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TESTIMONY OF CENTER FOR PUBLIC INTEREST LAW SENIOR COUNSEL ED HOWARD REGARDING EX PARTE COMMUNICATION DISCLOSURE

Respectfully submitted to the Little Hoover Commission

INTRODUCTION

It is well-accepted by scholars that ex parte communications during non-adjudicatory administrative deliberations[1] are an effective way for interest groups to persuade regulatory agencies to do things or not do things. Practitioners who actually represent clients and interests before such agencies do not need scholarly confirmation of this fact. If ex parte lobbying didn't work to achieve the objectives of interest groups, the groups would not pay for it and lobbyists or other representatives wouldn't do it, favoring strategies that accomplished their aims.

Secret ex parte communications are among the most effective ways for powerful regulated interests to accomplish their objectives. This is because they can influence the opinions or bias the views of unelected and largely anonymous regulators and staff without the public, the press, or their opponents ever knowing that the communications-lobbying has occurred. In the absence of such knowledge, the press and the public cannot hold decision-makers fully accountable for the fairness and quality of their deliberations, and resource-strapped advocates who might oppose those interests in a matter won't know to re-direct their limited resources to do so.

Because of ex parte lobbying, the public rule-making process is a too often a charade; the game won or lost before the game has even formally begun.

Indeed, as Professor Fellmeth trenchantly observed in his October 2014 testimony before the Commission on the Bagley-Keene Open Meetings Act ("BK"), the lack of regulation of ex parte communications makes (in my words) a mockery of open meetings laws, including the BK:

> But this *ex parte* problem relates to the central rationale behind the BK Act, which is to prevent such private arguments from being the sole determinant of the final decision. That abuse is facilitated by favorable private cross-communication of messages contaminated by *ex parte* lobbying between commission members. But whether communicated to commissioner "x" who then communicates it to commissioner "y" and then to "z" in violation of the BK Act, the underlying problem is the unfair, secret, one sided argument being made. Indeed, the special interests counter BK compliance by themselves each communicating that concealed

[1] I use the word "deliberations" here instead of "proceedings" intentionally, as often the most effective ex parte communications about regulations occur prior to the initiation of formal quasi-legislative proceedings.

> message to commissioners x, y and z themselves – accomplishing the same end – one which undermines the BK Act intent to have transparent public decisions made with public input and balanced consideration. And it violates that intent without violating the terms of the BK Act itself. The passive assent by a majority of public commissioners to a special interest decision arranged by private orchestration does not advance democratic values. Any system where one side may make claims without any check of the source, or consideration of alternative and contrary evidence, is dangerous.
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> Our longstanding concern over fair testing of evidence from all sides leads us to recommend a reexamination of *ex parte* messaging. It is clear that they are a problem even in an agency that has rules limiting their incidence, such as the PUC. But there are two problems with current law guiding agencies here: (1) *ex parte* rules are relaxed or non-existent for proceedings that are not pure adjudications (including the hybrid proceedings where evidence is taken in a confined hearing setting); and (2) those prohibitions/limitations are honored in the breach.

This paper is based on my personal experience representing consumer, civil rights, and environmental groups before such agencies, for over twenty years. It is also based on my experience working for five years for a State Senator who oversaw the Department of Consumer Affairs licensing boards and bureaus, and who often wrestled with the trade groups that sought to influence their decisions. It is based on personal experiences representing public interest organizations or the Senator before the following California boards and commissions: the Athletic Commission, the Board of Chiropractic Examiners, the Medical Board of California, the Board of Accountancy, the Public Utilities Commission, the Department of Insurance, the State Lands Commission, the Coastal Commission, the Court Reporters Board, the Acupuncture Board, the Nursing Board, the Bureau of Private Postsecondary Education, and the Cemetery and Funeral Bureau.

It is also, to a lesser extent, based on my tenure at the California Performance Review, tasked with reviewing all of the state's boards and commissions, and the same charge in the Legislature, as Chief Consultant of the Joint Committee on Boards, Commissions, and Consumer Protection.

TESTIMONY

The Commission's Executive Director has asked that the following topics be addressed.

1. Differing Ex Parte Rules Between State And Federal Agencies, Between Resource And Energy Agencies And All Other State Agencies.

Rarely does government reform proceed in a fashion that embraces federal and state governments concurrently. This has to do with the resource-limited nature of public interest advocacy.

