relevant meetings, conversations, outreach and correspondence with interested parties at their quarterly meetings. In addition, the members asked that staff compile a report of how other state agencies deal with such communications.

It is important to define the type of communications that the Board's new policy is intended to address. It is not directed at traditional 'ex parte' (one-sided) communications regarding administrative proceedings such as licensing or disciplinary cases where Board members perform a quasi-judicial function. Existing law already sets the boundaries of those types of communications, as explained below.

Background:

The law relating to ex parte communications is contained in the Government Codes (11430.10 et. seq). Subdivision (a) of section 11430.10 of the Government Code states:

" While the proceeding is pending, there shall be no communication, direct or indirect, regarding any issue in the proceeding to the presiding officer from an employee or representative or if any agency that is a party from an interested person outside the agency, without notice and an opportunity to participate in the communication".

The law leaves no question that a Board member must not engage in ex parte communications while a proceeding is pending unless the communication involves procedural matters or the communication is otherwise specifically authorized by statute. Subdivision (c) of section 114310.10 defines a proceeding as pending from the issuance of the agency's pleading or from the application for an agency decision. This section of law is located within the codes governing administrative adjudication, and therefore is specific to administrative actions, not the broader issue of advocating for regulatory or policy actions.

It is these policy and regulatory actions at which the Board's new action is aimed --- those conversations, statements and communications regarding action items that come before the board. For the purpose of this memo, these communications will be referred to as "interested party communications."

These interested party communications have piqued the interest of the Legislature. Last year, Senator Ridley-Thomas introduced language into SB 963 (Chap. 385; Stats. of 2008) which sought to broaden the definition of ex parte communications. The language, which was **not** included in the final version of the legislation, sought to add Section 38 to the Business & Professions Code, as follows:

A member of a board within the department and a member of a state board, as defined in Section 9148.2 of the Government Code, shall disclose all of his or her ex parte communications at the board's next public meeting, and the ex parte communications shall be recorded in the board's minutes. "Ex parte communication" means any oral or written communication concerning matters, other than purely procedural matters, under the board's jurisdiction that are subject to a vote by the board that occurred between the member and a person, other than another board member or an employee of the board or the department of which the board is a part, who intends to influence the decision of the member.

If the above language had been contained in the final version of the bill, it would have required Medical Board members to disclose all communications on any subject under the jurisdiction of the Board at the next public board meeting, and include that information in the meeting minutes.

It would appear that the language introduced was attempting to supplement what is already covered in the Bagley-Keene Open Meeting Act (Act). The purpose of that Act is to provide a public arena for decisions affecting public policy, and to prevent secretive, behind doors governing. Most public boards and governing bodies are covered either by the Bagley-Keene Open Meeting Act or the Brown Act.

Other State Agencies:

In January 2008, the California Research Bureau (CRB) published a report at the request of Assembly member Loni Hancock, *Ex Parte Communications: The Law and Practices at Six California Boards and Commissions*. (California Air Resources Board, California Integrated Waste Management Board, State Water Resources Control Board, California Energy Resources Conservation and Development Commission, Public Utilities Commission and California Coastal Commission) It reviews the laws and manners in which these Boards or Commissions deal with ex parte communication.

Of the six agencies examined, the term "ex parte communications" was broadened to include not only those off-record communications about adjudicative proceedings, but other matters before the boards. These communications are generally defined as those made in private between an interested party in a decision-making process and an official in a decision making process.

As an example, the California Public Utility Commission (PUC) is required, under Public Utility Code Section 1701.3(c), to disclose all conversations or written contact relating to rate setting. It states:

Ex parte communications are prohibited in rate setting cases. However, oral ex parte communications may be permitted at any time by any commissioner if all interested parties are invited and given not less than three days' notice. Written ex parte communications may be permitted by any party provided that copies of the communication are transmitted to all parties on the same day. If an ex parte communication meeting is granted to any party, all other parties shall also be granted individual ex parte meetings of a substantially equal period of time and shall be sent a notice of that authorization at the time that the request is granted. In no event shall that notice be less than three days. The commission may establish a period during which no oral or written ex parte communications shall be permitted and may meet in closed session during that period, which shall not in any circumstance exceed 14 days. If the commission holds the decision, it

may permit ex parte communications during the first half of the interval between the hold date and the date that the decision is calendared for final decision. The commission may meet in closed session for the second half of that interval.

As you can see, ex parte communications are permitted, but three days notice must be given so that all interested parties may participate. At every meeting of the PUC, a log of every conversation or communication with any party is published along with every action.

It is reasonable that the laws and regulations governing the studied agencies have a broader definition of ex parte communications and greater prohibitions, as their actions have greater economic and environmental impact on the entire state, communities and local governments.

