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Administrative Hearing Officer Committee
State Capitol
Boise, Idaho

Re: Draft Legislation KAG003 Regarding the Administrative Procedure Act (APA)

Dear Committee:

I am counsel to the Idaho Boards of Dentistry and Professional Engineers and Professional Land Surveyors. My clients have asked me to review Draft DRKAG003 regarding the Administrative Procedure Act (APA). For the record, my 22 years of experience in administrative law consists of representing clients before state agencies, acting as a hearing officer, and advising state and local governmental entities.

The draft fills in current gaps in the law, and is well taken where it does so. But it also contains enough new proposals so that it can only be described as a major revision in the law.

The draft, although understood as pertaining primarily to hearing officers, has significant effects beyond requiring lawyers to hear matters. The draft has provisions that change the way evidence is received and used, and adds strictures more in keeping with the criminal courtroom than an administrative proceeding. It also revises the role of the judiciary in highly significant ways.

While it is my intent to speak about the potential changes in the draft that have application to the licensing process, it is to be remembered that the draft has direct application to every board and agency of every kind at the state level, affecting administrative processes in a wide array of circumstances, affecting agencies tasked with administering federal law, such as DEQ, agencies tasked with granting certifications, such as the POST Council, to non-state governmental entities dealing with permitting, such as Health Districts, to counties and cities acting under the Land Use Planning Act. It is also to be remembered that the draft conflicts significantly with the Attorney General's Rules of Administrative Procedure, so that those rules will require extensive revision should the draft be passed into law

From the perspective of the dental, engineering and surveying professions, the overwhelming majority of licensees never come to the attention of the Boards. When a licensee does come before a board, it will almost always be for one of four reasons. Each of those reasons requires a hearing under the APA, as the matter will involve a liberty or property interest. Hence they are "contested cases." The first three classes of cases are:

- The *granting* of an initial license or renewal in the face of admitted misconduct.

For example, occasionally a person will apply for a license and will disclose that he or she has been subject to criminal sanctions or discipline in another state, which might in theory allow the board to deny the application. When this occurs, the board will hold a hearing to determine whether to grant the license, which almost always results in the granting of the license with some conditions or restrictions, often readily agreed to by the applicant.

- The *monitoring* of an agreed upon condition of a license.

When a licensee has agreed to a condition of a license, such as maintaining certain qualifications or refraining from doing certain things (often involving controlled substances), a licensee may fail to comply with the condition. A hearing is held to determine what can be done to protect the public safety.

- Failure to comply with professional development education.

Most professionals are required to meet professional development hours as a matter of state law. When one does not comply, a hearing is set up.

Section 7 of the draft requires an attorney presiding officer to conduct the hearing in all these cases. With respect, interjecting an attorney hearing officer in such matters is not only unwarranted, it would be counterproductive. The facts are rarely in dispute; the licensee usually admits the misconduct and offers remedies. Given the board's task of protecting the public by determining what should be reasonably required of a licensee in these matters, there is simply no reason to hire a lawyer at public expense to find facts that are already obvious to everyone involved. Moreover, the procedures set forth in the draft (especially sections 18 and 19) require extensive written fact finding, and mandatory delays in the finalization of an order. This is usually the opposite of what the licensee wants to have happen.

Given the limited information before us at this time, it is doubtful that the proponents of the draft intended to impose such strictures in such relatively simple and straightforward hearings. Yet, the draft mandates such strictures.

The fourth category of contested cases is presumably what the proponents of the draft focused upon. That category is the disciplinary hearing, based upon a formal complaint of a violation of state law. The current statute and rules expressly deal with how such hearings are to be conducted and have been followed in this state for decades. Every board counsel is familiar with the law and must advise the board in compliance with the law. The significant difference between the draft and current law is the draft's requirement that a lawyer always must be the presiding officer as opposed to a board. The issue is whether this is reasonable in all cases.

For example, a complaint may be based upon an obvious statutory violation. A licensee may be convicted of a major felony, or may have been found to have made a glaring error contrary to explicit law, or may have been found to have been misusing controlled substances. These relatively straightforward cases do not call for a lawyer to act as a buffer before the board can find facts in the matter and issue a disciplinary order.

