WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

IN THE MATTER OF JOHN H. HOFFMAN, JR.	**Case No. Misc. 250** **OPINION AND DECISION AFTER RECONSIDERATION**

John H. Hoffman, Jr. (Hoffman), has filed a petition seeking reconsideration of the Findings and Order issued by the workers' compensation administrative law judge (WCJ) on August 9, 2005. In that decision, the WCJ found that Hoffman has violated the provisions of Workers' Compensation Appeals Board (WCAB) Rule 10779. (Cal. Code Regs., tit. 8, § 10779.) Rule 10779 provides, in essence, that a former attorney who has been disbarred or suspended, who has been placed on involuntary inactive status, or who has resigned while disciplinary action is pending, shall be deemed unfit to appear as a representative of any party before the WCAB, unless he or she petitions the Appeals Board and receives prior permission to appear. The WCJ ordered that Hoffman be barred from any further appearances before the WCAB unless: (1) he complies with the provisions of Rule 10779 by petitioning the Appeals Board for permission to appear; and (2) he is given permission to appear by the Appeals Board.

In his petition for reconsideration, Hoffman contends, in substance that: (1) Rule 10779 only precludes disbarred and other attorneys who fall within its scope from appearing as a representative of a "party" before the WCAB, and that the lien claimants he represents are not "parties" as contemplated by Rule 10779; and (2) even if lien claimants can be "parties" under Rule 10779 in some circumstances, Rule 10301(l) (Cal. Code Regs., tit. 8, § 10301(l)) makes lien claimants "parties" only when either the applicant's case has been settled by way of a compromise and release agreement or the applicant has chosen not to proceed with his or her case.

On October 26, 2005, we granted reconsideration in order to further study this matter. As our Decision After Reconsideration, we conclude that: (1) both Rule 10779 and the State Bar Act

preclude any non-reinstated former attorney who has been disbarred or suspended by the Supreme Court (for reasons other than nonpayment of State Bar fees), who has been placed on involuntary inactive status by the State Bar, or who has resigned with disciplinary proceedings pending against him or her from appearing as a representative of any party before the WCAB (at least if they have not received permission under Rule 10779);[1] (2) this preclusion against appearing as a representative of any "party" extends to appearing on the behalf of *any* litigant, including but not limited to lien claimants; and (3) this preclusion against "appearing as a representative" in WCAB proceedings extends to any activity that would constitute the practice of law. Accordingly, we affirm the WCJ's August 9, 2005 Findings and Order.

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[1] There is no petition requesting permission to appear under Rule 10779 now pending before us. Therefore, we presently need not and will not address the effect of the State Bar Act on the portion of Rule 10779 that allows former attorneys who have lost their licenses to petition the Appeals Board for permission to appear.

I. BACKGROUND

This case involves the question of whether Hoffman has violated WCAB Rule 10779 (Cal. Code Regs., tit. 8, § 10779), which provides:

> "An attorney who has been disbarred or suspended by the Supreme Court for reasons other than nonpayment of State Bar fees, or who has been placed on involuntary inactive enrollment status by the State Bar, or who has resigned while disciplinary action is pending shall be deemed unfit to appear as a representative of any party before the Workers' Compensation Appeals Board during the time that the attorney is precluded from practicing law in this state. Any attorney claiming to be qualified to appear as a representative before the Workers' Compensation Appeals Board despite disbarment, suspension or resignation may file a petition for permission to appear. The petition shall set forth in detail:
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> > "(1) the facts leading to the disbarment, suspension or resignation; and
> >
> > "(2) the facts and circumstances alleged by the attorney to establish competency, qualification and moral character to appear as a representative before the Workers' Compensation Appeals Board.
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> "The petition shall be verified, shall be filed in the San Francisco office of the Appeals Board and a copy thereof served on the State Bar of California."

In relation to this question, the following facts are established by the evidence and/or by admissions in Hoffman's pleadings.

Hoffman was admitted to the State Bar of California in December 1972.

In 1985, Hoffman pled guilty to two courts of grand theft (Pen. Code, § 487(1)) and one court of forgery (Pen. Code, § 470), which are all felonies. At the time he entered his guilty pleas to the three felonies, he admitted in writing that, "with the intent to defraud and to use the money and property of others for my own personal uses," he took $60,000.00 from two people on

February 23, 1981, he took another $8,500.00 from those two people on June 6, 1981, and he then forged an assignment of a deed of trust on December 6, 1982.[2]

On April 19, 1985, Hoffman voluntarily became an inactive member of the State Bar.