Staff surveyed eight DCA professional licensing boards (Nursing, Psychology, Dental, Cemetery, Veterinary Medicine, Behavioral Science, Contractors and Podiatry). All Boards surveyed do not include in their public meeting agendas a dedicated item for disclosure of communications of members with interested parties. Most Board presidents or executive officers report at their public meetings any significant communications on subjects before the board, or subjects likely to come before the board in the future.

Discussion:

The stricter rules of the PUC and agencies studied by the California Research, are burdensome and reduce the accessibility of the Board to the public. As an example, the CRB summarized an event at a meeting of the Water Resources Board where public comment on an issue was cut off as it violated the ex parte communications rules. Just as the Board must cut off comments at its meeting when individuals begin to speak about individual enforcement cases, the Board, under a broader definition of ex parte communications, would have to cut off any comment on issues that might come before the board.

By comparison, licensing boards have more limited power and jurisdiction. Most actions involve individuals. Regulatory actions, while sometimes important to those regulated, are not often controversial, and have little, if any, significant economic or fiscal impact. On rare occasions when regulatory actions are controversial or have significant economic impact, the rulemaking process includes public notice and a comment period, and is fully utilized by the interested parties in public. Any new regulations must be justified, and comments made during the comment period must be addressed. Ex parte communication would likely be counterproductive for those wishing to influence the process.

From the discussions at the November and January Board meetings, it would appear that the members are most concerned about fairness to all stakeholders and preventing the appearance of any favoritism or bias toward any group or

individual. The discussions also indicate that the matter of concern is not the legal prohibition of ex parte communications on pending actions, but relates to compliance with spirit of the Act.

At the November meeting, members voiced two major concerns: 1) that only some members were contacted by certain groups, which could result in a disparity of information among the members, and; 2) things said by members speaking with representatives of certain groups could be misconstrued as representing the opinion of the entire Board.

While the Open Meetings Act does not prohibit a member from speaking or listening to anyone about policy issues, it does require discussions that may lead to collective concurrence to be conducted in a public meeting where proper notice has been given. One-on-one conversations are not prohibited, but they may pose a problem in some instances where there is lobbying of multiple members and those members discuss the issue amongst themselves. For that reason, on matters of policy discussion, it is wise for members to encourage groups to formulate their ideas and opinions in writing, so that they may be simultaneously shared with the entire membership. Without all members hearing the same version at the same time, there is a disparity of knowledge on the subject.

While there is no harm in members speaking individually to colleagues or even representatives of interest groups on policy matters that may come before the Board, there is a danger in creating the appearance of favoritism and creating bias based on information not shared with the entire membership. Those contacts may also create the perception that members have engaged in an illegal meeting.

At the January meeting, two public comments were offered relating to the Board's discussion on the subject. Julie D'Angelo Fellmeth, representing the Center for Public Interest Law, in summary, cautioned the members that compliance with the Act assures Board business is discussed in public so all interested parties can hear what others have to say and respond appropriately. Brett Michelin, representing the CMA, voiced his concerns that conversations with Board members on very complex issues was necessary, and that at times there was not enough time to discuss such issues during the public comment period. It is his organization's opinion that it has the right to approach members of a publicly accountable board. (This comment is consistent with existing law.) CMA would, however, have no objection to members disclosing their conversations publicly.

Board members agreed that while members of the Board may not insulate themselves from conversations with constituents, they also must not conduct Board business in secret. For those reasons, the members adopted the least burdensome and most practical solution to promote openness, deciding that all

consequential and significant communications with all parties be disclosed at their quarterly meetings.

In keeping with the spirit of the Act, members should be aware that their communications, if relevant to Board business and matters that may come before the members, should not have the effect of conducting business in secret. Also, if members are approached in a manner that is inappropriate, they should share that information with the Executive Director or legal counsel so that appropriate action may be taken.

Attachments:

Excerpt from Board Member Administrative Procedure Manual:

Ex Parte Communications

(Government Code Section 11430.10 et. seq.)

The Government Code contains provisions prohibiting *ex parte* communications. An "ex parte" communication is a communication to the decision-maker made by one party to an enforcement action without participation by the other party. While there are specified exceptions to the general prohibition, the key provision is found in subdivision (a) of section 11430.10, which states:

" While the proceeding is pending, there shall be no communication, direct or indirect, regarding any issue in the proceeding to the presiding officer from an employee or representative or if any agency that is a party from an interested person outside the agency, without notice and an opportunity to participate in the communication".

Occasionally, an applicant who is being formally denied licensure, or a licensee against whom a disciplinary action is being taken, will attempt to directly contact Board Members.

If the communication is written the member should read only enough to determine the nature of the communication. Once he or she realizes it is from a person against whom an action is pending, he or she should reseal the documents and send them to the Executive Director.

If a Board Member receives a telephone call from an applicant or licensee against whom an action is pending, he or she should immediately tell the person they cannot speak to him or her about the matter. If the person insists on discussing the case, he or she should be told that the Board Member will be required to recuse himself or herself from any participation in the matter. Therefore, continued discussion is of no benefit to the applicant or licensee.

