

SANTA MONICA RENT CONTROL BOARD-MEMO

SUPPLEMENTAL STAFF REPORT ON PROPOSED AMENDMENTS TO CHAPTER 15 (SUBPOENAS)

To: Board Commissioners

From: Staff

Board Meeting of: July 10, 2003

Re: [Proposed Amendments to Chapter 15](#) (Subpoenas)

INTRODUCTION

At its Board meeting June 26, 2003, the Board considered proposed amendments to Chapter 15 of its regulations which staff recommended. Chapter 15 covers procedures for issuance and enforcement of subpoenas in Board hearings. The proposed amendments deal with consumer notice and the right to object when subpoenaed records potentially require measures to protect privacy.

At the meeting, the Board added proposed regulation 15032.5(g), which requires consent of the consumer for production of medical and attorney records. The Board set the proposed amendments for hearing on July 10. Attached to this supplemental staff report are the proposed amendments as set for hearing by the Board, including regulation 15032.5(g).

In addition, the Board requested that staff research the spousal privilege, which allows one spouse to refrain from testifying against the other spouse in appropriate circumstances. Evidence Code section 970 *et seq.* sets forth provisions regarding the spousal privilege (sections 970 and 971) and exceptions to the privilege (sections 972 and 973). These provisions apply not only to court cases but to administrative hearings such as hearings before the Board and its hearing officers.¹

Section 970 provides: "Except as otherwise provided by statute, a married person has a privilege not to testify against his spouse in any proceeding."

¹ Evidence Code section 901 defines proceedings as used in the statutes dealing with privilege, providing: "'Proceeding' means any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given."

Section 971 states that, unless another statute provides otherwise, the privilege includes the right not to be called as a witness by the opposing counsel without the consent of the spouse holding the privilege.²

Evidence Code sections 972 and 973 set forth several exceptions to the spousal privilege. The exceptions in section 973³ are relevant to Board proceedings. Subsection (a) provides that a spouse waives [gives up] the privilege by testifying in a proceeding to which his or her spouse is a party or by testifying against his or her spouse. Subsection (b) states that the privilege does not apply in a civil proceeding (which includes administrative proceedings under Evidence Code section 902⁴) brought or defended by a married person for the benefit of his or her spouse or for the benefit of both spouses.

As a practical matter, in a hearing pursuant to regulation 3304, both spouses are in all probability parties to the case, and both parties should therefore testify in the case. Even if both spouses are not parties, one spouse's defense of a petition brought under 3304 is likely for the benefit of both spouses. It is therefore appropriate for both spouses to testify, if asked to. Moreover, if both spouses voluntarily testify at the hearing, they have waived or relinquished the spousal privilege.

Other privileges apply to communications made in confidence between wife and husband (Evidence Code section 980 - 987), attorney and client (Evidence Code section 950 - 962), physician and patient (Evidence Code section 990 - 1007), psychotherapist and patient (Evidence Code section 1010 - 1028), clergy member and penitent (Evidence Code section 1030 - 1034), counselor and sexual assault victim (Evidence code section 1035 - 1036.2), and counselor and domestic violence victim (Evidence Code section 1037 - 1037.8). These privileges apply only to confidential communications between the listed

² Evidence Code section 971 states: "Except as otherwise provided by statute, a married person whose spouse is a party to a proceeding has a privilege not to be called as a witness by an adverse party to that proceeding without the prior express consent of the spouse having the privilege under this section unless the party calling the spouse does so in good faith without knowledge of the marital relationship."

³ Evidence Code section 973 states: "(a) Unless erroneously compelled to do so, a married person who testifies in a proceeding to which his spouse is a party, or who testifies against his spouse in any proceeding, does not have a privilege under this article in the proceeding in which such testimony is given. (b) There is no privilege under this article in a civil proceeding brought or defended by a married person for the immediate benefit of his spouse or of himself or his spouse."

⁴ Evidence Code section 902 states: "'Civil proceeding' means any proceeding except a criminal proceeding."

people and apply whenever disclosure of the communication is sought (including in administrative proceedings), with exceptions specified in the statutes.

In any event, both the spousal privilege set forth in the Evidence Code 970 *et seq.* and the confidential marital communication privilege of sections 980 *et seq.* already apply in Board proceedings. Staff therefore does not recommend that the Board include in its regulations a provision regarding spousal privilege. Such a regulation would likely be pre-empted by the provisions of the Evidence Code.

In considering regulations regarding privacy protections, the Board needs to consider the balance between those protections and competing due process protections, also provided by the constitution. As stated by the California Supreme Court in *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal. 3d 652, 657, in a case involving bank records: “[W]e indulge in a careful balancing of the right of civil litigants to discover relevant facts, on the one hand, with the right of bank customers to maintain reasonable privacy regarding their financial affairs, on the other.” Courts have determined that this balance requires consumer notice with an opportunity to object to the production of records or to request that the subpoena be quashed, with the court or hearing officer, who is familiar with the issues and facts in the case, carefully fashioning an order that serves both constitutional concerns. The courts suggest, depending on the case, deletion of the customer’s name, sealing the information to be opened only on order of the court [or hearing officer], holding *in camera* hearings regarding the objections, and other appropriate limitations of the subpoena. They state: “Whenever possible, the ALJ [administrative law judge] should impose partial limitations rather than an outright denial of discovery.” *Sehlmeyer v. Department of General Services* (1993) 17 Cal.App.4th 1072, 1081; *Valley Bank, supra*, at p. 658. This careful balancing of constitutional interests cannot be made if there is a blanket prohibition against subpoenaing whole categories of records.

Staff recommends that the Board adopt the attached, proposed recommendations to Chapter 15, requiring consumer notice and allowing parties to object to record production. These regulations adequately protect competing constitutional concerns with the hearing officer deciding the appropriate balance between a party’s right to obtain relevant facts and evidence on the one hand and the right to privacy on the other hand. Staff does not recommend that the Board further limit the parties’ ability to subpoena records or witnesses.

RECOMMENDATION

Staff recommends that, after public hearing, the Board adopt the proposed amendments to Chapter 15, attached to this staff report.