And, rarely does a public interest result occur in the absence of public interest advocacy supporting it; working to overcome typically well-funded, and highly professional, numerous, and effective regulated industry opposition. Thus, when it comes to explaining why a public interest result occurred in one place and not another, the most likely explanation will be found in identifying where the public interest advocacy was directed. During the period of the 1960s through the 1980s, an

enormous amount of "good government" public interest advocacy and attention was funded and focused on the federal government.[2] Once the victories there were won, and the battle turned to the states, it is likely that there simply were no public interest groups in the statehouses that could successfully overcome industry opposition and successfully bring federal precedents to the states.

An example in California is instructive. SB 963 (Ridley-Thomas) sought in 2008 to enact ex parte communication disclosure for the Department of Consumer Affairs boards and bureaus. The relevant language read:

> **SEC. 5.**
> **Section 38 is added to the Business and Professions Code, to read:**
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> **38.**
> **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.**

I worked closely with staff from the authoring Senator and this provision had the full support of senior staff to Senate pro Tem (now Commissioner) Don Perata, the Senator who authored the bill, and CPIL.

[2] I want to emphasize the funding aspect here. Long past is the time when major philanthropies pay for public interest organizations with a generalized mission to act as a counter-weight to the power of aggregated private interests. Now, as any public interest advocate who must also raise funds will tell you, funders will typically only commit to niche causes, and the more niche, the better. Instead of, for example, funding the representation of consumers before the Department of Consumer Affairs or the PUC generally, leaving it to the specialist advocates to move resources between fights as the public interest demands, funders more commonly want to fund this or that aspect of such advocacy, even while the broader public interest suffers. Advocates seeking to keep alive a broad mission for years have contorted programmatic emphasis away from the broad public interest in obedience to the funding priorities conjured of non-expert philanthropies. Worse, lobbying and litigation – the two most needed forms of counter-weight advocacy – are disfavored by funders. When I began work in the State Capitol in 2001, many different high profile public interest groups were actively engaged in lobbying issues related to technology and privacy; it was a part of their general mission. That is no longer the case and a lack of generalized philanthropic support is responsible. The result is that the privacy reforms enacted over furious business opposition in the early 2000s – the Confidentiality of Medical Information Act, the national program-inspiring California "Do Not Call" anti-telemarketing list, financial privacy disclosure, to take just three examples – were the high water mark of such reforms. Now, with little public interest advocacy support, privacy bills that would have more easily moved through the Legislature years ago, now are easily killed. All of this enhances the need for ex parte disclosure because, with just a few exceptions where there exist intervenor funding sources of revenue, public interest advocates simply cannot anymore manage to cover regulatory agencies generally as they used to, and hence are in a reactive mode.

I was invited to a meeting of "stakeholders" convened by Senator Perata's staff in a legislative hearing room to discuss this provision. It was standing room only. Representing consumers: me, although others were invited, none had funding to work on DCA issues. The rest of the room was filled with lobbyists from every trade group whose professions are regulated by the Department of Consumer Affairs: physicians, engineers, CPAs, podiatrists, you name it. Staff asked, please stand if you are in favor of the disclosure. Only I stood up. Cue nervous laughter from among my lobbyist colleagues. "Who represents clients that would be opposed?" The rest of the audience of about 50 stood up.

The language was eventually stripped from the bill. Preceding this, a slate of regulatory boards – ironically, lobbied ex parte – began taking opposing positions on the bill owing to the ex parte provision.

As for why the resource boards and commissions? One answer may be the attention of this Commission which long ago led the charge for such disclosures in the area of resource agencies:

> There is no limit on ex parte communications (outside of official forum) by anyone appearing before the CWMB in a quasi-judicial matter. Thus, it is possible that interactions between a person and the CWMB could greatly influence the CWMB's actions in a quasijudicial matter but not became a matter of public record.

www.lhc.ca.gov/studies/096/report96.PDF (1989)[3]

2. Unrestricted Ex Parte Communications As Contributing To Public Scorn Of Government.

To the extent that the public learns that secret communications between the regulated and the regulator have an impact on decisions that affect them, ex parte communications do rightly contribute to the overall impression that government bends more toward special interests than the needs of the public interest.

[3] The Commission once came under some criticism from at least one source – a then-sitting Commissioner, former *Los Angeles Times* Sacramento Bureau Chief Virginia Ellis -- for itself for not effectively ensuring that all voices are heard, and tracing that imbalance to the results of a Commission report: "The report recommends that regulatory agencies reach out to all stakeholders early in the regulation-drafting process and subject proposed new regulations to a cost-effectiveness standard before adopting new rules. Yet, the report does neither of these things before recommending its proposed rules. During the study process for the report-- analogous to the internal drafting of regulations--the full Commission heard testimony from invited academicians, businesses and regulated entities. Only when the Commission was poised to write its full report--analogous to when regulations are about to be put out for public comment--did an advisory panel hear from a group who supports regulations protecting safety and the environment. None were ever invited to testify individually. Commissioners have argued that those who were not invited could have simply attended meetings on their own. Not only does this ignore the relative obscurity of both Commission and regulatory proceedings (which is why the report recommends that regulators reach out to stakeholders), the argument fails to explain why some warranted an invitation and others did not." Better Regulation: Improving California's Rulemaking Process (2011), Dissent by Commissioner Virginia Ellis, Appendix F, pp. 61-63. A search of "ex parte" did not quickly reveal whether the Commission had rules governing ex parte communications.

