



Policy Type: Board

Category: Personnel

Policy Name: Defending Professionally Licensed Employees in Administrative Proceedings – Board Policy 3.55

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3.55 DEFENDING PROFESSIONALLY LICENSED EMPLOYEES IN ADMINISTRATIVE PROCEEDINGS (Adopted 10-25-11)

The County values its employees and desires to support them when they perform their duties within the scope of their employment in a good-faith manner and to the best of their abilities. The County acknowledges that its professionally-licensed employees often face difficult judgment calls that need to be made promptly and sometimes result in good-faith mistakes. The County considered these factors in adopting this policy.

Further, this policy may be applied retroactively to underlying actions or failures to act that form the subject matter of a professional-licensing entity proceeding, but is prospective in nature in that it applies only to matters that were initiated by a professional-licensing entity after the enactment of this policy.

3.55.1 Policy

Pursuant to Government Code section 995.6, the County does not have a legal duty to defend employees licensed pursuant to the provisions of the California Business and Professions Code (“professionally-licensed employees”) in administrative proceedings initiated by the respective



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professional licensing entities. The County may, however, provide a defense to its current and former employees if:

- (a) The administrative proceeding is brought on account of the employee's act or omission in the scope of his or her employment; and
- (b) The County determines that such defense would be in the best interests of the County and that the employee acted, or failed to act, in good faith, without actual malice, and in the apparent interests of the County.

In accordance with Government Code section 995.6, the County will decide on a case-by-case basis whether to defend professionally-licensed employees in administrative proceedings. The decision to defend employees is at the sole discretion of the County and will be provided only if all the requirements of Section 995.6 have been met.

The County will make the decision whether to defend employees in administrative proceedings at three stages. The first stage pertains to the initial investigation and written response to the inquiry from a professional-licensing entity; the second stage to the formal initiation of disciplinary charges if the written response does not resolve the inquiry; and the third stage to any appellate proceeding that the employee wishes to initiate following a decision adverse to the employee.

Even if the County initially agrees to defend an employee, the County has the right to withdraw its defense if it is established that 1) the proceeding was not brought on account of an act or omission in the scope of the employee's employment with the County; 2) the County determines that the defense would not be in the best interests of the County; or 3) the employee did not act in good faith, without actual malice, or in the apparent interests of the County. The right to withdraw during Stage 1, Stage 2, and Stage 3 is discussed below.



3.55.2 Procedures

The following procedures will be followed to implement the County's policy for defending professionally-licensed employees in administrative proceedings:

(A) Stage 1

- (1) Immediately upon receipt of an inquiry from a professional-licensing entity, the employee, or the head of the department in which the employee works, must contact the Office of the County Counsel to request a defense in the proceeding if he or she wants to have County-appointed representation. (Note: In view of the Short response time involved in inquiries from the medical board to physicians, physicians who receive an inquiry, or the department head, will contact the deputy county counsel assigned to medical malpractice cases. The deputy county counsel will determine if the physician acted within the course and scope of his/her employment with the Santa Clara County Health and Hospital System and, if so, assist the physician in drafting a response to the Board. If the medical board decides to initiate formal disciplinary proceedings against the physicians, all the provisions of Stage 2 will apply.)

This provision does not apply to the Office of the Public Defender that will handle Stage 1 of all inquiries "in-house" in recognition of the expertise developed in that office relating to Stage 1 inquiries. The Public Defender will, however, provide the Office of the County Counsel with notice of all inquiries that it will handle in-house and the responses thereto. The Public Defender's in-house handling of Stage I inquiries for its attorneys will not result in a waiver of the employee's entitlement to request a defense during Stage 2 or Stage 3 of said proceedings.



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- (2) If an employee decides not to have County-appointed representation, the employee may be precluded from later receiving representation from the County. Under these circumstances, the employee will sign the attached waiver indicating that he or she understands and acknowledges that the County may refuse to represent him or her in Stage 2 or Stage 3 of the professional-licensing entity proceedings if he or she decides not to have County-appointed representation during Stage 1 or Stage 2 of said proceedings.
- (3) If a request for County-appointed representation is made, County Counsel will appoint an attorney in the Office of the County Counsel to review the matter as soon as possible after receipt of the inquiry. The employee is required to reasonably cooperate in good faith with the assigned attorney to provide all pertinent and known information and to assist in the preparation of a response to the inquiry. Failure to cooperate at any stage of the administrative proceeding may result in withdrawal of representation.
- (4) Before assuming the representation of an employee, the County and the employee will enter into an agreement in which the County, through the Deputy County Executive responsible for the Employee Services Agency ("Deputy County Executive"), reserves the right to withdraw its defense as follows:

At any time during Stage 1 of the proceeding if it is established that 1) the employee did not act within the scope of his or her employment; 2) the employee did not act in good faith, without actual malice, or in the apparent interests of the County; or 3) the employee failed to cooperate with the defense ("Stage 1 Requirements").

At any time during Stage 2 of the proceeding if it is established that 1) the employee did not act within the scope of his or her employment; 2) the County determines that the defense would not be in the best interests of



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the County; 3) the employee did not act in good faith, without actual malice, or in the apparent interests of the County; or 4) the employee failed to cooperate with the defense (“Stage 2 Requirements”).

