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COMMENT

DEFAULT LICENSE REVOCATION IN CALIFORNIA ADMINISTRATIVE LAW

JACOB REINHARDT*

INTRODUCTION

Junk mail, junk mail, perhaps a few bills, maybe a credit card offer—in an increasingly electronic world, daily mail seems less relevant. But for California licensed professionals, regular mail remains critically important. For with as little as 15-days’ notice, California licensing agencies can revoke a professional license by way of a default decision that may be impossible to reverse.

Imagine you are a registered nurse, a licensed contractor, or a real estate agent. You ignore your mail during a weeklong vacation, forget to check your post office box, or your family member misplaces correspondence from your respective licensing agency. Unbeknownst to you, however, California law allows you only fifteen days to respond to notice of a license disciplinary action and you are now subject to default revocation. The principle of default is commonly known in our legal system and is counterbalanced by the right to request that the default be vacated or “set aside” for good cause. Unfortunately for California’s professional licensees, the set aside process offers dismal prospects for relief.

This problem affects hundreds of thousands of Californians, as state administrative agencies oversee a multitude of professional licensees. The Board of Registered Nursing is responsible for the licensing and oversight of over 390,000 nurses.¹ California has more than 290,000 licensed contractors, over 418,000 licensed real estate brokers and salespersons, and tens of thousands of other professionals such as pharma-

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¹ *What is the Board of Registered Nursing?*, CAL. DEP’T OF CONSUMER AFFAIRS, http://www.rm.ca.gov/about_us/whatisbrn.shtml (last visited Mar. 10, 2016).

cists, physicians, and physical therapists.² Given these numbers, it is apparent that a substantial number of people in California's labor force have their profession, and in turn their ability, to continue their chosen livelihood governed by an administrative agency.

This article will examine default license revocation in California and the extremely difficult process for overturning such a determination. In Part I, the article will provide background information regarding the principles of notice and default. Part II will continue with a chronological examination of the administrative set aside process, noting recommendations for improvements that can be made at each stage. Part II will be divided into three sections: A) the timelines and service procedures used in license disciplinary actions; B) how administrative set aside requests are decided at the agency level; and C) judicial review of the agency's decision. Finally, Part III will review the article's findings and recommendations, concluding that California administrative law does not provide professional licensees with adequate recourse in the event of a default decision.

I. BACKGROUND

A. DUE PROCESS AND DEFAULT

Our core constitutional principles guarantee that no citizen shall be deprived of life, liberty, or property without due process of law and state-issued licenses are no exception.³ A professional licensee has a property interest in his or her license, the deprivation of which may not occur without due process.⁴

Before reviewing the procedural protections afforded to California licensees, this article will examine due process and default procedures in civil proceedings. By examining these concepts we can measure whether the California Administrative Procedures Act (APA) provides due process protections for licensees in accordance with the core concepts on which they are based.

² *May 2014 State Occupational Employment and Wage Estimates California*, BUREAU OF LABOR STATISTICS, http://www.bls.gov/oes/current/oes_ca.htm#29-0000 (Mar. 25, 2015). The administrative scheme discussed herein also applies to the Department of Social Services, which licenses and oversees programs that serve vulnerable California residents through facilities for the aged and disabled as well as residential and non-residential services for children.

³ U.S. CONST. amend. XIV, § 1; *Hansen v. Bd. of Registered Nursing*, 145 Cal. Rptr. 3d 739, 747 (Cal. App. Ct. 2012) (quoting *Sulla v. Bd. of Registered Nursing*, 140 Cal. Rptr. 3d 514, 518 (Cal. App. Ct. 2012)).

⁴ *Hansen v. Bd. of Registered Nursing*, 145 Cal. Rptr. 3d 739, 747 (Cal. App. Ct. 2012) (quoting *Sulla v. Bd. of Registered Nursing*, 140 Cal. Rptr. 3d 514, 518 (Cal. App. Ct. 2012)).

1. *Notice of the Action*

The right to be heard has “little reality or worth unless one is informed that the matter is pending” and is given the choice whether to appear or default.⁵ Notice is a fundamental requirement of due process, a rule central to civil and administrative proceedings alike.⁶ In both circumstances, an evaluation of whether notice was proper includes examination of: 1) the way in which notice is sent; and 2) the sufficiency of the information conveyed therein.⁷ The following discussion of notice, default, and set aside requests will focus on the former.

The importance of proper notice is paramount, but the law does not require actual notice in all situations.⁸ Notice is constitutionally sufficient if it is reasonably calculated to advise the parties of the pending action.⁹ This caveat notwithstanding, the adequacy of notice depends on the circumstances: where there is more interest to be deprived, notice requirements will be greater.¹⁰ While actual notice is not required in all proceedings, reviewing courts must consider whether the notice provided satisfies the requirements of due process.

In evaluating the adequacy of notice in civil actions, three factors must be balanced: 1) the private interest to be affected by state action; 2) the risk that the interest will be erroneously deprived and the possible benefit of additional procedures; and 3) the government’s interests, including fiscal and administrative burdens required by additional procedures.¹¹ In civil proceedings, questions of due process and notice are considered by learned judges and decided based on precedential principles.¹² In reviewing the administrative set aside process, we must ask whether the agency decision makers adhere to these same principles.

2. *Default and Set Aside Requests in Civil Proceedings*

A party subject to a default order or judgment may request that the court set aside, or vacate, a default decision, thereby allowing the party to proceed on the merits.¹³ The importance of notice is reflected in civil

⁵ *Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306, 314 (1950).

⁶ *See id.*

⁷ *See J. Bruce Bennett, The Rights of Licensed Professionals to Notice and Hearing in Agency Enforcement Actions*, 7 TEX. TECH. ADMIN. L.J. 205, 214 (2006).

