A142454

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JONATHAN WIDENBAUM

Appellant,

v.

CALIFORNIA DEPT. CONS. AFFAIRS/BOARD OF CHIROPRACTIC EXAMINERS,

Respondent.
_____/

No. A142454
(Contra Costa County Superior Court No. MSNCIV14-0353)

APPELLANT'S REPLY BRIEF

APPEAL FROM THE DENIAL OF APPELLANT'S ADMINISTRATIVE WRIT IN THE CONTRA COSTA COUNTY SUPERIOR COURT HONORABLE LAUREL S. BRADY

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The Attorney General raises new arguments not made in the trial court, but on the assumption that the Court would prefer to address these matters fully, we respond to all aspects of respondent's brief. It is precisely because of the constitutional

impact of the issues raised in appellant's challenge, and their broad ranging implications, that appellant seeks calendar preference.

1. The BCE's "Place Within State Government" is not like the Location of Cheerios on a Supermarket Shelf[1]

The AG's argument seems to be that regardless of where the BCE sits on an organizational chart, it is still the good old BCE, so no harm, no foul. But if that is true, why does the state want the BCE to be under the DCA. Perhaps because it matters - a lot.

The ballot argument in favor of the Chiropractic Act specifically notes the tension between the physician community (Medical Board) and chiropractic community, and addresses the need for an independent board.

> The Medical Board, empowered as it is now to exercise unlimited authority over the practice of chiropractic, is using the medical law to throttle chiropractic and prohibit its practice in California.

The DCA now supervises both the Medical Board and the Chiropractic Board. The DCA supplies attorneys to both boards. The DCA hires and fires staff at both boards. This clearly blurs the

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[1] Appellant's opening brief fully set forth the law applicable to this case and appellant will not repeat that analysis herein. Appellant does not intend, by not repeating those arguments herein, to waive any points raised in his opening brief.

line of protection that chiropractors sought and the public granted through the initiative act. It is interesting that the opposition to the Act targets Osteopaths as well as Chiropractors for derision. It states in part that “Chiropractors and Osteopaths constitute only two of the twenty-seven drugless cults of California.”

In *Wilk v. American Medical Association*, 895 F.2d 352 (7th Cir. 1990) the Seventh Circuit affirmed a district court holding that the American Medical Association ("AMA") violated Sec. 1 of the Sherman Act, 15 U.S.C. Sec. 1, by conducting an illegal boycott in restraint of trade directed at chiropractors generally, and the four plaintiffs in particular. Under California law, physicians have the right to challenge board discipline by writ while chiropractors must slog along by appeal. The conflict between the professions has persisted almost as long as the battle between the Hatfields’ and McCoys. Having both physicians and chiropractors under one master undoubtedly will lead to decisions that favor the physicians over the chiropractors.

The ability to hire staff is the ability to impose policy or to obstruct policy. In *Professional Engineers in California Government v. State Personnel Bd.* (2001) 90 Cal.App.4th 678, 685-686, the Third District cited *Pacific Legal Foundation v. Brown* (1981) 29

Cal.3d 168 for the point that “Governor Pat Brown had ‘difficulty in getting his programs rolling because of the opposition of top-level bureaucrats who were unsympathetic or indifferent to the Administration's policies.’ [citations)” The ability of the DCA to hire the executive director and other high level bureaucrats similarly influences policy. In fact, in the Widenbaum case, staff chose which of Dr. Widenbaum’s documents would be presented to the Board in deliberation.

Respondent’s interpretation of the powers and duties of the California Board of Chiropractic Examiners is a perfect example of the ongoing conflict of interest it found between its own function and the Department of Consumer Affairs. As the Board stated in its lawfully adopted Resolution 1-76, the DCA interprets everything in favor of itself and against the Board. The BCE was quite knowledgeable when they said that the conflict of interest was irreconcilable and ongoing.

Respondent claims that the CCIA does not “require” the Board to remain a “freestanding” entity. Freestanding must be code word for independent. This isn’t true because the CCIA was adopted precisely to confer upon the Board independence from the entities representing the Board of Medical Examiners, namely, the DCA. It

was precisely this administrative change that was the point of the CCIA!