3. Disclosure: Benefits vs. No Downside.

There is simply no downside to ex parte disclosure. We are unaware of any scholarly study at all, let alone a good one, that documents a diminution of effective regulation or decision-making owing to ex parte disclosure or even outright, stricter regulation. This is in contrast to the comparatively vast scholarship documenting how the absence of disclosure skews deliberations and decision-making.

Practice, too, bolsters this "no downside" conclusion. Once ex parte disclosure has been implemented, there is no clamoring to get rid of it among the regulated industry or the affected agencies themselves.

Done sensibly, disclosure – openness generally -- works to restore confidence in government because it does in fact have a salutary, anti-corrupting impact on the operations of government. It also lends balance to the information-gathering of decision-makers by alerting advocates that their voices are needed as a counter-weight in this or that proceeding or with this or that regulator. It also does not dissuade lobbying, as if lobbying could be dissuaded, and has no impact on legitimate, policy-based arguments as there is no reason to be ashamed of such positions, or a need to cloak them in secrecy. In fact, if the argument is a good one, the person communicating it should want disclosure to better hold the decision-maker accountable if the good argument is not heeded

4. Recommendations.

Such communications should properly at least be banned during formal quasi-legislative proceedings affecting the lives and finances of millions as they banned are during quasi-adjudicatory proceedings affecting one person. From Professor Fellmeth's prior testimony:

> The fact that legislators operate in extreme *ex parte* license has infected the executive branch with a similar mindset. And to their discredit, legislators have been unwilling to limit that license for themselves or for the entities they create. That has to change. For the balance of advocacy before the Legislature and these agencies (whose meetings we have been attending for 35 years) has become increasingly and alarmingly imbalanced. Leaving the Legislature aside, the agencies are divided into territories that correspond to the interests of specific economic-stake lobbies. They attend all meetings and are much involved in their own regulation – regulation intended and designed to constrain them *visà- vis* the general public. It is the latter that is the touchstone of a democracy. Our system properly separates the public domain from profit-stake interests.
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> And so we ask: Why are any *ex parte* communications to an agency allowed, period, including to the persons charged with the final public decision? Given modern communications, why cannot every such communication be posted where it may be viewed and commented upon by others? What is the advantage to private conversations making contentions free from any check from any other source? Is there really a privacy concern here? What is it? Perhaps a separate channel could be allowed where legitimate "trade secret" disclosures are implicated. But we should all appreciate that this basis for corporate concealment is abused *in extremis*. Perhaps we could go halfway and limit such private communications -- at least where the subject matter "is an issue currently before the agency for consideration and decision." …

> But whether the matter be adjudication, or hybrid rate setting or rulemaking – why should these officials (who are not themselves elected and directly accountable via that mechanism) not be required to function in public, with what they receive and what they decide all transparent to those who are their real governors – we the People? The radical change in communications technology over the past two decades especially commends such an alteration. To be sure, communications concerning scheduling or other matters without substantive elements relevant to the decisionmaking consideration of the agency may be excepted. But a public official subject to an *ex parte* phone call simply types who communicated, the basic contentions made, and posts it. An e-mail sent to a public official concerning substantive policy is copied and pasted to a central index kept by each agency and accessible from the web site. Any letters or written contentions are scanned by a simple machine now common and are similarly posted – all in a subject matter format allowing easy access. Replies, corrections and additional evidence may then be sent by any person to those who received the messages, and to the central repository for all to view. What communications do we want to allow in private, without such check? Why? What is the downside?
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> The change above would certainly ameliorate the concerns expressed about communications between commissioners or board members. For a major area of concern has to do with those serial communications augmenting private lobbying that lacks factual check or counter-comment. And the prevalence of this abuse is the open secret in Sacramento – one that should be of special concern to this Honorable Commission.

At minimum, the language from SB 936 above should apply to all government communications during open quasi-legislative proceedings.

5. The BK and Ex Parte Communications.

As mentioned above, the BK is a charade in much of its application in the absence of any regulation or disclosure of secret and serial deliberations sponsored by lobbyists or representatives for regulated industries.

Respectfully submitted:

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