⁸ *Conservatorship of Moore*, 229 Cal. Rptr. 875, 879 (Cal. App. Ct. 1986).

⁹ *Id.*

¹⁰ *Ingraham v. Wright*, 430 U.S. 651, 672-75 (1977).

¹¹ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

¹² *See CAL. CIV. PROC. CODE* § 473(b) (West 2016).

¹³ BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “set aside” as the court’s power to vacate a judgment or other order).

default set aside proceedings. From a simple timeline standpoint, civil set aside is profoundly default-averse. In California, a defendant may seek set aside relief up to two years after the entry of default judgment.¹⁴ This deadline varies by matter and jurisdiction, but civil procedure typically provides generous timelines that allow defaulted parties a substantial period of time to request set aside relief.

In addition to the procedural aspects of civil default, the underlying substantive principles in civil set aside proceedings are also instructive. There is longstanding judicial preference that cases be heard on the merits and default decisions prevent such adjudication.¹⁵ When reviewing default set aside requests, judges consider a number of factors, such as whether the default was willful, any prejudice to the adversary, the good faith of the parties, the interest involved, and the timeliness of the motion.¹⁶ Defendants seeking set aside relief must show proof that their default was not the result of avoidance of service or inexcusable neglect.¹⁷ Several circuit courts, including the Ninth Circuit, have stated that courts should vacate default *except* upon showing of willful or culpable conduct or bad faith on the party in default.¹⁸ In civil proceedings, default is disfavored and can be overcome by a valid showing of failed service.¹⁹

Perhaps the most important factor in civil set aside proceedings is so obvious it might be taken for granted—a neutral decision maker. A defendant subject to default submits her motion for set aside to the court to be decided by a judge.²⁰ It would seem illogical and contrary to due process protections for a prevailing plaintiff to decide whether his adversary should be granted relief from default. While this is not the case in civil proceedings, it is exactly what California licensees face when attempting to set aside a default license revocation.

B. OVERVIEW OF ADMINISTRATIVE DEFAULT REVOCATION AND SET ASIDE PROCESS

Individuals who wish to practice their profession in California are subject to statutes and regulations enforced by agencies such as the

¹⁴ CIV. PROC. § 473.5.

¹⁵ Arthur J. Park, *Fixing Faults in the Current Default Judgment Framework*, 34 CAMPBELL L. REV. 155, 159 (2011).

¹⁶ *Id.* at 163.

¹⁷ CIV. PROC. § 473.5.

¹⁸ Park, *Fixing Faults in the Current Default Judgment Framework* at 164-65.

¹⁹ See generally William A. Danne, Jr., *What Constitutes "Good Cause" Allowing Federal Court to Relieve Party of his Default under Rule 55(c) of Federal Rules of Civil Procedure*, 29 A.L.R. FED. 7 § 4 (1976).

²⁰ CIV. PROC. § 473.5.

Board of Registered Nursing and the Dental Board.²¹ Through their enforcement power, these and numerous other agencies are responsible for the critical function of protecting the public.²² When a licensee violates these provisions, agencies are authorized to take disciplinary action to suspend or revoke his or her license upon proper notice to the licensee.²³ For California licensees, the California Administrative Procedures Act governs the due process requirements for these license disciplinary actions.²⁴ The APA sets forth the measures by which an administrative agency may initiate and process a disciplinary action to revoke or otherwise discipline a licensee.²⁵ The fundamental elements of procedural due process such as notice and the right to an adversarial hearing on the merits are reflected in the APA and will be the focus of the examination below.

1. Notice by Certified Mail

The California license disciplinary process begins with the filing of an accusation.²⁶ The accusation is akin to a complaint in a civil case in that it initiates the proceeding by stating the acts or omissions by the licensee upon which the agency seeks to proceed.²⁷ Accompanying the accusation, the agency must provide a statement advising the licensee that he or she has the right to a hearing provided one is requested within fifteen days of receipt of the accusation.²⁸ The agency must also advise the licensee that failure to respond within fifteen days will constitute a waiver of his or her right to a hearing.²⁹ This hearing is requested by filing a “notice of defense.”³⁰

The accusation and above advisement may be served personally or by certified mail.³¹ Presumably due to the high cost of personal service, agencies generally perform service by mail.³² Licensees are usually required to maintain their address on file with their licensing agency, and service by certified mail to a licensee’s address of record is considered

²¹ See, e.g., CAL. BUS. & PROF. CODE § 2715 (West 2016).

²² See, e.g., CAL. BUS. & PROF. CODE § 2708.1 (West 2016).

²³ E.g., CAL. HEALTH & SAFETY CODE § 1551 (West 2016).

²⁴ See CAL. GOV’T CODE § 11340.1 (West 2016).

²⁵ *Id.* § 11505.

²⁶ *Id.* § 11505(a).

²⁷ See *id.* § 11506(a).

²⁸ *Id.* § 11505(a).

²⁹ *Id.*

³⁰ *Id.*

³¹ GOV’T § 11505(c); GOV’T § 8311 (“registered mail” is synonymous with certified mail).

³² See, e.g., *Evans v. Dep’t of Motor Vehicles*, 26 Cal. Rptr. 2d 460, 463 (Cal. App. Ct. 1994) (DMV served accusation by certified mail).

effective.³³ Service is effective upon mailing, therefore licensees have only fifteen days from the date the accusation is mailed to respond to the action.³⁴ It should be noted that the 15-day response period may be considered extended by five calendar days if mailed within the State of California.³⁵ While such technicalities may seem tedious, the strict and severe penalties of a default revocation require close attention to such deadlines.

