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Common Issues in Quasi- Judicial Hearings

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Overview

- ▶ Set up Morongo and Sabey discussions -- attorney functions
 - Focus on quasi-judicial hearings
 - ▶ Overview of due process and applicable law
 - Due process tests
 - Key distinctions
 - ▶ Practical discussion of useful procedural protections and examples
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Quasi-Judicial Hearings

- ▶ Quasi-judicial = administrative
 - ▶ Quasi-judicial hearing:
 - held to apply a rule or standard to an individual person, project or circumstance
 - involves the taking of evidence
 - results in a written decision and findings by the hearing officer or tribunal
 - decision is based on the facts and arguments submitted at the hearing
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Quasi-Judicial vs. Legislative or Ministerial Proceedings

- ▶ Quasi-judicial proceedings affect individual properties or parties
 - ▶ Legislative actions formulate rules to be applied to all future cases
 - ▶ Ministerial decisions are those the decision maker itself is forced to follow
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Applicable Laws



- ▶ Federal and State due process
 - Notice
 - Opportunity to be heard by unbiased tribunal
- ▶ CCP 1094.5—fair hearing, impartial tribunal
- ▶ Specific hearing requirements Administrative Procedure Act

Due Process

- ▶ Federal due process: *Mathews v. Eldridge* (1976) 424 US 319, 331
 - Constraints on governmental decisions that deprive individuals of 'liberty' or 'property' interests
- ▶ State due process: *People v. Ramirez* (1979) 25 Cal.3d 260, 268–69
 - includes a liberty interest in "freedom from arbitrary adjudicative procedures"

Code of Civil Procedure section 1094.5 – Administrative Mandate

- ▶ In administrative decisions, 1094.5 provides a statutory right to a fair hearing before an impartial tribunal.
 - Did the agency proceed without, or in excess of, its jurisdiction?
 - Was there a fair hearing (based on due process principles)?
 - Was there an abuse of discretion? Meaning,
 - Failure to proceed in a manner required by law
 - No findings
 - Findings not supported by evidence

California Administrative Procedures Act

- ▶ Expressly inapplicable to cities and other local agencies unless adopted, but courts have looked to the APA for guidance in analyzing quasi-judicial issues involving cities. *Nightlife Partners Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 92

What Process is Due?

- ▶ Unlike technical rules, due process is flexible and "calls for such procedural protections as the situation demands."
Mathews
- ▶ “*Mathews-plus test*” *People v. Ramirez*, 25 Cal.3d 260
 - The private interest that will be affected by the official action
 - The risk of an erroneous deprivation of the interest through procedures used, and the probable value, if any, of additional safeguards
 - The governmental interest, including the fiscal and administrative burdens that the additional procedural requirement would entail
 - California adds: The dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side.
- ▶ *Mathews* says “the essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and the opportunity to meet it.”

Evaluative or Investigative vs. Adversarial or Prosecutorial Functions

- ▶ Hearings in which attorneys are in an evaluative role
 - Separation of functions generally not required. *Witt Home Ranch, Inc. v. County of Sonoma* (2008) 165 Cal.App.4th 543.
 - Not commonly characterized by heightened due process protections
 - Ex: Land use permit applications, business license applications
 - Similarities to investigative function. E.g., Superintendent in *Today's Fresh Start*.
- ▶ Hearings with prosecutorial/advocate attorney functions
 - Separation of functions may be required
 - Greater due process protections are more common
 - Ex: land use permit revocation/non-renewal (*Nightlife*), appeals of personnel complaints (*Howitt*), employee termination (*Sabey*), mobilehome rent control (*Manufactured Home Comm.*)

Flexible Nature of Due Process Leads to Need for Judgment in Determining Level of Protections

- ▶ “the differences in the origin and function of administrative agencies ‘preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts [to the administrative setting].’”
Mathews v. Eldridge (1976) 424 US 319, 348
- ▶ “[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.” *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy* (1961) 367 US 886, 896
- ▶ Focus on “what would the proposed additional procedures add to the fairness and accuracy of the proceedings”
 - No presumption in favor of formal evidentiary hearing. *Today's Fresh Start* (2013) 57 Cal.4th 197, 228

The subject of a nuisance abatement hearing is raising 10 chickens and 3 roosters at his single-family residence. A Council Member tells you that she visited the house to check out “how bad the noise from the property actually is.” She tells you that she thinks chickens are “dirty animals,” and the noise from the roosters is “terrible.” At the hearing, she makes no mention of visiting the house.