If a Board Member believes that he or she has received an unlawful *ex parte* communication, he or she should contact the Board's assigned attorney or Executive Director.

Government Code Section 11430.10 through 11430.80 Ex Parte Communications:

11430.10. (a) While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.

(b) Nothing in this section precludes a communication, including a communication from an employee or representative of an agency that is a party, made on the record at the hearing.

(c) For the purpose of this section, a proceeding is pending from the issuance of the agency's pleading, or from an application for an agency decision, whichever is earlier.

11430.20. A communication otherwise prohibited by Section 11430.10 is permissible in any of the following circumstances:

(a) The communication is required for disposition of an ex parte matter specifically authorized by statute.

(b) The communication concerns a matter of procedure or practice, including a request for a continuance, that is not in controversy.

11430.30. A communication otherwise prohibited by Section 11430.10 from an employee or representative of an agency that is a party to the proceeding is permissible in any of the following circumstances:

(a) The communication is for the purpose of assistance and advice to the presiding officer from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage. An assistant or advisor may evaluate the evidence in the record but shall not furnish, augment, diminish, or modify the evidence in the record.

(b) The communication is for the purpose of advising the presiding officer concerning a settlement proposal advocated by the advisor.

(c) The communication is for the purpose of advising the presiding officer concerning any of the following matters in an adjudicative proceeding that is nonprosecutorial in character:

(1) The advice involves a technical issue in the proceeding and the advice is necessary for, and is not otherwise reasonably available to, the presiding officer, provided the content of the advice is disclosed on the record and all parties are given an opportunity to address it in the manner provided in Section 11430.50.

(2) The advice involves an issue in a proceeding of the San Francisco Bay Conservation and Development Commission, California Tahoe Regional Planning Agency, Delta Protection Commission, Water Resources Control Board, or a regional water quality control board.

11430.40. If, while the proceeding is pending but before serving as presiding officer, a person receives a communication of a type that would be in violation of this article if received while serving as presiding officer, the person, promptly after starting to serve,

shall disclose the content of the communication on the record and give all parties an opportunity to address it in the manner provided in Section 11430.50.

11430.50. (a) If a presiding officer receives a communication in violation of this article, the presiding officer shall make all of the following a part of the record in the proceeding:

(1) If the communication is written, the writing and any written response of the presiding officer to the communication.

(2) If the communication is oral, a memorandum stating the substance of the communication, any response made by the presiding officer, and the identity of each person from whom the presiding officer received the communication.

(b) The presiding officer shall notify all parties that a communication described in this section has been made a part of the record.

(c) If a party requests an opportunity to address the communication within 10 days after receipt of notice of the communication:

(1) The party shall be allowed to comment on the communication.

(2) The presiding officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that has been concluded.

11430.60. Receipt by the presiding officer of a communication in violation of this article may be grounds for disqualification of the presiding officer. If the presiding officer is disqualified, the portion of the record pertaining to the ex parte communication may be sealed by protective order of the disqualified presiding officer.

11430.70. (a) Subject to subdivision (b), the provisions of this article governing ex parte communications to the presiding officer also govern ex parte communications in an adjudicative proceeding to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

(b) An ex parte communication to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated is permissible in an individualized ratemaking proceeding if the content of the communication is disclosed on the record and all parties are given an opportunity to address it in the manner provided in Section 11430.50.

11430.80. (a) There shall be no communication, direct or indirect, while a proceeding is pending regarding the merits of any issue in the proceeding, between the presiding officer and the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

(b) This section does not apply where the agency head or other person or body to which the power to hear or decide in the proceeding is delegated serves as both presiding officer and agency head, or where the presiding officer does not issue a decision in the proceeding.

**Public Utility Code Section 1701.3 (c); Law governing
Public Utility Commission ex-parte communications:**

(c) Ex parte communications are prohibited in ratesetting cases. However, oral ex parte communications may be permitted at any time by any commissioner if all interested parties are invited and given not less than three days' notice. Written ex parte communications may be permitted by any party provided that copies of the communication are transmitted to all parties on the same day. If an ex parte communication meeting is granted to any party, all other parties shall also be granted individual ex parte meetings of a substantially equal period of time and shall be sent a notice of that authorization at the time that the request is granted. In no event shall that notice be less than three days. The commission may establish a period during which no oral or written ex parte communications shall be permitted and may meet in closed session during that period, which shall not in any circumstance exceed 14 days. If the commission holds the decision, it may permit ex parte communications during the first half of the interval between the hold date and the date that the decision is calendared for final decision. The commission may meet in closed session for the second half of that interval.

California Research Bureau *Ex Parte Communications: The Law and Practices at Six California Boards and Commissions.*

Copy of report is available at: <http://www.library.ca.gov/crb/08/08-001.pdf>