If the licensee fails to request a hearing within fifteen days, the agency may proceed with a default revocation.³⁶ Under such circumstances, the agency would issue a default decision advising the licensee that his or her license has been revoked.³⁷ For a licensee who did not receive the accusation, the default decision and order may be the first time he or she becomes aware of the action.³⁸ Whether the licensee is a chiropractor with months of appointments booked, a contractor with projects lined up for weeks, or a residential care facility filled with elderly tenants, all licensed activity must cease on the effective date listed in the default decision.

On as little as 15-days' notice, California law allows an agency to revoke a professional license.³⁹ This deadline pales in comparison to the even shorter deadline and uphill battle the licensee will face in the administrative set aside process.

2. *Motion for Set Aside*

Upon receipt of a default decision, the licensee has seven days to request that the default be set aside.⁴⁰ The licensee has one week to prepare a written motion explaining the reasons for his or her failure to file a timely notice of defense and request that the default be vacated on those grounds.⁴¹ After a motion to set aside the default is filed, the agency itself decides whether good cause exists to vacate the default.⁴² As explained below, the APA's good cause standard appears to mirror civil set

³³ GOV'T § 11505(a), (c).

³⁴ *Id.* § 11505(c).

³⁵ *See* CAL. CIV. PROC. CODE § 1013(a) (2015) (providing that deadlines to respond shall be extended by five days if the recipient resides in California and ten days if outside of California).

³⁶ GOV'T § 11520(a).

³⁷ *Id.*

³⁸ *See* *Baughman v. Med. Bd. of Cal.*, 46 Cal. Rptr. 2d 498, 500 (Cal. App. Ct. 1995) (physician failed to receive accusation and was first advised of the pending action when he received the default decision).

³⁹ GOV'T § 11520(a).

⁴⁰ *Id.* § 11520(c).

⁴¹ *Id.*

⁴² *Id.*

aside requirements, however motions for set aside are routinely denied by administrative agencies on facts that might very well justify relief in a civil proceeding.⁴³

To reiterate, the authority to grant or deny relief from default in an administrative action is vested in the very agency that is pursuing the disciplinary action. Had the disciplinary action proceeded to a hearing on the merits, a neutral administrative law judge (“ALJ”) would have presided over the case.⁴⁴ However, in the event of a default decision, set aside relief is decided by the agency alone.⁴⁵

3. *Writ of Mandate to the Superior Court*

In the event that the agency denies a motion for set aside, the licensee may seek judicial review by filing a petition for writ of mandate.⁴⁶ The licensee must file such a petition with the Superior Court within 30 days after the last day on which reconsideration can be ordered, typically the effective date of the decision.⁴⁷ Given the agency’s ability to set the effective date, the timeline for filing a writ can vary. The agency may issue a default decision that is effective immediately upon service, thereby allowing the 30-day timeline to begin prior to the licensee’s receipt of the default decision and further shortening this timeline.

A denied set aside request may be advanced to a Superior Court by way of either traditional mandamus or administrative mandamus. The two petitions are governed by different statutes and call for different standards of review, and licensees subject to default revocation have sought relief under both sections.⁴⁸

Traditional mandamus action, which is also known as ordinary mandamus, is advanced under Section 1085 of the California Code of Civil Procedure. Under this section, a reviewing court may issue a writ of

⁴³ *Evans v. Dep’t of Motor Vehicles*, 26 Cal. Rptr. 2d 460, 463-64 (Cal. App. Ct. 1994) (tenant living in a rental unit of a ten-acre auto dismantling facility fails to give an accusation to her landlord, the licensed auto dismantler); *Miller Family Home, Inc. v. Dep’t of Soc. Servs.*, 67 Cal. Rptr. 2d 171, 171-72 (Cal. App. Ct. 1997) (children’s group home licensee provides the agency with a new address of record, but fails to receive notice of an accusation because it was erroneously served upon the old address); *Baughman v. Med. Bd. of Cal.*, 46 Cal. Rptr. 2d 498, 500 (Cal. App. Ct. 1995) (physician failed to check post office box and did not receive certified mail notice of the accusation).

⁴⁴ Gov’t § 11502(a).

⁴⁵ *Id.* § 11520(c).

⁴⁶ *Id.* § 11523.

⁴⁷ *Id.*

⁴⁸ *Evans v. Dep’t of Motor Vehicles*, 26 Cal. Rptr. 2d 460, 464 (Cal. App. Ct. 1994) (writ of mandate filed pursuant to California Code of Civil Procedure section 1094.5); *Miller Family Home, Inc. v. Dep’t of Soc. Servs.*, 67 Cal. Rptr. 2d 171, 172 (Cal. App. Ct. 1997) (writ of mandate filed pursuant to California Code of Civil Procedure § 1085).

mandate to any inferior tribunal or board—here the administrative agency—to compel the performance of an act required by law.⁴⁹ Traditional mandamus is usually used to review quasi-legislative actions by administrative agencies.⁵⁰ Quasi-legislative agency action typically forms a rule to be applied to future cases.⁵¹ In most circumstances, quasi-legislative action does not require a hearing at the agency level.⁵² In consideration of the principles of separation of powers and deference to agency discretion, the reviewing court will overturn an agency's set aside denial only upon a finding that the agency action was "arbitrary, capricious, or entirely lacking in evidentiary support."⁵³

When a party seeks the review of a final administrative order or decision, administrative mandamus is appropriate.⁵⁴ Unlike traditional mandamus, administrative mandamus allows for review of quasi-judicial agency action.⁵⁵ As a result, administrative mandamus is typically deemed appropriate if the agency decision was the result of a proceeding in which a hearing was required by law, evidence was taken, and decision-making authority was vested with the agency.⁵⁶ The applicable standard of review in administrative mandamus turns on whether a vested fundamental right is implicated in the action.⁵⁷ If so, the court may exercise independent review of the agency decision.⁵⁸ Absent a fundamental vested right, administrative mandamus implicates a substantial evidence test in which the trial court will affirm the agency decision if a reasonable person could have reached the same conclusion.⁵⁹ In either case, the standard in administrative mandamus is less deferential to the agency than the standard of review in traditional mandamus.