On June 27, 1986, Hoffman formally resigned from the State Bar, with disciplinary proceedings pending against him.

The Appeals Board has no record of any petition from Hoffman seeking permission to appear before the WCAB pursuant to Rule 10779, filed on or after June 27, 1986.

Nevertheless, in 1989, Hoffman began representing medical lien claimants before the WCAB. From 1989 to 1990, he worked for Fisher-Hoffman Resolution Services, Inc. Then, from 1990 to 1995, he worked for Hoffman, Hoffman & Associates, Inc. Since 1995, he has been employed by Integrated Healthcare Recovery Services, a California corporation, dba Hoffman, Hoffman & Associates.

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[2] The WCJ never ruled on Hoffman's objection to the admission in evidence of the records of the Supreme Court regarding his State Bar disciplinary proceedings, which included his guilty plea in Superior Court to the two counts of grant theft and one count of forgery.

On reconsideration, however, the Appeals Board may address all issues that were presented for determination to the WCJ, even if those issues were not raised in the petition for reconsideration. (*Great Western Power Co. v. Industrial Acc. Com.* (*Savercool*) (1923) 191 Cal. 724, 729 [10 I.A.C. 322]); *State Comp. Ins. Fund v. Industrial Acc. Com.* (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98]; *Tate v. Industrial Acc. Com.* (1953) 120 Cal.App.2d 657, 663 [18 Cal.Comp.Cases 246]; *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (*Sowell*) (1943) 58 Cal.App.2d 262, 266-267 [8 Cal.Comp.Cases 79].)

Here, for the reasons that follow, we will admit in evidence Hoffman's "Guilty Plea in Superior Court," which contains his admission of facts that furnished the basis for his guilty plea, and which was filed in Superior Court on July 10, 1985.

First, Hoffman testified at trial to having been convicted of grand theft and forgery, which sufficiently authenticates the guilty plea. (Evid. Code, §§ 1400, 1414; see, *StreetScenes v. ITC Entertainment Group, Inc*. (2002) 103 Cal.App.4th 233, 244; *Cal. Metal Enameling Co. v. Waddington* (1977) 74 Cal.App.3d 391, 395, fn. 6.)

Second, judicial notice may be taken of the records of any state court. (Evid. Code, § 452 (d).) Because Hoffman's guilty plea here is a record of both the Superior Court and the Supreme Court, it is properly the subject of judicial notice. (E.g., *Duggal v. G.E. Capital Communication Services, Inc*. (2000) 81 Cal.App.4th 739, 745.) Moreover, we may accept the truth of a guilty plea entered into court records. (*Cote v. Henderson* (1990) 218 Cal.App.3d 796, 801-803; accord: *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1567.)

Third, Hoffman's guilty plea to three felonies is an admission against interest that is admissible in a subsequent civil proceeding. (Evid. Code, § 1220; *Interinsurance Exchange v. Flores* (1996) 45 Cal.App.4th 661, 672-673.)

On June 11, 2004, a notice was prepared stating that Hoffman, Hoffman & Associates had become the "attorney/lien representative of record" and the "attorney of record" for lien claimants – LAGS Spine Treatment Center; and Sportcare and Spine Treatment Center – in Case No. GOL 0089767. This notice of representation indicated it was signed by Hoffman. At trial, Hoffman denied the signature was his, but he acknowledged having authorized various staff members of Hoffman, Hoffman & Associates to sign his name for him. The notice of representation was filed with the WCAB on June 14, 2004, which was after a WCJ had issued a November 12, 2002 order approving a compromise and release agreement settling the applicant's underlying claim in the matter.

On January 20, 2005, Hoffman appeared as the representative of lien claimant – Cypress Surgery Center – at a lien trial in Case No. GOL 0097353 before a WCJ at the WCAB's Goleta district office. No one else from Hoffman, Hoffman & Associates appeared at that hearing. This appearance occurred after a WCJ's August 20, 2004 order approving a compromise and release resolved the applicant's underlying claim in the matter.

On January 26, 2005, Hoffman appeared as the representative for lien claimants – Galileo Surgery Center; and Cypress Surgery Center – at a lien trial in Case No. GOL 0026960 before a WCJ at the WCAB's Goleta District Office. No one else from Hoffman, Hoffman & Associates appeared at that hearing. This appearance occurred after a WCJ's February 21, 2003 order approving a compromise and release that had settled the applicant's claim in the matter.