Conversely, a finding may turn upon highly esoteric information outside the experience of those not in the profession. In the practice of engineering, complex applications of the principles of physics, accompanied by computerized mathematical computation, are the norm. Why is better that a lawyer find facts based on these calculations than subject matter experts? This is not to say reasonable fact finding cannot be made by a lawyer, it can. But a lawyer will have to be educated by expert witnesses at length, and at significant expense.

It is important to recognize that even under the conditions set forth in the draft bill, the board makes the ultimate decision regarding discipline. What is required in the draft is that the discipline must be set out based solely upon a cold written record. And as described below, the board would be handcuffed from revising even the most obvious mistakes of fact made by the lawyer presiding officer.

Having said that, there are other concerning aspects to the draft. Section 7 sets out a disqualification standard based upon fact-finding, and conflicts with the current rules allowing for one-time disqualification without cause. The standard for disqualification is somewhat vague, and will certainly be used as a cudgel against the presiding officer.

Section 8 requires hearings to be open to the public. There are two issues with this. The first is that it conflicts with the open meeting and public records laws, which explicitly state that information received in cases involving fitness to retain a license is private. The second issue is that some cases involve physical or sexual abuse, the details of which should not be open to the media or any person with an interest. The courts cannot close such hearings, but heretofore boards can.

Section 8 also allows representation of clients by a lay person. My experience has shown that this type of procedure has proven to be extremely counterproductive.

Section 9 explicitly allows for hearsay, but section 18 states that it cannot be used to make findings absent application of the complexity contained in Article VIII of the rules of evidence, currently running to 21 single space pages. Read literally, section 18 would prevent the use of transcripts of sworn testimony, court records and certified documents, let alone police reports attorney's letters and surveyor's sworn interviews.

Section 12 requires hearings after emergency orders within two days if someone objects to the hearing coming within thirty days. Two days between the issuance of an order and a hearing is not reasonable for anyone.

Section 14 mandates intervention in a case by anyone having a theoretical interest. Having once presided over a clean water act case where 30 lay persons sought to intervene, raising clean air, land use and endangered species matters, I can state unequivocally that mandatory intervention is a recipe for chaos, unnecessary delay and unreasonable expense to the parties. Intervention should be a matter of discretion.

Section 16 introduces the exculpatory evidence doctrine into civil discovery proceedings. The doctrine is a product of criminal jurisprudence and is enforced by the exclusionary rule, also having no application to civil matters. The idea is that evidence of criminal innocence must be disclosed. Discovery is wide open in the civil law, with such concepts as the right to remain silent having no application. Idaho's current rules on civil discovery contain no mention of exculpatory evidence, for the reason that the doctrine is foreign to civil law.

Section 19 prevents a board from sending a presiding officer's findings of fact back for more fact finding. In other words, the section mandates that boards are stuck with the findings of fact, no matter how transparently wrong. The notion that a reviewing body cannot send findings back for more work is alien to the civil law.

Section 22 sets out a process for the indexing of precedential orders. While the concept is well taken, redacting or removing the precedential orders should be left to board discretion, not the presiding hearing officer, who's role is limited to fact finding in individual cases.

Section 24 contains a subsection that is both vague and sweeping. Read literally, subsection (4) would allow a court to take over the running of an agency or board, the way federal courts run state correctional systems. While there is always a place for injunctions or writs of mandate, they should not be litigated in the guise of review of an administrative order.

Section 29 seems to indicate that trials can be held regarding ministerial acts of an agency or board, so that a record can be developed for an appeal of ministerial acts. Like section 24, this seems to give courts sweeping power to run agencies, down to ministerial minutiae, as the court deems fit. Moreover, it seems to allow for appeals of matters not formerly considered appealable. Added to this, section 29 allows for full litigations, including discovery, on what the record on appeal should look like.

Section 30 allows courts to substitute their judgment for the agency's judgment. This is wholly outside current law, and in fact allows a court to retry any decision that it finds "unwarranted."

Obviously, there is much to be done. My clients stand ready to meet with the proponents to discuss this draft further.

Thank you.

Yours very truly,

MICHAEL J. KANE

MJK:tlp
cc: Clients