

RESOLUTION 5-04-04

DIGEST

Administrative Hearings: Issue and Claim Preclusion

Amends Government Code section 11506 and adds Government Code section 11506.6 to allow the defenses of issue and/or claim preclusion in administrative hearings.

RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Government Code section 11506 and adds Government Code section 11506.6 to allow the defenses of issue and/or claim preclusion in administrative hearings. This resolution should be disapproved because it would remove necessary discretion from the administrative law judge in considering the appropriate application of issue and/or claim preclusion to the particular facts and circumstances presented.

California courts have recognized that in some instances claim and/or issue preclusion may be appropriate between administrative proceedings and civil and/or criminal actions. (See *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 71.) However, this resolution takes the concept of claim and issue preclusion in the administrative context too far. In mandating the application of issue and/or claim preclusion, it takes necessary discretion away from the administrative law judge. "[U]nlike private party litigation, the public has an important interest in administrative proceedings; hence, res judicata principles are to be more flexibly applied to protect the public interest." (*Montebello Rose Co. v. ALRB* (1981) 119 Cal.App.3d 1, 22 (citations omitted).) Given the different interests involved, administrative agencies should have wider discretion to protect the public interest and should not be necessarily hampered by civil findings.

Furthermore, by attempting to extend issue preclusion to facts and issues that are merely "similar" instead of "identical," this resolution broadens the definition of res judicata and collateral estoppel principles as established in case law. Broadening the scope of issue preclusion to those issues which are merely "similar" is contrary to the rationale behind issue preclusion, which is to prevent the relitigation of issues that were decided in prior judicial or quasi-judicial proceedings where the parties had an adequate opportunity to litigate fully and fairly.

Finally, in the administrative context, the agency (and the public it represents) usually was neither a party nor in privity with a party in the prior criminal or civil proceeding, and therefore res judicata cannot apply. (*Montebello Rose Co., supra.*)

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates recommends that legislation be sponsored to amend California Government Code section 11506, and add section 11506.6 to read as follows:

- 1 §11506
2 (a) Within 15 days after service of the accusation the respondent may file with the
3 agency a notice of defense in which the respondent may:
4 (1) Request a hearing.
5 (2) Object to the accusation upon the ground that it does not state acts or omissions
6 upon which the agency may proceed.
7 (3) Object to the form of the accusation on the ground that it is so indefinite or
8 uncertain that the respondent cannot identify the transaction or prepare a defense.
9 (4) Admit the accusation in whole or in part.
10 (5) Present new matter by way of defense.
11 (6) Object to the accusation upon the ground that, under the circumstances,
12 compliance with the requirements of a regulation would result in a material violation of
13 another regulation enacted by another department affecting substantive rights.
14 (7) Object to the accusation upon the ground that the facts and issues upon which
15 the accusation is based was determined civilly in favor of respondent by way of a final
16 judgment on the merits.
17 (b) Within the time specified respondent may file one or more notices of defense
18 upon any or all of these grounds but all of these notices shall be filed within that period
19 unless the agency in its discretion authorizes the filing of a later notice.
20 (c) The respondent shall be entitled to a hearing on the merits if the respondent files
21 a notice of defense, and the notice shall be deemed a specific denial of all parts of the
22 accusation not expressly admitted. Failure to file a notice of defense shall constitute a
23 waiver of respondent's right to a hearing, but the agency in its discretion may nevertheless
24 grant a hearing. Unless objection is taken as provided in paragraph (3) of subdivision (a),
25 all objections to the form of the accusation shall be deemed waived.
26 (d) The notice of defense shall be in writing signed by or on behalf of the
27 respondent and shall state the respondent's mailing address. It need not be verified or
28 follow any particular form.
29 (e) As used in this section, "file," "files," "filed" or "filing" means "delivered or
30 mailed" to the agency as provided in Section 11505.

31
32 §11506.6
33 A judgment or final order in a civil action which is in favor of respondent with
34 respect to the factual issues and legal conclusions directly or necessarily adjudged in those
35 proceedings shall be conclusive between the respondent and the agency in any matter
36 concerning the same or similar facts and issues.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

Existing Law: While recognizing the applicability of, essentially, the collateral estoppel doctrine, and what it portends regarding the agency's ability to establish cause for discipline by clear and convincing evidence to a reasonable certainty (where the evidence presented will command the unhesitating assent of all reasonable persons), a licensee's exculpation in a fully litigated civil malpractice suit will not prevent the continued prosecution of and hearing on the accusation.

This Resolution: Would provide the written direction checking unwarranted proceedings and waste of agencies proceeding with accusations that cannot possibly prevail when other presumptively reasonable minds, acting in a court of law and considering the same issues on a lower standard of proof, already concluded the absence of wrongdoing by the respondent as a necessary finding of fact incident to a litigated civil proceeding resulting in a final judgment. Without a written rule observing the obvious, the Board will proceed to hearing on its accusation undeterred. With this provision, it will have the permission it needs to stop "doing its job."

The Problem: Following a civil trial and judgment in favor of a licensee, for example a physician who was sued for medical malpractice, the Medical Board of California may and not uncommonly will still bring charges against the doctor, seeking discipline on his or her license over the same matter. This is so even though the burden of the Board establishing cause for discipline against the physician is by a clear and convincing evidence to a reasonable certainty standard. That means, the evidence against the licensee must be so clear and convincing, even when considering that evidence opposed to it, that the evidence as a whole would command the unhesitating assent of all reasonable persons. If a judge and jury just got done concluding that the physician was not guilty of wrongdoing on a lower, preponderance of the evidence standard, it would seem that as a matter of law that the Board could not prevail in an accusation based on similar issues. Absent a bright light statute recognizing the obvious, the agencies will continue to quixotically proceed on its accusation against the licensee through a complete hearing, to the unnecessary time and expense of all.

IMPACT STATEMENT

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

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RESPONSIBLE FLOOR DELEGATE: Joel Bruce Douglas

COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

Entirely different factors, events and circumstances may influence or determine the outcome of a civil trial, as compared with those in an administrative proceeding. The purposes to be served

are entirely different. The motivation, duty and responsibility of the triers of fact are different. To use the proponent's own example, a medical doctor may well avoid a finding of liability in a civil trial-for reasons of jury sympathy, death or disappearance of a critical witness, etc. If the doctor's actions were nevertheless sufficient to warrant disciplinary action by the Medical Board of California, he should not be protected by reason of what occurred at the trial.