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A Primer On Defending Your Calif. Insurance License

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For clients, there is little that can match the emotion of receiving an accusation from the California Department of Insurance seeking to revoke the license that justifies your business's existence. The reason is that licensees are conditioned to believe they have little to no rights when defending against the department. In this instance, it is good to be wrong.

An accusation is a charging document; the document the department must issue to place the licensee on notice of what it is alleging as violations of insurance laws. It is only in the rarest situations that the department can essentially skip the issuance of an accusation and summarily revoke a license. This is good news because if the department believes insurance laws have been violated, it must tell a licensee, with specificity, what it is that was allegedly violated. This is a requirement that a licensee be provided "notice."[1] This starts the process that leads to an administrative hearing.

After receiving notice, the licensee is entitled to respond by serving its own notice that it intends to defend itself and would like a hearing. All accusations are served with a notice of defense form, but this does not include a critical document most often missed by novice practitioners — a "special notice of defense."[2] A special notice of defense is parallel to affirmative defenses in civil litigation — if they are not raised at a certain time, these defenses are forever waived.

The value of the special notice of defense is that it lays the foundation for the licensee to go on the offensive, not only demanding that the department provide evidence supporting its allegations but also raising potential shields to its allegations. For example, it can provide the basis for the licensee to seek an immediate dismissal of the allegations if the department has failed to follow specified legal requirements in bringing the action. While rarely granted, this practice compels the department to provide more facts to justify its position.

Advantageously, in some instances, the department will realize that some of the alleged violations are incorrect and it will dismiss those aspects of its accusation. Surprisingly, this happens more often than many assume. As a result, before the discovery battles begin, the department's allegations may already be cut down to a more manageable size. Through a carefully crafted litigation strategy, licensees can often prevail at this stage in the proceedings.

The licensee should also serve a discovery request that seeks to obtain all of the investigation files, which the department will be required to produce.[3] These files offer a treasure trove for the defense, as they are often incomplete, lack proper investigation tactics and reveal helpful facts for defending the action. Attacking the department's investigation and demonstrating the flaws between the investigation results

and the allegations can be devastating to the department's case. In one particular case, it was uncovered that certain witnesses actually provided declarations contrary to the allegations found in the accusation. While such gems are infrequently found, they can bring the department's case to a screeching halt.

Even if a case-collapsing piece of evidence does not turn up in the investigation file, it is important for the licensee to persist. After all, at hearing, it is the department as the party prosecuting the action — not the licensee — that has the burden of proof to show that the allegations in the accusation are supported by the evidence. Because an insurance license is considered to be a "professional license," the standard of proof that the department must meet is "clear and convincing." Furman v. State Bar (1938) 12 Cal.2d 212; Ettinger v. Board Of Medical Quality Assurance (1982) 135 Cal.App.3d 853; Realty Projects Inc. v. Smith (1973) 32 Cal.App.3d 204.

This burden is not an easy one and can be a difficult level of proof for the department to establish. Importantly, the hearing takes place before an administrative law judge and not a jury.[4] This usually means there is less opportunity for "emotion" to come into play, as the administrative law judge respectfully adheres to the burden of proof requirement.

In order to establish that the department has not met its burden, the licensee must cross-examine the department's witnesses and then call its own witnesses to provide the necessary evidence upon which the administrative law judge can rely in rendering a decision in the licensee's favor. The witnesses called at trial are like any other trial; they can be impeached and, better yet, converted to testify in a manner that actually helps a licensee's version of events and disproves the underlying allegations. The opportunity to cross-examine a witness should never be skipped. Over the years, the numbers of "department" witnesses that have proven to be assets instead of liabilities at trial are countless. In fact, in one recent case, the department's own investigator turned out to be the one of the best witnesses for the licensee because the investigator told the truth and was forced to admit that the investigation failed to uncover any evidence that supported the department's allegations.

At the conclusion of the case, the administrative law judge issues a proposed decision.[5] Uniquely, the department is allowed the opportunity to either accept or reject the proposed decision.[6] When the defense prevails and the commissioner adopts the decision, the case officially concludes and the accusation is dismissed. In the rare instance that the department rejects the proposed decision, the licensee is still entitled to challenge that the department's rejection of the proposed decision in a state appellate court.

Above all else, it is important to remember the licensee has rights and that those rights are substantial. It is not necessary, or even smart business, to simply concede to the allegations in a department accusation when, oftentimes, the allegations can be defeated.

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[1] CAL. GOV. CODE § 11503.

[2] CAL. GOV. CODE § 11506.

[3] CAL GOV. CODE § 11507.6.

[4] CAL. GOV. CODE § 11502.

[5] CAL. GOV. CODE § 11517(c)(1).

[6] CAL. GOV. CODE § 11517(c)(2).