Problem?

Yes.



Ex Parte Contacts

- ▶ When an administrative adjudicator uses evidence outside the record. *Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 Cal.App.4th 1305, 1319; *English v. City of Long Beach* (1950) 35 Cal.2d 155, 159
 - There is a denial of a fair hearing as to that evidence because “there has been no hearing,” it is a “hearing in form, but not in substance”
 - There is also a potential for the appearance of bias on the part of the decision makers
 - Prevents possible refutation or rebuttal
 - Findings problem, unreported ex parte evidence not in the record
 - CCP § 1094.5
 - *Topanga Association for a Scenic Community v. County of Los Angeles*

Ex Parte Contacts

- ▶ Ex parte prohibitions and reporting requirements avert these types of due process violations
- ▶ As long as the information obtained is not concealed, hearing bodies may consider “outside information” (*Flagstad v. San Mateo* (1957) 156 Cal.App.2d 138; *Candlestick Properties v. BCDP* (1970) 11 Cal.App.3d 557.)
- ▶ How should ex parte contacts be reported?
 - At the start of the hearing.
- ▶ Is reporting ever not enough?
 - Perhaps, if
 - there is a local prohibition against hearsay evidence
 - the information is highly technical

At the beginning of a meeting, with ten adversarial administrative hearings on personnel determinations, the Chair asks everyone present who is going to testify to rise and take the oath that their testimony will be true and correct, etc.



Good Practice?

Yes and No

Sworn Testimony

- ▶ Yes. There is an oath.
 - Useful where witnesses are self-interested and have a motivation to lie, and where issues of facts are “fully and hotly contested.” *Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 291
- ▶ No. Not everyone who will testify is taking it.
 - Joe Smith, a subject of a controversial personnel appeal who happens to have a particular medical condition, is on his third trip to the men’s room in the last two hours and misses the oath
- ▶ System needs to be reliable, verifiable, and ideally unobtrusive to decision makers and the public

Sworn Testimony – Examples

- ▶ Common in personnel matters. See e.g., Los Angeles Civil Service Rules section 12.5, San Mateo County Civil Service Rules section 7
 - Not required in nuisance abatement. (*Mohilef* using the *Mathews* analysis)
- ▶ Recommended practice: add an oath with a signature block to the sign in sheets or speakers cards and check that subjects and witnesses sign in.



An employee is disciplined for sexual harassment of a colleague. She appeals. At the hearing, the employee asks to cross-examine a witness who testified about one of the incidents.

Should the hearing body allow cross-examination?

Yes.



Cross-Examination

- ▶ “the greatest legal engine ever invented for the discovery of truth.” *Manufactured Home Communities v. County of San Luis Obispo* (2008) 167 Cal.App.4th 705, 712
- ▶ Importance of cross examination can depend on the type of evidence. Compare two mobile home rent control cases
 - *Stardust Mobile Estates v. City of San Buenaventura* (cross not req'd, cases involving documentary evidence, rather than cases that turn on live testimony, do not require cross-examination and confrontation of witnesses)
 - *Manufactured Home Communities* (cross req'd, especially important where findings against a party are based on an adverse witness's testimony)
- ▶ Generally not mandated in nuisance abatement because it would “strip the public hearings of their informality,” “unnecessarily lengthen the hearings,” and “encourage witnesses to retain counsel or not testify at all.” *Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 301

Cross-Examination Examples

- ▶ Palo Alto, compare
 - In administrative code citation hearings: right to cross-examine and subpoena witnesses and documents. Palo Alto Municipal Code (“PAMC”) §1.12.090(c).
 - In land use subdivision appeal hearings: no explicit right to cross-examine or put on witnesses. PAMC §21.36, *et seq.*
- ▶ Stockton
 - Civil Service Rules for disciplinary appeals allow cross-examination. Rules XIV, XIIA.

An auto body repair shop is the subject of a nuisance abatement proceeding. The citation identifies 13 separate issues, including “excessive noise.” At the hearing, after staff and the shop owner have completed their presentations, a member of the hearing body asks how staff knows the noise exceeds the limits in the municipal code. Only then, does staff provide the hearing body and shop owner with a copy of a noise study it conducted the previous week. The shop owner has not read the study. He stands up and says he does not understand and wants an opportunity to read it.

Should the hearing
be continued?