On March 8, 2005, a notice was prepared stating that Hoffman, Hoffman & Associates had become the "attorney of record" for lien claimant – Bay Surgery Center – in Case No. OAK 0277268. The notice of representation indicated it had been signed by Hoffman, but he denied this at trial. Again, however, he acknowledged there were staff people who he had authorized to sign his name for him. This notice of representation was filed with the WCAB on March 11, 2005.

On May 2, 2005, a notice was prepared stating that Hoffman, Hoffman & Associates had become the "attorney/lien representative of record" and the "attorney of record" for lien claimant – Bay Surgery Center – in Case No. OAK 0289010. Although the notice of representation purported

to bear Hoffman's signature, he asserted at trial that the signature was not his. We reiterate, however, he acknowledged that several staff members had the authority to sign for him. This notice of representation was filed with the WCAB on May 5, 2005.

On June 13, 2005, a trial occurred on the issue of why Hoffman should not be barred from further appearances before the WCAB on the basis of alleged violations of Rule 10779.

On August 9, 2005, the WCJ issued her Findings and Order. She found that Hoffman has violated the provisions of Rule 10779 because he had resigned from the State Bar with disciplinary proceedings pending, but then had appeared in WCAB proceedings without having petitioned the Appeals Board for permission to do so. She then ordered that Hoffman be barred from further appearances before the WCAB unless he both complies with Rule 10779 and receives permission to appear from the Appeals Board.

Hoffman then filed the petition for reconsideration now pending before us.

II. DISCUSSION

A. Any Non-Reinstated Former Attorney Who Was Disbarred Or Suspended, Who Was Placed On Involuntary Inactive Status, Or Who Resigned With Disciplinary Proceedings Pending Is Precluded From Appearing As A Representative Of Any Party Before The WCAB.

As a *general* rule, a person who is not licensed to practice law is allowed to practice before the WCAB. (Lab. Code, §§ 5501, 5700; see also, *Eagle Indemnity Co. v. Industrial Acc. Com.* (*Hernandez*) (1933) 217 Cal. 244, 248 [19 I.A.C. 150]; *99 Cents Only Stores v. Workers' Comp. Appeals Bd*. (*Arriaga*) (2000) 80 Cal.App.4th 644, 648 [65 Cal.Comp.Cases 456]; *Longval v. Workers' Comp. Appeals Bd*. (1996) 51 Cal.App.4th 792, 798 [61 Cal.Comp.Cases 1396].)[3]

[3] Labor Code section 5501 provides, in relevant part: "[An] application may be filed with the appeals board by any party in interest, his attorney, *or other representative authorized in writing*. A representative who is not an attorney licensed by the State Bar of this state shall notify the appeals board in writing that he or she is not an attorney licensed by the State Bar of this state." (Emphasis added.)

Labor Code section 5700 provides, in relevant part: "Either party may be present at any hearing, in person, by attorney, *or by any other agent*, and may present testimony pertinent under the pleadings." (Emphasis added.)

Under both the WCAB's Rules and the State Bar Act, however, there is an exception to this general rule when the person *had once been licensed to practice law in California*, *but lost that license*.

WCAB Rule 10779 provides, in essence, that any former attorney who was disbarred or suspended by the Supreme Court (for reasons other than nonpayment of State Bar fees), who was placed on involuntary inactive status by the State Bar, or who resigned with disciplinary proceedings pending cannot appear as a representative of any party before the WCAB unless either: (1) the former attorney petitions the Appeals Board for permission to appear and that permission is granted in advance; or (2) the former attorney's right to practice law is reinstated. (Cal. Code Regs., tit. 8, § 10779.) Rule 10779 is predicated on Labor Code section 4907, which provides that the privilege of any person (other than a licensed attorney) to appear as a representative of any party before the WCAB may be "removed, denied, or suspended by the Appeals Board."[4] Rule 10779 was adopted by the Appeals Board pursuant both to its rulemaking power (Lab. Code, § 5307) and its broad authority "to do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon it." (Lab. Code, § 133.)

Rule 10779 – which precludes disbarred, suspended and other specified former attorneys from appearing before the WCAB without prior Appeals Board approval, even though Labor Code sections 5501 and 5700 generally allow non-attorneys to appear – is consistent with the provisions of the State Bar Act and the case law construing that Act.