At any time during Stage 3 of the proceeding if it is established that 1) the employee did not act within the scope of his or her employment; 2) the County determines that the defense would not be in the best interests of the County; 3) the employee did not act in good faith, without actual malice, or in the apparent interests of the County; or 4) the employee failed to cooperate with the defense (“Stage 3 Requirements”).

- (5) A decision by the Deputy County Executive to withdraw the County's defense of an employee under any of these circumstances after the County initially agreed to defend the employee may be appealed to the County Executive, who in his or her sole discretion will make a final decision regarding withdrawal.
- (6) If, upon review of the inquiry or during the initial investigation, it is determined that the Stage 1 Requirements of Section 995.6 have not been met, the County will withdraw its defense. The Deputy County Executive will make the decision upon advice of counsel. The Office of the County Counsel will advise the employee in writing of the Deputy County Executive's decision.
- (7) If, upon review of the inquiry or the initial investigation, the Deputy County Executive determines that the Stage 1 Requirements of Section 995.6 have been met, the assigned attorney from the Office of the County Counsel will represent the employee during the first stage of the proceedings. After consultation with the employee, the assigned attorney will prepare a written response to the inquiry from the professional-licensing entity.



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- (8) The County will not assume payment of fees or costs incurred by an employee for representation by an attorney privately retained by the employee, unless specifically approved by the County before the commencement of such representation.
 - (B) Stage 2
 - (1) If the professional-licensing entity decides to pursue formal disciplinary charges, the employee will be afforded the opportunity to meet with the Deputy County Executive to explain his or her account of the claims asserted against him or her and to request that the County provide him or her with a defense in Stage 2 of the proceedings.
 - (2) If the employee decides at the outset of Stage 2 of the proceedings that he or she does not want County-appointed representation, the employee may be precluded from requesting County-appointed representation at a later date.
 - (3) If the employee requests County-appointed representation, the Deputy County Executive will, upon advice of counsel, decide whether the County will continue to defend the employee. The decision will be made at the sole discretion of the Deputy County Executive.
 - (4) If the Deputy County Executive determines that the County will not continue to defend the employee, the employee can appeal the Deputy County Executive's decision to the County Executive, who will independently review the decision. The decision on appeal will be made at the sole discretion of the County Executive.
 - (5) The County Executive's decision, made upon advice of counsel, other than counsel defending the employee, will be final.



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- (6) If the Deputy County Executive or the County Executive decides that the County will continue to defend the employee with respect to a formal disciplinary charge, the Office of the County Counsel will provide the defense, or at the sole discretion of the County Counsel, will appoint outside counsel of its choice.
- (7) The County will not assume payment of fees or costs incurred by an employee for representation by an attorney privately retained by the employee, unless specifically approved by the County before the commencement of such representation.

(C) Stage 3

- (1) If there is a finding adverse to an employee during Stage 2 of the disciplinary proceedings, and the employee wishes to appeal the finding, the County will, at the request of the employee, continue to provide him or her with County-appointed representation during the appellate process, subject to the provisions below.
- (2) If an employee decides during Stage 1 or Stage 2 of the proceedings that he or she does not want County-appointed representation, the employee may be precluded from receiving County-appointed representation during Stage 3.
- (3) If the County continues to provide County-appointed representation to the employee with respect to the appeal of a formal disciplinary charge, the Office of the County Counsel will provide the defense, or at the sole discretion of the County Counsel, appoint outside counsel of its choice.
- (4) If it is determined at any time during Stage 3 of the proceedings that the Stage 3 Requirements of Section 995.6 have not been met, the County will withdraw its defense. The Deputy County Executive will make such decision



upon advice of counsel. The Office of the County Counsel will advise the employee in writing of the Deputy County Executive's decision.

- (5) If the Deputy County Executive determines that the County will not continue to defend the employee in Stage 3, the employee can appeal the Deputy County Executive's decision to the County Executive, who will independently review the decision. The decision on appeal will be made at the sole discretion of the County Executive.
- (6) The County Executive's decision, made upon advice of County Counsel, will be final.
- (7) The County will not assume payment of fees or costs incurred by an employee for representation by an attorney privately retained by the employee during Stage 3, unless specifically approved by the County before the commencement of such representation.

WAIVER

In Re the Inquiry/ Matter of _____
I, _____ [full name], an employee of _____
have received an Inquiry/Complaint from _____ in
regard to actions arising in the course and scope of my employment for the
County. I elect not to have County-appointed representation in this matter. I
hereby understand and acknowledge that if I request County-appointed
representation at a later stage of this proceeding, the County may refuse to
represent me and that I will be solely responsible for my own
representation throughout this matter. I further understand and
acknowledge that I will not have the right to seek reimbursement from the
County for any of the fees, costs, or expenses that I incur in providing my
own representation in this matter.



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Name

Date

Related Policies

None.

Related Forms and Information

- Representation Waiver -
[url]/sites/policies/FormsrelatedtoPolicies/Representation-Waiver.pdf

History

Date	Changes Made
1/31/2014	Policy Uploaded. (John Myers)
10/25/2011	Policy Adopted. View legislative file.