

PROFESSIONAL LIABILITY UPDATE

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Juan C. Araneda

Jennifer A. Becker

David P. Borovsky

Robert J. Buccieri

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Howard M. Garfield

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Seth E. Watkins

Gerald G. Weisbach

Kevin Whittaker

Irene K. Yesowitch

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By Jennifer A. Becker

**Berg v. Davi** (2005) 130 Cal.App.4th 223

*The Third District upholds the denial of a real estate license to a disbarred attorney based on the record of the disbarment proceedings.*

Bernard Jerome Berg was admitted to the practice of law in 1959. He was disbarred in 1998 for violations related to fraudulent billing practices and trust fund violations. The conduct was found to involve moral turpitude. One client also obtained a civil judgment against him based on the billing fraud.

When Berg applied for a real estate salesperson's license the Department of Real Estate denied the license citing Berg's disbarment. After a hearing, an administrative law judge found that Berg was disbarred for acts that constituted fraud or dishonest dealing which would be grounds for revocation of a real estate license. The judge rejected the argument that the disbarment proceeding did not offer due process protections comparable to the Administrative Procedures Act. The judge would not allow Berg to collaterally attack the civil judgment against him or the state bar proceedings. The judge also noted that in Berg's employment as a "law clerk" he was essentially still practicing law. Berg was defensive to the point of defiance,

exhibited no remorse, and offered no evidence of rehabilitation. The Judge concluded it would be contrary to the public interest to issue a license to Berg and the Department of Real Estate adopted the administrative law judge's decision. Berg's petition for a writ of mandate was denied.

The Court of Appeal noted the statutory authority of the Department of Real Estate to deny the issuance of a license to an applicant who has had another license revoked for acts that, if done by a real estate licensee, would be grounds for license revocation. The revocation must have taken place after affording the applicant due process protections comparable to the Administrative Procedures Act and only upon an express finding of a violation of law.

After rejecting arguments concerning the adequacy of notice the trial court held that hearsay documentary evidence concerning the disbarment was properly used for the purpose of supplementing or explaining Berg's disbarment. This is

specifically permitted by the governing statute, which does not require proof of the underlying bad conduct, only the reason for the license revocation.

Berg's attempt to argue that the civil and state bar proceedings should be rejected as unfair did not persuade the Court of Appeal. The Court agreed with the administrative law judge and the trial court that a collateral attack on the prior judgments was improper. Collateral estoppel principles apply in an administrative proceeding to prevent the impeachment of a prior final judgment. Criticism of the conduct of the trial may be appropriate in a motion for a new trial or on appeal, but has no place in a subsequent licensing disciplinary proceeding.

The Court of Appeal also rejected Berg's argument that the forums did not afford due process protections comparable to the Administrative Procedures Act. The statute does not require the proceedings be exactly the same as those under the Administrative Procedures Act, only that they provide comparable due process protections.

The non-tenured status of the State Bar Court judges did not impair the due process afforded by the Administrative Procedures Act. Although administrative law judges enjoy civil status protections tenured judges are not a requirement of due process; judges of constitutional courts also serve limited terms and must stand for election.

The fact that Berg did not have full judicial review, that is oral argument and a written judicial opinion of his disbarment proceeding, did not impair the comparable due process afforded by the State Bar Proceedings. The

California Supreme Court has held that the due process clause does not require that it hear oral argument or issue a written opinion before denying an attorney's petition for review of a State Bar Court decision recommending disbarment or suspension.

The Court also rejected Berg's contention that the Supreme Court's disbarment order did not make an express finding of a violation of law because the Supreme Court order disbaring Berg did not recite any violations. Although the State Bar Court findings are not binding on the Supreme Court, it may adopt them by summary denial of a petition for review. The State Bar Court found Berg violated provisions of California's Business and Professions Code and the Rules of Professional Conduct meeting the requirement of an express finding of violation of law.

*Comment:* State Bar proceedings can affect not only the ability to practice law, but also any opportunity for a fresh start in a new career requiring licensure. The importance of attorney disciplinary proceedings cannot be overstated.

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