In *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61 (rehg. den., 2006 Cal. App. LEXIS 198; rev. den., 2006 Cal. LEXIS 4780), the Court of Appeal considered the case of a former lawyer (Benninghoff), who had resigned from the State Bar with disciplinary charges pending after he had been convicted of four federal felonies (including conspiracy to defraud the United States and making various false statements). This resignation with disciplinary

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[4] Although section 4907 purports to give the Appeals Board the authority to remove or deny the privilege of "any person" to appear in any WCAB proceedings, the Supreme Court has held that only it – and not the WCAB – has the power to discipline licensed attorneys. (*Hustedt v. Workers' Comp. Appeals Bd*. (1981) 30 Cal.3d 329 [46 Cal.Comp.Cases 1284].)

proceedings pending meant he could not practice law. (Bus. & Prof. Code, § 6126.) After his resignation, however, Benninghoff began representing parties before state administrative boards and commissions as a "lay representative." He asserted he could do so, arguing that because laypeople may represent parties in state administrative hearings, this kind of representation must not constitute the practice of law. The Court flatly rejected this assertion, stating: "Representing parties in state administrative hearings constitutes the practice of law [even] [a]s a 'lay representative … .' By representing parties in state administrative hearings, Benninghoff practiced law in California--something he has lost the right to do by reason of his resignation from the State Bar with disciplinary charges pending." (*Benninghoff*, *supra*, 136 Cal.App.4th at p. 65.)

In reaching this determination, the Court declared that the State Bar Act differentiates between a true layperson and a "defrocked" attorney:[5]

> "Benninghoff is not the typical layperson--he used to be a lawyer. The statute prohibiting the unauthorized practice of law treats true laypeople differently than lawyers who have lost their bar membership. [Business and Professions Code] [s]ection 6126, subdivision (a) addresses true laypeople. It provides that '[A]ny person ... practicing law who is not an active member of the State Bar, *or otherwise authorized pursuant to statute or court rule to practice law in this state* at the time of doing so, is guilty of a misdemeanor.' (Italics added.) Section 6126, subdivision (b) addresses lawyers like Benninghoff. It provides that '[a]ny person who ... has resigned from the State Bar with charges pending, and thereafter practices or attempts to practice law ... is guilty of a crime punishable by imprisonment in the state prison or county jail.'[6] Thus, a true layperson may practice law when 'authorized pursuant to statute or court rule'; a defrocked lawyer like Benninghoff may not practice law at all. (§ 6126, subds. (a) & (b).)" (*Benninghoff*,

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[5] The Court used the term "defrocked" lawyer to refer to disbarred lawyers, suspended lawyers, lawyers involuntarily enrolled as inactive State Bar members, and lawyers who resign from the State Bar with disciplinary charges pending. (*Benninghoff*, *supra*, 136 Cal.App.4th at p. 68, fn. 5.)

[6] *Benninghoff* excerpts only a partial quote from Business and Professions Code section 6126(b). Therefore, we will emphasize that section 6126(b) does not criminalize the practice of law only by former attorneys who "resigned from the State Bar with charges pending." Instead, it criminalizes the practice of law by "[a]ny person who has been involuntarily enrolled as an inactive member of the State Bar, or has been suspended from membership from the State Bar, or has been disbarred, or has resigned from the State Bar with charges pending." (Bus. & Prof. Code, § 6126(b).)

> *supra*, 136 Cal.App.4th at pp. 67-68 (italics in original; Court's footnote omitted).)

After concluding that "defrocked" attorneys cannot practice law under any circumstances, the Court next addressed the question of "whether the representation of parties in state administrative hearings constitutes practicing law." (*Benninghoff*, *supra*, 136 Cal.App.4th at p. 68.) The Court held that it does, stating:

> "The California Supreme Court addressed what it means to 'practice law' in *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535 … (*Baron*). There, … our Supreme Court had no difficulty resolving the … question of 'whether participation on behalf of another in hearings and proceedings before a board or commission constitutes the practice of law.' (*Baron, supra,* 2 Cal.3d at p. 543 ...) 'The cases uniformly hold that the character of the act, and not the place where it is performed, is the decisive element, and if the application of legal knowledge and technique is required, the activity constitutes the practice of law, even if conducted before an administrative board or commission.' (*Ibid.*)" (*Benninghoff*, *supra*, 136 Cal.App.4th at p. 68 (footnote and parallel citations omitted).)