A writ proceeding is the licensee's first opportunity to have his or her request for set aside evaluated by a neutral decision maker. As explained below, this does not mean the licensee in default should expect relief. Trial and appellate court judges are limited in their review and the above standards of review give considerable deference to the agency de-

⁴⁹ CAL. CIV. PROC. CODE § 1085 (West 2016).

⁵⁰ McGill v. Regents of Univ. of Cal., 52 Cal. Rptr. 2d 466, 471 (Cal. App. Ct. 1996).

⁵¹ *Id.*

⁵² *Id.*

⁵³ Shapell Indus. v. Governing Bd., 1 Cal. Rptr. 2d 818, 824 (Cal. App. Ct. 1991) (citation omitted).

⁵⁴ CIV. PROC. § 1094.5.

⁵⁵ Western States Petroleum Assn. v. Superior Court, 888 P.2d 1268, 1270-71 (Cal. 1995) (*en banc*).

⁵⁶ Weary v. Civil Serv. Com., 189 Cal. Rptr. 442, 445-46 (Cal. App. Ct. 1983).

⁵⁷ Bixby v. Pierno, 481 P.2d 242, 251 (Cal. 1971) (*en banc*).

⁵⁸ *Id.*

⁵⁹ McGill v. Regents of Univ. of Cal., 52 Cal. Rptr. 2d 466, 471 (Cal. App. Ct. 1996); Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. REV. 1157, 1167 (1995).

cision.⁶⁰ Rather than evaluating the merits of a default like a civil default judgment or full de novo review of the facts at issue, judges review limited records and must apply the standards of review described above. Like the administrative request for set aside, licensees are similarly unlikely to find relief through judicial review.

In a license disciplinary action, California licensees are subject to strict deadlines, review by the very agency pursuing the action, and limited opportunity for relief in a civil proceeding. Considering the judicial preference for a decision on the merits and the importance of an individual's licensing rights, the process explained above is surprisingly averse to the licensee. The following examination of this process will highlight the unique aspects of California law that allow for perverse outcomes in administrative set aside proceedings.

II. ANALYSIS

This section will move chronologically through the administrative default and set aside process and examine the perils licensees face at each stage. It will then review how California administrative law compares to civil proceedings, model administrative procedure, and administrative disciplinary actions in other states.

A. PROCEDURAL SHORTCOMINGS—TIMELINES AND SERVICE REQUIREMENTS

The uphill battle for California licensees begins with the APA's procedural requirements for service, responding to the action, and requesting set aside relief. Following service of an accusation by mail, the licensee has only fifteen days to request a hearing.⁶¹ If a licensee is subject to a default decision, he or she has only seven days to prepare a motion requesting that the default be set aside.⁶² A review of simple timelines may appear mundane or rudimentary, but it is upon these deadlines all hope of relief rests. Failure to maintain the California APA's strict deadlines will foreclose any hope of relief through either the administrative set aside process or judicial review.⁶³ In order to determine whether these procedural requirements are appropriate, examinations of procedural due process requirements, the civil default process, the Federal Administrative

⁶⁰ See *Drumme v. State Bd. of Funeral Dirs. and Embalmers*, 87 P.2d 848, 854 (Cal. 1939).

⁶¹ CAL. GOV'T CODE § 11506(a) (West 2016).

⁶² *Id.* § 11520(c).

⁶³ *E.g.*, *Hansen v. Bd. of Registered Nursing*, 145 Cal. Rptr. 3d 739 (Cal. App. Ct. 2012) (denying writ due to failure to timely file request for set aside relief).

Procedure Act, and administrative default in other jurisdictions are all instructive.

1. Notice, Default, and Set Aside Requests in Civil Proceedings

State and federal rules of civil procedure include many similarities to administrative law, but also important differences, particularly concerning deadlines for requesting set aside relief. This section will review and compare civil and administrative procedural rules concerning service requirements, the deadline for responding to an action, and the deadline for requesting set aside relief.

In California, a summons in a civil action may be served by personal delivery or by a number of alternate forms of “substituted service.”⁶⁴ Forms of substituted service include service by mail with a return “notice and acknowledgement,”⁶⁵ personal service to a responsible individual at the party’s home or place of business followed by a mailed copy,⁶⁶ or, as a last resort, publication.⁶⁷ In many cases, service is incomplete until a return receipt is received from the party being served, confirming that the party was notified of the pending action.⁶⁸ Federal rules largely mirror California Civil Procedure, allowing for either personal service or a number of alternative means.⁶⁹ In contrast, California agencies may serve licensees personally or by registered mail, and service is effective upon mailing.⁷⁰ If agencies choose service by registered mail, there is no provision requiring a return receipt in order to proceed.

California defendants are allowed thirty days to respond in a civil action, and the Rules of Court allow the parties to stipulate to one 15-day extension.⁷¹ These formal rules do not include any potential agreements between the parties to informal extensions to prepare a responsive pleading. The Federal Rules of Civil Procedure (FRCP) require defendants to answer within twenty-one days unless service is waived, in which case the defendant has sixty days to respond to the action.⁷² For California license disciplinary actions, licensees have only fifteen days from the

⁶⁴ ROMUALDO P. ECLAVEA & MARY ELLEN WEST, 50A CALIFORNIA JURISPRUDENCE § 13 (3d ed. 2016).

⁶⁵ CAL. CIV. PROC. CODE § 415.30 (West 2016).

⁶⁶ CAL. CIV. PROC. CODE § 415.20 (West 2016).

⁶⁷ CAL. CIV. PROC. CODE § 415.50 (West 2016).

⁶⁸ *Id.* § 415.30.

⁶⁹ FED. R. CIV. P. 5(b).