Respondent also proclaims that wrongful amendment of the CCIA has no "impact" on the Board's conferred powers. Respondent repeatedly characterizes the administrative take over of the Board as a mere change of "location." Location is a term best left to real estate. Taking over the administration, hiring of staff, employment of counsel, advising the Board in closed session, and removing deliberating board members from voting on appellant's disciplinary action is not a mere change of "location." The argument that this control over the Board has no impact on it's functioning is ludicrous.

Respondent suggests that the BCE has no right to determine its own "placement" within state government. The CCIA established an independent Board, not puppet members, whose strings could be pulled into any assortment of configurations or placement.

Respondent glosses over the Acts empowerment of the Board with "administration" of its own act. Respondent leaps from the CCIA's grant of the power to administer its own act to the contorted conclusion that "placement within state government" "is a policy decision left to the Legislature." (Resp Brf, p.23.) Not even a

Houdiniesk master contortionist could read the CCIA as conferring on the *Legislature* the power to make "policy decision[s]" regarding its administration. Such a construct is the antithesis of an independent Board and the power granted to the board to administer the act, and "to do any and ALL things necessary or INCIDENTAL to the exercise of its powers and duties...." (§ 4). How can a board be independent if its administration and functioning are policy decisions left to the Legislature?

Continuing in its characterization of the take over of the Board as mere change in "placement," respondent goes on to argue that the board has no authority, express or implied to control its own "placement," as placement is not necessary to further its purposes or necessary for the exercise of its authority. The powers granted the Board in the CCIA, its own independent functioning, the power to administer the act, and the grant of all powers to do ALL THINGS necessary or incidental to the exercise of the powers are express.

In support of its argument that all powers rest with the Legislature other than the disciplinary function, respondent cites cases involving Legislative agencies under the lawful administration of the DCA. (See *Rich Vision Centers, Inc. v. Bd. of Med. Examiners* (1983) 144 Cal. App. 3d 110, 114 [purpose of Boards of agencies

within the Department of Consumer Affairs]; *Lusardi Constr. Co. v. Aubry* (1992) 1 Cal. 4th 976, 988-89.)

Ironically, the *Lusardi* case cited by respondent cuts against respondent's argument that the BCE's powers are somehow limited and subject to the "policy decisions" of the Legislature. In *Lusardi*, the director was given broad powers to discharge all responsibilities, and carry out and effect all purposes vested by law in the department, and, in accordance with the provisions of [the Administrative Procedure Act], to make such rules and regulations as are necessary to carry out the provisions of this chapter and to effectuate its purposes. (*Lusardi Constr. Co., supra,* 1 Cal. 4th at p. 988-89.) The court held that these grants conferred *plenary authority* on the director.

The CCIA has almost identical language as that governing the director in *Lusardi*. The CCIA gives the board power to adopt rules and regulations "necessary for the performance of its work, the effective enforcement and ADMINISTRATION of the act...." (§ 4(b)). The CCIA also gives the board the power "to do any and ALL things necessary or INCIDENTAL to the exercise of the powers and duties." (§ 4(e)). The board has the same plenary authority as that found in *Lusardi*. Moreover, the CCIA does not give the Legislature power to

amend the act.

The *Terhune v. Superior Court* (1998) 65 Cal.App.4th 864 case cited by respondents also supports appellant's challenge to the take over of the BCE by the DCA. In interpreting an enabling statute, courts give "great weight to the interpretation of an enabling statute by officials charged with its administration, including their interpretation of the authority vested in them to implement and carry out its provisions." (*Terhune v. Superior Court* (1998) 65 Cal.App.4th 864, 873, citing *People* ex rel. *Lungren v. Superior Court* (1996) 14 Cal.4th 294, 309.) The BCE, in adopting Resolution 1-76, understood its right to determine its own "placement" as not only necessary, but essential to its independent functioning and the protection of the chiropractic healing arts. The BCE understood the inherent conflict of interest its "placement" within the DCA created in its ability to carry out those essential functions. The Board duly adopted Resolution 1-76 and the attorney's general office determined they had the power to do so. This court gives great weight to the BCE's actions and its own interpretation of its powers and duties as reflected in Resolution 1-76.