And:

> "We reject Benninghoff's suggestion that representing parties in state administrative hearings cannot constitute practicing law because laypeople (arguably) are allowed to do so. As we explained *ante*, the law differentiates between laypeople and defrocked lawyers. Lawyers who resign with disciplinary charges pending may not practice law, without exception. (§ 6126, subd. (b).) In contrast, laypeople may practice law when 'authorized pursuant to statute or court rule.' (§ 6126, subd. (a).) If the various APA sections and regulations that Benninghoff cites do in fact allow laypeople to represent parties in administrative hearings, they constitute the

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> statutory authorization contemplated by section 6126, subdivision (a)." (*Benninghoff*, *supra*, 136 Cal.App.4th at p. 69.)[7]

In support of its determination that appearing before administrative boards and commissions constitutes the practice of law, *Benninghoff* also cited to the Supreme Court's 1933 decision in *Eagle Indemnity Co. v. Industrial Acc. Com*. (*Hernandez*), *supra*, 217 Cal. 244, which held that a layperson who appeared before the Industrial Accident Commission (the predecessor to the WCAB) was practicing law without a license, albeit permissibly. *Benninghoff* observed:

> "In *Eagle Indem. Co. v. Industrial Acc. Com*. [(*Hernandez*)] (1933) 217 Cal. 244 … the Supreme Court allowed a layperson to recover attorney fees for his successful representation of an injured employee before the Industrial Accident Commission.[8] (*Id*. at pp. 248-249.) The parties did not dispute that 'the services performed by [the layperson] in the prosecution of the claim before the Commission were legal services.' (*Id*. at p. 247.) And the court noted that 'as a general rule, no one may practice law without a license.' (*Ibid*.) But it also noted that '[e]xceptions to this general rule have been established and long recognized.' (*Ibid*.) It then reviewed the Workmen's Compensation Act, and concluded that 'the [L]egislature has [therein] provided a further exception to the general rule, as to practice before the Industrial Accident Commission.' (*Id*. at p. 248.) If the APA allows lay representation, presumably it does so as another exception to the general rule against laypeople practicing law. It does not remove that representation from the practice of law, or invalidate the absolute bar against defrocked lawyers practicing

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[7] We will briefly explain the Court's statement that laypeople "arguably" can appear in state administrative hearings and its comment that "[i]f the various APA sections and regulations that Benninghoff cites do in fact allow laypeople to represent parties in administrative hearings."

Benninghoff had argued, based on various provisions of the APA (Administrative Procedure Act), as well as various regulations, that laypeople may represent parties in state administrative hearings. (*Benninghoff*, *supra*, 136 Cal.App.4th at pp. 66-67 & fns. 2&3.) The Court, however, merely assumed, without actually deciding, that laypeople may represent parties before state administrative agencies. (*Id*., 136 Cal.App.4th at p. 67.)

We observe that, in addition to the WCAB, other judicial or quasi-judicial administrative agencies do allow non-attorneys to appear before them. (E.g., *Welfare Rights Org. v. Crisan* (1993) 33 Cal.3d 766, 770 [welfare hearings]; *Consumers Lobby Against Monopolies v. Public Utilities Com*. (1979) 25 Cal.3d 891, 913-914 [Public Utilities Commission]; Unemp. Ins. Code, § 1957 [Unemployment Insurance Appeals Board].)

[8] In 1991, Labor Code sections 4903(a) and 5710(b)(4) were amended to allow fee awards for representing injured employees only to licensed attorneys, and not to non-attorney representatives. (*Longval v. Workers' Comp. Appeals Bd*., *supra*, 51 Cal.App.4th 792.)

> law." (*Benninghoff*, *supra*, 136 Cal.App.4th at p. 70 (footnote and parallel citations omitted).)[9]

The Court then pronounced: "Thus, Benninghoff, whom the State Bar Act prohibits from practicing law, may not represent parties in state administrative hearings. This representation constitutes the practice of law, from which defrocked lawyers are categorically barred." (*Benninghoff*, *supra*, 136 Cal.App.4th at p. 70.)

Therefore, under both Rule 10779 and the State Bar Act (as interpreted in *Benninghoff*, which is binding upon us (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455)), former attorneys who have lost their licenses cannot represent any party before the WCAB, at least if they have not received permission under Rule 10779. Indeed, *Benninghoff* specifically pointed out: "Today, the Workers[']] Compensation Appeals Board expressly prohibits disbarred lawyers from representing parties before it. (Cal. Code Regs., tit. 8, § 10779.)" (*Benninghoff*, *supra*, 136 Cal.App.4th at p. 70, fn. 7.)

B. The Preclusion Against Attorneys Who Have Lost Their Licenses From Appearing As A Representative Of Any "Party" Bars Their Appearances On Behalf Of *Any* Litigant, Including But Not Limited To Lien Claimants.