⁷⁰ CAL. GOV’T CODE § 11505(c) (West 2016).

⁷¹ CIV. PROC. § 412.20(a)(3); CAL. CT. R. 3.10 (West).

⁷² FED. R. CIV. P. 12(a)(1)(A).

date the agency mails the accusation to respond with a notice of defense.⁷³

Deadlines to request set aside relief in civil proceedings vary by jurisdiction and circumstances presented, but allow much greater deference to the defaulted party. Federal procedure allows a party to request set aside relief “within a reasonable time,” but no more than one year after the entry of default judgment.⁷⁴ In California, defendants subject to default must also petition for relief within a “reasonable time,” but are given up to two years after the entry of default or 180 days after service of written notice that the default has been entered.⁷⁵ California Civil Procedure also includes provisions for setting aside other adverse actions such as dismissal, provided relief is requested within six months.⁷⁶ In dramatic contrast, California’s licensed professionals are given *seven days* to respond to a default decision.⁷⁷

A civil action may implicate a greater deprivation of a party’s interests than a license disciplinary action, but notable procedural differences exist between the two. While the response period and service requirements have some similarities, the difference between when a defaulted party can request set aside relief in civil and administrative proceedings is staggering.

2. *Model State APA and Administrative Default in Other Jurisdictions*

A review of the Model State Administrative Procedure Act (MSAPA)⁷⁸ and a number of other administrative jurisdictions show that California’s deadlines are more stringent, but reasonable by comparison. California law is firmly rooted in MSAPA and, while other states offer better protections to licensees, California APA’s notice provisions are within the bounds of procedural due process requirements.⁷⁹

⁷³ Gov’t § 11505(a). See *Evans v. Dep’t of Motor Vehicles*, 26 Cal. Rptr. 2d 460, 467-68 (Cal. App. Ct. 1994).

⁷⁴ FED. R. CIV. P. 60(c)(1).

⁷⁵ CIV. PROC. § 473.5(a).

⁷⁶ *Id.* § 473(b).

⁷⁷ Gov’t § 11520(c).

⁷⁸ See generally John Gedid, *Administrative Procedure for the Twenty-First Century: An Introduction to the 2010 Model State Administrative Procedure Act*, 44 ST. MARY’S L.J. 241 (2012). The original Model State Administrative Procedure Act was published in 1946 with the intention of preventing arbitrary agency action and encouraging fairness in administrative decision-making. Unlike uniform acts that are intended to be adopted verbatim, the MSAPA provisions are intended to be flexible guidelines for administrative rulemaking and adjudication. The MSAPA has undergone three substantial revisions, the most recent being the 2010 changes that focused on the importance of central panel decision-making.

⁷⁹ See *Evans v. Dep’t of Motor Vehicles*, 26 Cal. Rptr. 2d 460, 465 (Cal. App. Ct. 1994).

The 2010 Revised MSAPA requires that agencies provide parties with express notice that failure to respond to an action may result in default.⁸⁰ The MSAPA suggests a 15-day timeline to petition for set aside and includes a prefatory note explaining that fifteen days is a suggested timeframe that may be modified if desired.⁸¹ The California APA mirrors this requirement but shortens the deadline for set aside requests to only seven days.

A survey of state procedures reveals varying timelines, most of which are more favorable for the licensee. Texas allows a 20-day response period and ten days to file a request for set aside.⁸² Arizona and Nevada each allow a full thirty days for a licensee to respond to notice of disciplinary action before default.⁸³ Washington provides the licensee with twenty days to respond to notice of a license disciplinary action.⁸⁴ Oregon gives its licensees sixty days to respond to certain disciplinary proceedings.⁸⁵ With minor variances, these states reflect the MSAPA timeline and are similar to California law.

One significant variation from California procedure can be seen in Ohio's APA notice requirements. Ohio has extensive notice provisions compared to other jurisdictions.⁸⁶ Notice of disciplinary action is first served upon the licensee by registered mail, but in the event that a return receipt is returned unclaimed, the agency must resend the notice by regular mail.⁸⁷ If notice is returned for failure of delivery, the agency must arrange for personal service or notify the licensee through publication, once a week for three weeks.⁸⁸ While Ohio's provisions appear to be an outlier compared to other jurisdictions, they are an example of greater procedural protections for licensed professionals.

Another notable exception can be found in the New York APA. In several states, failure to respond with an answer or request for hearing is deemed a waiver of the licensee's right to object to the agency's allega-

⁸⁰ REVISED MODEL STATE ADMIN. PROCEDURE ACT § 405(c)(6) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010) http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa_final_10.pdf.

⁸¹ *Id.* § 412.

⁸² 22 TEX. ADMIN. CODE § 533.3(c) (West 2016); 1 TEX. ADMIN. CODE § 155.501(f) (West 2016).

⁸³ ARIZ. REV. STAT. ANN. § 32-1664(I) (West 2016); NEV. REV. STAT. ANN. § 645.685(1) (West 2015).

⁸⁴ WASH. REV. CODE ANN. § 18.235.050(1) (West 2016).

⁸⁵ OR. REV. STAT. ANN. § 183.482(1) (West 2016).

⁸⁶ Mary Kay Finn, *Administrative Enforcement in the Real Estate Profession: A Nationwide Examination of Regulatory Ambushes and Pitfalls*, 28 REAL EST. L.J. 7, 9 (1999).

⁸⁷ OHIO REV. CODE ANN. § 119.07 (West 2016).