The DCA argues that this duly adopted Resolution, which effected a major change in "placement," and which has governed for

the last thirty seven (37) years, is nothing more than an "informal statement" issued by the Board. (Resp Brf p. 26, ftn. 15.) Respondent completely ignores, and would give no meaning to, § 3 of the CCIA which specifically empowers the board to pass resolutions "It shall require the affirmative vote of four members of said board to carry any motion or resolution, to adopt any rule, or to authorize the issuance of any license provided for in this act."

The AG would have us believe now, in defense of the DCA, that the voice of BCE is not a voice at all, but mere expressions of meaningless informal statements, subject to the policy decision of the DCA. Resolution 1-76 is an echo in the wide chamber of silence imposed on the board by the DCA and the legislature of a former voice which is now silenced.

By their own statements in the Decision issued in this case, the board considered itself prohibited from challenging the DCA's intrusion on their independence, or even adjudicating appellant's objection to the constitutionality of the DCA takeover. (Exh. D, p.5.) Bus. & Prof. Code 108, which with this new "placement" now controls the BCE, enforces this by requiring the Board to obtain the DCA's consent to any challenge to the DCA!

The eviscerating influence of the DCA on the board's

independence, and the ongoing saliency of the facts and findings in Resolution 1-76 that interpretation is always to the detriment of the board, is proved by the arguments made in support of the DCA that the CCIA leaves policy decisions to the legislature, and that the boards own resolutions are mere “informal statements.” Respondents brief is a testament to what the BCE so poignantly noted in Resolution 1-76 of the ongoing and irreconcilable conflict of interest between its own independent functioning and the DCA.

Following respondent’s argument to its logical conclusion, there is nothing differentiating the BCE from any other *legislative* agency withing the DCA. According to respondent, the DCA has the same authority to control “placement,” staff, legal counsel and all other functions within the BCE as it does over every other agency controlled by the Legislature. The DCA would have this court believe that the board’s quasi-judicial functions are valid, regardless of internal interference, regardless of the fact that there are strings being pulled effecting the integrity of that process, and regardless of who is pulling them.

2. The DCA Attorney has a Major Conflict of Interest

If being under the DCA was simply window dressing one would assume that the legal opinions rendered by the DCA attorneys would be completely independent of each other. But they are not. In *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc*. (1999) 20 Cal. 4th 1135, the Supreme Court stated that "[a]n attorney represents a client — for purposes of a conflict of interest analysis — when the attorney knowingly obtains material confidential information from the client and renders legal advice or services as a result." (Id. at pp. 1148-1149, 1152) Unless the conflict between the physicians and chiropractors has abated in some mystical Kumbaya epiphany, there will be significant discussions on matters with vicious conflicts.

In *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 155 the court held that an attorney may not "at any time use against his former client knowledge or information acquired by virtue of the previous relationship." With the DCA running both boards, how are matters being kept separate? And is the attorney truly independent or does he/she interact with politicians on the DCA?

State Bar Rule of Professional Conduct, rule 3-310(E) . . .

provides that an attorney may not, "without the informed written consent of the . . . former client, accept employment adverse to the . . . former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment."

In order for there to be valid consent, clients must indicate that they "know of, understand and acknowledge the presence of a conflict of interest … ." (*Gilbert v. National Corp*. (1999) 71 Cal.App.4th 1240, 1255; cf. Rest.3d Law Governing Lawyers § 122 ["Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client."].) No such advisement or waiver is in the record.

The Board has recently ruled that Manipulations Under Anesthesia were legal when chiropractors performed the manipulations but MD's performed the anesthesia. This was hotly contested and this writer defended a chiropractor at trial who performed MUA's against a charge of practicing medicine without a license. The chiropractic act is also somewhat archaic in that it limits the practice to what was performed at the time of its passage. New technologies that were not conceived of in 1922, and

chiropractors may perform similar functions as to what was done in 1922. For example, heat caused by warm objects is (potentially) similar to heat caused by low level sound waves. If the sound making machines did not exist in 1922, can they be used by chiropractors now? Does the (assumed/proven) fact that the result at the tissue level is the same, make a difference?