Labor Code section 4907 provides that the Appeals Board may remove, deny, or suspend the privilege of any non-attorney admitted "to appear in any proceeding as a representative of any *party* before the appeals board." (Lab. Code, § 4907 (emphasis added).)

Similarly, WCAB Rule 10779 provides that a former attorney who lost his or license "shall be deemed unfit to appear as a representative of any *party* before the [WCAB] during the time that

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[9] Although not cited by *Benninghoff*, the Supreme Court's opinion in *Hustedt* also supports the conclusion that appearances before the WCAB constitute the practice of law. There, in discussing WCAB proceedings, the Court said:

> "It is well established that 'participation on behalf of another in hearings and proceedings before a board or commission constitutes the practice of law. The cases uniformly hold that the character of the act, and not the place where it is performed, is the decisive element, and if the application of legal knowledge and technique is required, the activity constitutes the practice of law, even if conducted before an administrative board or commission.' (*Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 543 …)" (*Hustedt v. Workers' Comp. Appeals Bd.*, *supra*, 30 Cal.3d at pp. 335-336 (internal parallel citations omitted).)

the attorney is precluded from practicing law in this state." (Cal. Code Regs., tit. 8, § 10779 (emphasis added).)

Hoffman argues, in substance that: (1) a lien claimant is *never* a "party," as contemplated by section 4907 and Rule 10779; or (2) even if a lien claimant can be a "party" under some circumstances, Rule 10301(l) (Cal. Code Regs., tit. 8, § 10301(l)) makes a lien claimant a "party" only where the applicant's case has been settled by way of a compromise and release or where the applicant chooses not to proceed with his or her case.[10]

Hoffman misapprehends the scope and intent of section 4907 and Rule 10779.

As just discussed, section 4907 gives the Appeals Board the power to remove, deny, or suspend the privilege of non-attorneys "to appear in any proceeding as a representative of *any party*." (Emphasis added.) The term "party" is not defined or limited by section 4907, nor is it otherwise defined or limited by any provision of Division 4 of Labor Code. Moreover, a statute should be construed to promote, rather than defeat, its general purpose and to avoid absurd consequences. (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003; *Estate of Griswold* (2001) 25 Cal.4th 904, 911; *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977-978.) The obvious purpose of section 4907 is to give the Appeals Board the power to preclude non-attorneys who are not fit to practice from appearing in WCAB proceedings. It would be absurd to construe the term "party" in section 4907 to mean that the Appeals Board can bar non-attorneys who are representing *applicants or defendants* from appearing before the WCAB, but that it cannot bar non-attorneys who are representing *lien claimants* from appearing, even if they are equally unfit, particularly given that case law clearly establishes that a lien claimant is a "party in interest" (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 811 [65 Cal.Comp.Cases 1402]),[11] even in circumstances where the applicant is still actively pursuing his

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[10] Rule 10301(l) provides: "As used in this chapter: … (l) 'Party' means an Applicant or Defendant, or a lien claimant where the applicant's case has been settled by way of a compromise and release, or where the applicant chooses not to proceed with his or her case." (Cal. Code Regs., tit. 8, § 10301(l).)

[11] E.g., also, *Premier Medical Management Systems, Inc. v. Cal. Ins. Guarantee Assn*. (2006) 136 Cal.App.4th 464, 468 [71 Cal.Comp.Cases 210]; *Boehm & Associates v. Workers' Comp. Appeals Bd*. (*Brower*) (2003) 108 Cal.App.4th 137, 149-150 [68 Cal.Comp.Cases 548]; *Hand Rehabilitation Center v.*

or her case. (E.g., *Beverly Hills Multispecialty Group, Inc.* (*Pinkney*), *supra*, 26 Cal.App.4th 789 (holding that, at least where there is a threshold issue fundamental to a lien claimant's claim, the lien claimant has the "right to participate in the worker's case-in-chief," and annulling the WCAB's decision because the lien claimant was not served with the employer's medical reports, was not served with mandatory settlement conference and trial notices; and was not allowed to cross-examine a witness); *Cedeno v. American National Ins. Co*. (1997) 62 Cal.Comp.Cases 939 (Appeals Board panel decision) (lien claimant denied due process where WCAB required it to conduct its cross-examination of witnesses by submitting questions to applicant's attorney).)[12]

The same reasoning, of course, holds true with respect to Rule 10779. If an attorney who has lost his or her license is "unfit to appear as a representative" before the WCAB (Cal. Code Regs., tit. 8, § 10779), then he or she is unfit to appear for *all* purposes – not just unfit to represent applicants and defendants.