Yes



Rebuttal

- ▶ “A hearing requires the party be appraised of the evidence against him so that he may have an opportunity to refute, test, and explain it.” *English v. City of Long Beach* (1950) 35 Cal.2d 155, 159
- ▶ Improper restrictions on the right to present evidence in rebuttal violate due process. *Pence v. Industrial Acc. Com.* (1965) 63 Cal.2d 48, 50–51

Two aspects

- Right to confront evidence
 - Some cases consider whether evidence was “concealed.” E.g., *Candlestick Properties v. BCDC* (1970) 11 Cal.App.3d 557, 570. Right of rebuttal is thus similar to requirement to report ex parte contacts.
 - Actual extra time reserved for the subject of the hearing to persuade the decision maker
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- ▶ Useful to show subject was informed of all the evidence presented at hearing

“Dear City Manager Jones, several people noticed Council Members accessing their city-provided devices – iPad, PA, whatever they are called – during deliberations at last week’s meeting. This is a formal Public Records Request for a list of any and all contacts, messages, or views made by Council Members on the date of the last council meeting, during or after the meeting. This is to include, but not be limited to, any and all emails to or from those devices, any and all text or video messages, and any and all web searches. Thanks, Publisher Smith”




Electronic Communications

- ▶ May be subject to disclosure under the Public Records Act
 - *Smith v. City of San Jose* (March 15, 2013) Santa Clara Superior Court Case No. 1-09-CV-150427
 - Possibility that records, even on personally owned electronic devices, subject to disclosure
- ▶ Due process: denial of fair tribunal, decision on evidence
 - *Depublished Lacy Street Hospitality Service, Inc. v. City of Los Angeles* (2004) 125 Cal.App.4th 526: videotape of Council talking on cell phone, eating, talking with aides, doing paperwork during hearing.
 - Held: Council was “obligated to pay attention, as in the obligation of sitting members of the judiciary.” Too far?
- ▶ Texting, emailing during a hearing can lead to the perception and create evidence that the body is disinterested and not determining the issues on the evidence.

Electronic Communications – Example Policies

- ▶ City and County of San Francisco’s “Good Government Guide”
 - strongly discourages the use of text messaging and the use of other electronic communication devices during meetings
 - emphasizes that the use of electronic communication devices can be particularly problematic during an adjudicative hearing where an individual’s due process rights may be compromised
- ▶ City of Petaluma Resolution No. 2012–026 N.C.S.
 - bans the use of electronic communications and data “in violation of due process rights of interested parties at adjudicatory hearings, such as by use of an electronic communications and data device so as to result in inattention to the record and/or proceedings before the body.”

Scripts

- ▶ Consider preparing a script of the order of proceedings and testimony
 - ▶ Avoid confusion by public and decision makers
 - ▶ Evidence of due process and equal protection
 - ▶ Generally, e.g., San Leandro code enforcement hearing
 - presentations by staff and subject of hearing
 - cross-examinations
 - questions from decision makers
 - rebuttal
 - closing arguments
 - deliberation and decision
 - equal time for both sides
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Scripts –Detailed Example Mobile Home Rent Commission Hearing

- ▶ Open public hearing
- ▶ Staff introduction
- ▶ Applicant/representative presentation including sworn witnesses (if necessary)
- ▶ Cross-examination of applicant's witnesses by opposing party and staff
- ▶ Questions to applicant and applicant's witnesses by commissioners
- ▶ Opposing party presentation, including sworn witnesses (if necessary)
- ▶ Cross-examination of opposing party and opposing party's witnesses by applicant and staff
- ▶ Questions to opposing party and opposing party's witnesses by commissioners
- ▶ Staff presentation, including sworn witnesses (if necessary)
- ▶ Cross-examination of staff and staff's witnesses by applicant and opposing party
- ▶ Questions to staff and staff's witnesses by commissioners
- ▶ Applicant rebuttal (if necessary)
- ▶ Opposing party rebuttal (if necessary)
- ▶ Staff rebuttal (if necessary)
- ▶ Staff Closing Argument
- ▶ Opposing party closing argument
- ▶ Applicant closing argument
- ▶ Public hearing closed
- ▶ Commission discussion and deliberation
- ▶ Commission motion and vote

Conclusion

- ▶ Keep in mind the *Mathews*–plus / *Ramirez* test
 - ▶ Consider adopting or preparing hearing procedures and/or scripts
 - ▶ Flexible nature of due process calls for different procedural protections in different types of hearings, and even within the same hearing
 - Stay attentive, nimble
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