There are endless questions such as this that a board must resolve. Having the DCA mediate this or influence this through staff appointments and legal counsel undercuts the very purposes of the Act which was to protect chiropractors from being eaten alive by the physicians.

To thwart this attack, the AG cites *Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal. App. 4th 81, 94 for the proposition that using the AG to prosecute Accusations and the DCA to advise the board is actually necessary to avoid a "due process violation when attorney was both advocate and adviser". If this argument is true, then at least three decades of discipline will be invalid as until the DCA takeover, the AG's office always served as both advisor and prosecutor.

In making this failed argument, the AG underscores the importance of the DCA's attorney in the organization. He/She

carries out a duty which, if done improperly, can violate due process. Since the conflict of interest involves an attorney whose decision making is governed by supervisors and politicians, there are serious due process concerns. Whereas prior to the takeover (we recognize the DCA got involved prior to the formal "reorganization"), the AG functioned as independent counsel, the advisors are now split. The AG remains independent but the policy advisor is not.

And despite this claim that a separation between the DCA for policy and the AG for prosecution is salutory, the AG cannot get around the fact that during deliberations on Dr. Widenbaum's matter, a DCA lawyer was present during the session and in closed session. The AG admits that Dr. Lubkin was NOT removed from deliberations by other board members. (Response page 34, fn. 22) Dr. Lubkin left because the DCA attorney told him he had to recuse himself. This is admitted by the AG in its response (P. 35, par. 1) The DCA was the "13th juror" in the Widenbaum case. The political ramifications of this legal intrusion on the board members participation is highlighted by the fact that the attorney did not have Lubkin recuse himself from another matter being voted on that day which also involved Cremata as an expert and targeted his participation in appellant's matter only.

3. The Act DOES Address Placement of the Board Within State Government

The AG argues that "The Chiropractic Act does not address the placement of the Board within State Government." Actually it does. The Act requires that the Board members be appointed by the Governor. (§ 1) Removal of a member is by act of the Governor. (§2) Section 3 states that the Board and not the DCA or any other agency, should employ the executive director. § 6 requires that the board be centered in Sacramento but can have additional offices in San Francisco and Los Angeles.

These provisions and the enumeration of the powers of the board (§ 4), leave no room for any outside agency to appoint attorneys, make policy, dictate hiring or firing. The power of the Governor is limited to appointing and removing members (§§'s 1 & 2 and reviewing the salary/expenses of the executive director. (§ 3) The only outside agency input is that the salary paid to the executive director should be approved by the Director of Finance. (§ 3)

Nothing in the State Constitution which addresses the powers of the Governor explicitly states that the Legislature cannot put the Governor under the aegis of the DCA, but separation of powers is so ingrained and obvious that no attempt would be made to do this.

While less absolute historically, it is clear as day from the Initiative Act's language that the board is an independent agency with specified powers. All the particulars relate to how the board interacts with the Governor.

At page 20, B., the AG argues that the takeover does not "Change the Scope or Effect of the Chiropractic Act". There are no facts in support of this argument. This is not a case of whether marijuana cards must be issued or carried. The public set up an independent board and the legislature has now given it a boss. The AG cites *Berkeley Chiropractic College v. Compton* (1929) 97 Cal. App. 790 to demonstrate that the powers of the board are limited. That case limited the board to powers that the court found were specifically enumerated in the Act. However, the flip side of that argument is that within those enumerated powers, the board's authority is plenary. Had the DCA attempted to take over only functions that were not in the Act, this briefing would have a very different tone. But in the Widenbaum case, the DCA takeover goes to one of the very specifically enumerated powers of the board.