We recognize that Rule 10301(l) defines "party" to mean "an Applicant or Defendant, or a lien claimant where the applicant's case has been settled by way of a compromise and release, or where the applicant chooses not to proceed with his or her case." (Cal. Code Regs., tit. 8, § 10301(l).) However, even if we were to construe this definition to apply to Rule 10779, notwithstanding the discussion above, the evidence establishes that Hoffman was representing lien claimants in proceedings *after* the injured employees had settled their cases by compromise and release. Therefore, he was violating Rule 10779 in any event.

Workers' Comp. Appeals Bd. (*Obernier*) (1995) 34 Cal.App.4th 1204, 1210 [60 Cal.Comp.Cases 289]; *Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd.* (*Pinkney*) (1994) 26 Cal.App.4th 789, 803 [59 Cal.Comp.Cases 461].

[12] See also, Civ. Code, § 3511, which states that "[w]here the reason is the same, the rule should be the same." If Labor Code section 4907 were construed to provide that the Appeals Board may bar only non-attorneys who are representing *applicants or defendants* from appearing before the WCAB, then the Appeals Board would be powerless to remove, deny, or suspend the privilege of defrocked attorneys and other non-attorneys representing *lien claimants* – even ones, for example, who do not respect or obey the laws of the state, who do not respect the judicial process, who do not respect the rights of others, or who are dishonest, deceitful or outright fraudulent, and the like.

Beyond Rule 10779, however, *Benninghoff* makes it emphatically clear that a "defrocked" attorney cannot represent anyone – a party or a non-party – under any circumstances, in judicial or quasi-judicial administrative proceedings. *Benninghoff* flatly states that a defrocked attorney: "has lost the right" to practice law (*Benninghoff*, *supra*, 136 Cal.App.4th at p. 65), is "strip[ped] [of] the privilege of practicing law" (*id*., at p. 67, fn. 5), "may not practice law at all" (*id*., at p. 68), "may not practice law, without exception" (*id*., at p. 69), and is "categorically barred" from practicing law. (*Id*., at p. 70.) This is true even for "state administrative hearings." (*Id*., at pp. 65, 68-69, 70.)

In this regard, we observe that, in addition to the statutory reasons discussed above, *Benninghoff* also cited policy reasons for its conclusion that the former attorney before it could not practice as a lay representative, even before state administrative boards and commissions:

> "Our conclusion is bolstered by public policy considerations. Benninghoff was convicted of four federal felonies, including conspiracy to defraud the United States and making false statements. Disbarment was an inevitable formality, as 'the Supreme Court shall summarily disbar' an attorney convicted of any felony requiring the specific intent to defraud or make false statements. (§ 6102, subd. (c).) In addition, his offenses were crimes of moral turpitude, which is an independent basis for summary disbarment. (*Ibid.;* see also *In re Lesansky* (2001) 25 Cal.4th 11, 16 … [offense reveals moral turpitude if it 'shows a deficiency in any character trait necessary for the practice of law (such as trustworthiness, honesty, [or] candor)'].) 'Moral turpitude has been defined by many authorities as an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general.' (*In re Craig* (1938) 12 Cal.2d 93, 97 … .) Benninghoff avoided the indignity of actual disbarment only by resigning from the State Bar with disciplinary charges pending. *Nonetheless, he suffers the same disqualifications as a bar member who has been tried on disciplinary charges and found wanting*. (§ 6126, subd. (b).) *He is unfit to practice law; he has forfeited the privilege of speaking for others under the law*." (*Benninghoff*, *supra*, 136 Cal.App.4th at pp. 70-71 (emphasis added; parallel citations omitted).)

Accordingly, an attorney who has lost his or her license is barred from appearing before the WCAB on behalf of *any* litigant, including lien claimants, at least if they have not received permission under Rule 10779.

C. The Preclusion Against "Appearing As A Representative" Of Any Party Before The WCAB Extends To Any Activity That Would Constitute The Practice Of Law.

Rule 10779 generally precludes a former attorney who has been disbarred or suspended, who has been placed on involuntary inactive status, or who has resigned with disciplinary proceedings pending from "appearing as a representative" before the WCAB.