⁸⁸ *Id.*

tions.⁸⁹ In New York however, the licensee *may* respond with an answer, but failure to respond does not result in default and preserves the licensee's rights to object.⁹⁰ This provision does not apply to New York license applicants, however they are still allowed a 35-day response period before default, longer than the MSAPA and several of the state procedures discussed above.⁹¹

In many states, the timeline for requesting set aside relief approximates the suggested 15-day window in the 2010 MSAPA. Kansas and Washington mirror California APA, allowing only seven days to request relief.⁹² Texas allows ten days, while certain Oregon administrative proceedings allow sixty days to request relief from a default decisions.⁹³ From a strictly procedural standpoint, California law appears similar to other jurisdictions.

3. *Procedural Comparison and Recommendations for Improvement*

Compared to civil procedure and administrative procedure in other jurisdictions, California administrative law provides a reasonable, albeit slightly more strict, policy. While civil procedure's personal service requirements are absent in California license disciplinary proceedings, the California APA service requirements are similar to service requirements in other jurisdictions. The starkest contrast appears when comparing civil and administrative set aside timelines, with civil proceedings allowing defaulted parties far more time to seek set aside relief.

Procedural requirements are but the first component in California's licensee-averse administrative set aside scheme. The strict timelines above are compounded by the difficulties presented in the next two stages of the process. In other jurisdictions, defaulted licensees have a reasonable opportunity for relief and access to a hearing on the merits. California licensees, on the other hand, face an uphill battle with little opportunity for relief.

Given how difficult it is to overturn a default decision, California law should be amended to provide better procedural protections for licensed professionals. First, the time period to respond to a license disciplinary action should be extended from fifteen days to at least thirty

⁸⁹ *E.g.*, CAL. GOV'T CODE § 11505(a) (West 2016); WASH. REV. CODE ANN. § 34.05.440 (West 2016); NEV. REV. STAT. ANN. § 645.685 (West 2015).

⁹⁰ N.Y. COMP. CODES R. & REGS. tit. 19, § 400.4 (West 2016).

⁹¹ *Id.*

⁹² KAN. STAT. ANN. § 77-520 (West 2015); WASH. REV. CODE ANN. § 34.05.440 (West 2016); CAL. GOV'T CODE § 11520(c) (West 2016).

⁹³ 1 TEX. ADMIN. CODE § 155.501 (West 2016); OR. ADMIN. R. 860-001-0410(2) (West 2016); OR. ADMIN. R. 860-001-0720(1) (West 2016).

days. Second, the time period for preparing and filing a motion requesting set aside relief should be extended to at least fifteen days, mirroring the MSAPA. These recommendations are firmly based in model statutory language and the procedures of numerous other jurisdictions and could be easily accomplished by making minor amendments to the California Government Code. Finally, the legislature should undertake an examination of the service requirements in other jurisdictions. While personal service, as seen in civil proceedings, may be too financially burdensome for administrative agencies, even the requirement that agencies send a duplicate notification by regular mail would increase the likelihood that licensees will be appropriately advised of a disciplinary action. These changes would make it easier for licensees to exercise their right to a hearing on the merits of a disciplinary action and allow more time to request set aside relief, if necessary.

B. THE NEED FOR MEANINGFUL SET ASIDE PROCEDURES

The absence of a neutral decision maker in California's administrative set aside procedure effectively dismantles the opportunity for relief and stands in marked contrast to civil procedure, model administrative procedure, and administrative law in other jurisdictions. This section will review the substantive side of the administrative set aside process in California and make recommendations for improving the state's misguided process.

1. *Examining Government Code Section 11520*

Before evaluating the California APA's substantive set aside process, a close review of the statutory language is in order. A licensee subject to a default decision must submit a written motion requesting that the default decision be vacated and stating grounds that constitute good cause.⁹⁴ For purposes of this section good cause "includes, but is not limited to, any of the following:

- 1) Failure of the person to receive notice served pursuant to [Government Code] Section 11505.
- 2) Mistake, inadvertence, surprise, or excusable neglect."⁹⁵

California law then instructs that, "[t]he agency in its discretion may vacate the decision and grant a hearing on a showing of good cause."⁹⁶

⁹⁴ CAL. GOV'T CODE § 11520(c) (West 2016).

⁹⁵ *Id.*

⁹⁶ *Id.* (emphasis added).

As discussed below, this standard appears to mirror the showing required to set aside a default decision in civil proceeding, with the notable exception that decision-making power is vested in the administrative agency bringing the action.

2. *Administrative Set Aside in Practice*

The following case illustrates the way in which a seemingly generous standard produced curious results in California administrative proceedings. In *Miller Family Home v. Dep't of Soc. Servs.*, the Department of Social Services ("Department") served notice of a disciplinary action upon a licensee, but the certified mail notices were returned to the Department unclaimed.⁹⁷ The Department issued a default decision revoking Miller's license, a copy of which the licensee received.⁹⁸ The licensee filed a request for set aside relief under Government Code Section 11520(c), arguing that there was confusion regarding a request for a change in her mailing address of record with the agency and, as a result, that she never received the accusation.⁹⁹ Despite what would appear to be good cause by the APA's two proffered definitions, the Department denied set aside relief.¹⁰⁰ In a civil action, failure of a defendant to receive notice is frequently considered good cause to grant set aside relief.¹⁰¹ Here, however, the licensee's own agency determined that good cause did not exist and denied the set aside request.

3. *Comparing California APA to Civil Set Aside Requirements*

The following review of the civil set aside process reveals that the same standard is supposedly being applied in civil and administrative proceedings. The key difference is that civil defendants subject to default do not petition the prevailing plaintiff, but a neutral judge. If circumstances that would warrant set aside relief in a civil proceeding are insufficient in the administrative realm, one would think different standards apply. This, however, is simply not the case.