Factually, the DCA attorney attended all sessions relating to Dr. Widenbaum. The DCA attorney was present in closed session. The DCA attorney gave legal advice as to whether a member who

appears to have been favorable to Dr. Widenbaum, had a conflict of interest, and demanded his recusal. There is more at issue here than what the ABG characterizes as "placement" within state government. Nothing less than the independent functioning of the performance of the board's quasi-judicial functions, e.g., determining discipline, is at stake in this case.

4. The Doctrine of *De Facto Officer* Has No Application To This Case

Respondent raises for the first time the doctrine of *de facto officer* in defense of the intrusion by the DCA into the quasi-judicial functions of the Board (e.g., installing its own attorneys as advisors, having its attorney recuse a deliberating voting member of the Board, taking part in closed sessions during which the Board was voting on appellant's discipline....) Respondent further argues that even it the DCA has unconstitutionally encroached on the powers and duties granted under the act, appellant should not be heard to complain.

The doctrine is inapplicable in this case. This is not a challenge to a particular voting member, but to the interference by the DCA in the independence of the Board, particularly in closed sessions where voting was taking place. Appellants has the right to challenge both the jurisdiction of the Board, as then constituted, and

its impartiality in light of the DCA's interference in the decision making process, and recusal of a deliberating board member during the voting process relating to appellant. (See *Oakley v. Aspinwall* (1850) 3 N.Y. 547; *People v. Whitridge* (1911) 144 App. Div. 493 (1st Dep't 1911), indicates that partiality may be probed by collateral attack (a second independent proceeding) as well.

To keep the appearance of prejudice in perspective, it should not forget that the Board, while including the wrongfully removed board member, voted for non-adoption of the ALJ's recommendation to revoke appellant's chiropractic license. That member is removed, and the Board subsequently adopts, almost verbatim, the original ALJ's findings and recommendations. Even the appearance of prejudice is sufficient to call into question the validity of the process in this case.

Nor should we forget that the DCA and the Board were acting in violation of the *Bagley-Keene* Act which requires transparency. Respondent attempts to defend these actions by suggesting that other employees did not witness the interaction between the DCA attorney and Lubkin, not that the interaction did not occur. Nor has respondent submitted a declaration by the DCA attorney denying the facts contained in Lubkin's declaration. They suggest that appellant

has not met his burden, but the burden is on the Board to agendize these matters so that there is a public record of significant actions taken. Even when they occur in closed sessions, the requirement is that a recitation of the events which occurred by made for the record at the conclusion of the closed session. This never occurred as is evident by the complete absence of these transactions from appearing anywhere in the public record. *Bagley-Keene* places the burden of transparency on the agency, not on an individual such as appellant.

The CCIA was enacted by the *People* of this state precisely because of the tendency of legislatively created Boards to discriminate against chiropractors in favor of the medical profession. Discrimination can come in many forms, including excessive discipline, such as revocation of a chiropractic license for a twenty year veteran, rather than a lesser sanction.

The type of Legislative overstepping that occurred with the DCA here has deep historical roots. The founders of our republic viewed the legislature as the branch most likely to encroach upon the power of the other branches. (See *Carmel Valley Fire Prot. Dist. v. State* (2001) 25 Cal. 4th 287, 297, citing *Bowsher v. Synar* (1986) 478 U.S. 714, 727; *Buckley v. Valeo* (1976) 424 U.S. 1, 129.) The

People passed the CCIA, and created an independent board, with the emphasis on independence, precisely to prevent the historically harsh treatment of members of the chiropractic healing arts and legislative interference that is complained of here.

CONCLUSION

For all the foregoing reasons, appellant respectfully requests that this court set aside the trial court's order denying the writ of mandate.

Dated: December 22, 2014

Respectfully submitted,

DANIEL A. HOROWITZ
attorney for the Appellant
JONATHAN WIDENBAUM

CERTIFICATION OF WORD COUNT

Counsel for JONATHAN WIDENBAUM hereby certifies that this brief uses a 13 point Arial font, and consists of 4010 words (excluding tables, proof of service, and this certificate), according to the word count of the computer word-processing program. (Cal. Rules of Court, rule 8.360.)

December 22, 2014

LAUREEN A. BETHARDS

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