The phrase "appearing as representative" means more than just physical appearances in a hearing room before the WCJ, although it obviously includes that. (See Rules Prof. Conduct, rule 1-311(B)(2).) Legal services outside the hearing room have a significant impact on WCAB proceedings and they are as central to them as are appearances before a WCJ. Accordingly, Rule 10779's preclusion against "appearing as representative" means that an attorney who has lost his or her license cannot perform *any* legal services that would constitute the practice of law.

Moreover, as discussed above, *Benninghoff* patently establishes that a "defrocked" attorney cannot "practice law" under any circumstances, including in judicial or quasi-judicial administrative proceedings, such as proceedings before the WCAB.

The term "practice of law" is not defined by statute, "but the cases on illegal practice have given it a most comprehensive meaning." (1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys, § 408, p. 499.) As early as 1922, before the passage of the modern State Bar Act, the Supreme Court adopted the definition of "practice of law" used in an Indiana case:

> "[A]s the term is generally understood, the practice of the law is the doing or performing services in a court of justice in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be []pending in a court." (*People v. Merchants' Protective Corp*. (1922) 189 Cal. 531, 535 (quoting *Eley v. Miller* (1893) 7 Ind.App. 529, 34 N.E. 836, 837); accord: *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 127; *In re Utz* (1989) 48 Cal.3d 468, 483, fn. 11; *Baron*, *supra*, 2 Cal.3d at p. 542; *Benninghoff*, *supra*, 136 Cal.App.4th at p. 68.)

Thus, the "practice of law" clearly precludes giving any legal advice and preparing any legal documents, whether or not a claim has been filed or is being adjudicated. (See also, Rules

Prof. Conduct, rule 1-311(B)(1).) Of course, the "practice of law" is broader than this. Although it is not feasible to set out an all-encompassing definition of what constitutes the practice of law (*People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599, 1609), we will highlight *some* of the activities that Hoffman and other similarly situated defrocked former attorneys <u>*cannot*</u> perform, including in the context of workers' compensation cases:

> (1) filing pleadings reflecting that the defrocked attorney is "appearing" on behalf of another (*Gentis v. Safeguard Business Systems, Inc*. (1998) 60 Cal.App.4th 1294, 1308);
>
> (2) negotiating and settling claims on behalf of a client with third parties (*Birbrower, supra,* 17 Cal.4th at p. 131; *Morgan v. State Bar* (1990) 51 Cal.3d 598, 603; *Benninghoff*, *supra*, 136 Cal.App.4th at p. 69; see also, Rules Prof. Conduct, rule 1-311(B)(4));
>
> (3) preparing stipulations and other documents for mandatory settlement conferences and trials (*Morgan*, *supra*, 51 Cal.3d at p. 603; *Arm v. State Bar* (1990) 50 Cal.3d 763, 773-774, 778);
>
> (4) appearing at depositions on behalf of another (*Ex Parte McCue* (1930) 211 Cal. 57, 68; see also, Rules Prof. Conduct, rule 1-311(B)(3)); and
>
> (5) engaging in discovery or responding to discovery requests (*Benninghoff*, *supra*, 136 Cal.App.4th at p. 69).

There are, however, some legal-related activities that may be performed by former attorneys who have been disbarred or suspended, who are involuntarily inactive, or who have resigned with disciplinary proceedings pending may perform. For example, they may engage in: (1) legal work of a preparatory nature, such as legal research, assembling data and other necessary information, or assisting in the drafting of pleadings, briefs, and other similar documents (Rules Prof. Conduct, rule 1-311(C)(1)); (2) direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages (Rules Prof. Conduct, rule 1-311(C)(2)); or (3) accompanying an active member in attending a deposition or other discovery matter for the limited purpose of

providing clerical assistance to the active member who will appear as the representative of the client (Rules Prof. Conduct, rule 1-311(C)(3)).

As a final point, we observe that Hoffman has not petitioned the Appeals Board for permission to appear under Rule 10779. Accordingly, we need not and will not now express an opinion regarding whether, in light of *Benninghoff*'s interpretation of the State Bar Act, the portion of Rule 10779 that allows former attorneys who have lost their licenses to petition the Appeals Board for permission to appear continues to be valid. If, however, Hoffman chooses to file a petition for permission to appear, he should address whether *Benninghoff* has any effect on the continuing validity of that portion of Rule 10779.

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For the foregoing reasons,

IT IS ORDERED that the Findings and Order issued by the workers' compensation administrative law judge on August 9, 2005, be, and it is hereby, **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ James C. Cuneo

I CONCUR,

/s/ William K. O'Brien

/s/ Frank M. Brass

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
5/17/06

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD.

NPS/bea