In civil proceedings, California courts may relieve a party from a dismissal, order, or other proceeding taken against the party if it was the

⁹⁷ *Miller Family Home, Inc. v. Dep't of Soc. Servs.*, 67 Cal. Rptr. 2d 171, 172 (Cal. App. Ct. 1997).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ William H. Danne, Jr., *What Constitutes "Good Cause" Allowing Federal Court to Relieve Party of his Default under Rule 55(c) of Federal Rules of Civil Procedure*, 29 A.L.R. FED. 7 (1976). See, e.g., *Rasmussen v. W. E. Hutton & Co.*, 68 F.R.D. 231 (N.D. Ga. 1975).

result of mistake, inadvertence, surprise, or excusable neglect.¹⁰² Federal civil procedure contains this same language.¹⁰³ An entry of default in federal court may be set aside for “good cause”¹⁰⁴ and judgment in the event of “mistake, inadvertence, surprise, or excusable neglect.”¹⁰⁵ In the event of civil default judgment, California requires the defaulted party to show that the failure of service was not the result of “avoidance of service or inexcusable neglect.”¹⁰⁶

Reviewing administrative default cases alongside civil cases it would appear as though agencies give wholly different meaning to the same standard. The APA calls for set aside relief if the licensee can show “mistake, inadvertence, surprise, or excusable neglect” while California Code of Civil Procedure and the FRCP both reference the exact same language.¹⁰⁷ This similarity, combined with the judicial preference for a hearing on the merits, would suggest relief would be appropriate in circumstances such as *Miller*.

Given these identical standards, the key difference is the decision maker. In civil proceedings, judges decide whether set aside relief should be granted,¹⁰⁸ whereas the agency itself makes this determination in California administrative set aside requests. Administrative proceedings, however, need not meet the stringent requirements of judicial proceedings.¹⁰⁹ So while civil proceedings may be instructive, we will next look to administrative set aside proceedings in other jurisdictions.

4. California APA and the 1981 Model State APA

The California APA underwent significant revisions in 1995, including the first appearance of the request for set aside provisions discussed herein. While the MSAPA was revised in 2010, drafters of the 1995 California APA revisions would have looked to the 1981 MSAPA. The Model Act was revised in 2010, but California APA has not been amended to reflect those changes.

The 1981 Model Act included a seven-day window for requesting set aside relief from a default and suggested that a “presiding officer”

¹⁰² CAL. CIV. PROC. CODE § 473(b) (West 2016).

¹⁰³ FED. R. CIV. P. 60(b).

¹⁰⁴ FED. R. CIV. P. 55(c).

¹⁰⁵ FED. R. CIV. P. 60(b)(1).

¹⁰⁶ CIV. PROC. § 473.5(b).

¹⁰⁷ CAL. GOV'T CODE § 11520(c)(2) (West 2016); CIV. PROC. § 473(b); FED. R. CIV. P. 60(b)(1).

¹⁰⁸ *E.g.*, CIV. PROC. § 473(b).

¹⁰⁹ *Abrahamson v. Ill. Dep't of Prof. Reg.*, 606 N.E.2d 1111, 1119 (1992).

would hear such a request.¹¹⁰ At that time, the Model Act defined “presiding officer” as an agency head *or* an administrative law judge.¹¹¹ The 1995 California APA mirrored the 1981 Model Act as to the timeline for set aside relief, but left decision-making authority to the discretion of the agency.¹¹²

In 2010, the MSAPA was revised with changes that show considerable preference for central panel decision-making.¹¹³ The 2010 Model Act specifically noted the widespread adoption of central panel administrative law judge provisions since the 1981 Model Act and sought to apply that experience to improve the MSAPA.¹¹⁴ The revised Act included provisions recommending the use of central panel hearing agencies, stating that the use of neutral administrative law judges “provides for a neutral separation of the hearing and decision authority from the agency authority to enforce the law and adopt agency rules.”¹¹⁵ This separation of decision-making authority is echoed in the Act’s provision regarding presiding officers. In the 1981 Act, the presiding officer was defined as an agency head, members of the agency head, or an ALJ.¹¹⁶ The 2010 Act revised this definition “so that central panel [ALJs] would be presiding officers in contested case proceedings” under the Act’s adjudication provisions.¹¹⁷ The 2010 Act states that a presiding officer “*must* be an administrative law judge” in accordance with the Act’s central panel provisions.¹¹⁸ The removal of the agency’s role in the decision-making process is of paramount importance when considered alongside the Act’s revised default provisions.

In discussing default and set aside relief, the 2010 Model Act was revised as follows:

Not later than [15] days after notice to a party subject to a default order that a recommended, initial, or final order has been rendered against the party, the party may petition the *presiding officer* to vacate the recommended, initial, or final order. If good cause is shown for the

¹¹⁰ MODEL STATE ADMIN. PROCEDURE ACT § 4-208 (1981) <http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa81.pdf>.

¹¹¹ *Id.* § 4-202(a) (emphasis added).

¹¹² GOV’T § 11520(c).

¹¹³ REVISED MODEL STATE ADMIN. PROCEDURE ACT, Prefatory Note (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2010) http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa_final_10.pdf (“Central panel decision-making” is the use of neutral administrative law judges to perform adjudicatory functions for administrative agencies, thereby separating the agency’s decision-making authority from the agency’s enforcement authority).

¹¹⁴ *Id.* (noting that 25 states have adopted central panel ALJ provisions).

¹¹⁵ *Id.*

¹¹⁶ *Id.* § 4-202(a).

¹¹⁷ *Id.* at Prefatory Note.

¹¹⁸ *Id.* § 402(a) (emphasis added).

party's failure to appear, the *presiding officer* shall vacate the [default] decision and, after proper service of notice, conduct another evidentiary hearing. If good cause is not shown for the party's failure to appear, the presiding officer shall deny the motion to vacate.¹¹⁹

In addition to doubling the recommended timeline for requesting set aside relief, the 2010 Model Act firmly vests set aside decision-making authority in a neutral administrative law judge. The defaulted licensee is instructed to petition the administrative law judge who in turn makes a determination of whether good cause exists to vacate the default order.

