

**MEDICAL BOARD STAFF REPORT**

DATE REPORT ISSUED: January 5, 2009  
 SUBJECT: Ex Parte Communications  
 STAFF CONTACT: Janie Cordray/Kimberly Kirchmeyer

REQUESTED ACTION:

Approve one of the options provided regarding advocacy or lobbying communications, which will then be included in the next revision of the Board Member Administrative Procedure Manual.

STAFF RECOMMENDATION:

Staff recommends the adoption of Option 3.

EXECUTIVE SUMMARY:

The law is quite clear regarding ex parte ("one-sided") communications relating to specific disciplinary or licensing actions against individual licensees or applicants. Members are aware of the statutory prohibition against ex parte communications in these matters.

However, the Board Members have voiced concerns about contact or communication with advocacy or other groups lobbying on policy, administrative, or regulatory matters. These are not ex parte communications in the narrow legal sense because they do not touch contested quasi-judicial cases involving licensing or disciplinary proceedings but they may have a substantial impact on policy issues before the Board. At the November meeting, Members voiced two major concerns about these types of contacts: 1) Only some Members were contacted by certain groups, which could result in some Members having more information than others on a certain issue, and; 2) statements made by Members speaking with representatives of certain groups could be misconstrued as representing the opinion of the entire Board. The Board expressed concern about the effect the unequal level of information and potential misunderstandings could have on its decision making.

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 Public Meeting 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 California Medical Association, voiced his concerns that conversations with Board Members on very complex issues was necessary, as the allotted time for public comment was often inadequate. The CMA's opinion is that it has the right to approach Members of a publicly accountable Board. The CMA would, however, have no objection to Members disclosing those conversations publicly.

OPTIONS:

1. Prohibit any advocacy or lobbying communications with anyone on any subject that might come before the Board. While this would solve the problem of preventing any appearance of favoritism or bias, it would also likely create an insular system and chill public participation. The outright ban on this type of speech may also raise constitutional issues.
2. Adopt a system similar to the Public Utilities Commission that would require Board Members to keep a written log of conversations or communications relating to specified subjects or all subjects pending before the Board. This log would then presumably be published or disclosed before certain Board actions were taken. While this would enhance disclosure, it may have the effect of discouraging any discourse or preventing the exchange of information. Often, various constituents alert the Members' to another board's or agency's action, the introduction of legislation, etc., from only the desire to share information, not persuade Members to take action. Requiring notice for discussion, logging of every conversation, and disclosing every person having a conversation with a Member may have the effect of insulating the Board and discouraging public participation in the Board's business. This burden may be viewed as unduly burdensome.
3. Adopt a policy requiring Board Members to disclose at a Board meeting all discussions and communications regarding any item pending before the Board which would result in their inclusion in the meeting minutes. This approach is similar to the practice of a past Board President as he disclosed all his relevant meetings,

conversations, and correspondence with interested parties and then asked the Members to disclose any such conversations, meetings, or communications they might have had. This practice made public the interests of various parties, as well as any outreach conducted. The report was included in the minutes.

Option 3 would be the least burdensome and most practical solution to promote openness, while not creating more work or a barrier to communication.

#### SUMMARY

Pragmatically, there are two ways to address these types of communications: 1) Prohibit them, which may chill communication and public participation and raise issues regarding the right to speak as well the public's access to Members of a government body or 2) Disclose them, which places all parties on equal footing. Option 3 accomplishes the latter without placing an unreasonable burden on Board Members. In addition, the concept of disclosure of Members' conversations is consistent with the provisions of the July 1, 2008 version of Senate Bill 963, considered by the legislature last year.

#### FISCAL CONSIDERATIONS:

No fiscal impact is anticipated.

#### PREVIOUS MBC AND/OR COMMITTEE ACTION:

At the November 6, 2008 Board meeting the Members had a discussion surrounding the Board Member Administrative Procedure Manual, including the section relating to ex parte communications of Board Members. As a result of that brief discussion, the Members directed staff to prepare a document regarding similar communication to be discussed at the January meeting. In addition, the Members voiced their interest on how other state agencies deal with such communications.

Attachment A

The Public Utility Commission (PUC), in addition to being covered by the Brown Act, is required, under Public Utility Code Section 1701.3(c) to disclose all conversations or written contact relating to ratesetting (see Page 4 for specific language). For the PUC, 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 relating to ratesetting is published along with every action.

From the discussions at the November Board meeting, it would appear the Members are most concerned about fairness to all stakeholders and preventing the appearance of any favoritism or bias toward any group or individual. That is certainly within the purpose and spirit of the Open Meetings Act. The discussions also indicate the matter of concern is not actually relating to the legal prohibition of ex parte communications in pending disciplinary actions, but are more related to compliance with the Open Meetings Act.

Public Utility Code Section 1701.3(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.*