For reference and ease of comparison, the California APA, as amended in 1995, reads as follows:

Within seven days after service on the respondent of a decision based on the respondent's default, the respondent may serve a written motion requesting that the decision be vacated and stating the grounds relied on. *The agency in its discretion* may vacate the decision and grant a hearing on a showing of good cause. As used in this subdivision, good cause includes, but is not limited to, any of the following: (1) Failure of the person to receive notice served pursuant to Section 11505. (2) Mistake, inadvertence, surprise, or excusable neglect.¹²⁰

Reviewed side-by-side, three differences are apparent: 1) licensees have only seven days to request set aside relief in California, not the recommended fifteen days; 2) California law provides two examples of good cause which are absent in the Model Act; and 3) decision-making authority is vested in "the agency in its discretion" in California, but in a neutral ALJ in the Model Act. These differences show how the California APA is out of step with the Model Act, especially regarding to the critical matter of set aside decision-making authority. As discussed below, California's set aside procedure also stands markedly apart from existing procedure in other states as well.

5. *Comparing California APA to Other Jurisdictions*

By 2010, twenty-five states had adopted central panel provisions in which neutral ALJs separate the hearing and decision authority from the agency's enforcement authority.¹²¹ California has a central panel system

¹¹⁹ *Id.* § 412(d) (emphasis added).

¹²⁰ CAL. GOV'T CODE § 11520(c) (West 2016) (emphasis added).

¹²¹ REVISED MODEL STATE ADMIN. PROCEDURE ACT § 412(d) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010) http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa_final_10.pdf.

that has been praised and recommended for application in other states.¹²² California ALJs routinely preside over license disciplinary hearings, but, as noted above, their authority is absent in the set aside process.

Unlike California, other central panel states use neutral administrative law judges to decide set aside requests. In Texas, ALJs from the State Office of Administrative Hearings decide motions to set aside default in licensing actions “for good cause shown, or in the interests of justice.”¹²³ Washington APA reflects the 2010 Model Act, vesting set aside decision-making authority in a central panel “presiding officer.”¹²⁴ Kansas requires set aside requests to be heard by a neutral administrative judge, either with or without a formal hearing.¹²⁵ In addition, some states allow licensees to request reconsideration or a rehearing in the event of any agency decision, including default.¹²⁶ These provisions routinely apply the good cause standard applied in California and civil proceedings, but licensee requests for set aside are decided by neutral ALJs.

6. *Conclusion and Recommendations*

Neither civil proceedings nor any examined state APA allows the party bringing the action to decide the critical question of whether set aside relief should be granted. California Government Code Section 11520 must be amended to ensure neutral adjudication of set aside requests. The legislature should revise this section by replacing the phrase, “[t]he agency in its discretion” with “the presiding officer.” This change will allow a neutral administrative law judge to decide whether set aside relief is appropriate.

Looking forward to judicial review, the present system of biased agency decision-making has devastating results. Courts give considerable deference to decisions made at the administrative level, meaning that an erroneous denial of set aside relief is likely to be upheld in the writ process.

¹²² Michael Asimow, *Speed Bumps on the Road to Administrative Law Reform in California and Pennsylvania*, 8 WIDENER J. PUB. L. 229, 236 (1999).

¹²³ 1 TEX. ADMIN. CODE § 155.501(f) (West 2016).

¹²⁴ WASH. REV. CODE ANN. § 34.05.440(3) (West 2016).

¹²⁵ KAN. STAT. ANN. § 77-520(b) (West 2015).

¹²⁶ ARIZ. REV. STAT. ANN. § 41-1062(B) (West 2016).

C. WRIT OF MANDATE—PRACTICE RECOMMENDATIONS FOR
ADVANCING DENIED SET ASIDE REQUESTS TO SUPERIOR
COURT

Parts A and B discussed default and set aside procedures at the administrative level and how they should be improved. Assuming set aside relief is denied by the agency, we will now turn to the way in which licensees can seek judicial review of the agency decision, the standards and scope of review therein, and practice recommendations to best position a defaulted licensee for relief through the writ process.

1. *Traditional or Administrative Mandamus?*

Due to the nature of administrative default decisions, writ proceedings fall into a gray area between the two types of mandamus action. Agency action can be categorized as either legislative or adjudicatory in nature, and the appropriate form of mandamus follows accordingly. Administrative mandamus is appropriate for reviewing adjudicatory decisions that follow an evidentiary hearing, while traditional mandamus applies to legislative agency action in which no hearing occurred and the agency formulated a rule to be applied going forward.¹²⁷ A license disciplinary action is adjudicatory in nature, suggesting that administrative mandamus would be appropriate. At the same time, administrative mandamus is intended to review an agency decision that follows a hearing on the record, and no hearing is held in the event of a default decision for failure to respond to the accusation. One could therefore argue that traditional mandamus, appropriate when no hearing occurred, should apply. As a result of this confusion, set aside writ petitions have been filed and reviewed under both traditional and administrative mandamus.

2. *Standard of Review*

Regardless of which form of mandamus review is chosen, the defaulted licensee has little hope for success in the trial court. Agency findings are presumed correct and considerable deference must be given to agency decision-making.¹²⁸

In traditional mandamus, the trial court's review is limited to whether the agency decision was arbitrary, capricious, or entirely lacking

¹²⁷ McGill v. Regents of University of California, 52 Cal. Rptr. 2d 466, 471 (Cal. App. Ct. 1996).

¹²⁸ Gardner v. Comm'n on Prof'l Competence, 210 Cal. Rptr. 795, 797 (Cal. App. Ct. 1985); Drummey v. State Bd. of Funeral Dirs. and Embalmers, 87 P.2d 848, 854 (Cal. 1939).

in evidentiary support.¹²⁹ As the court in *Miller* noted, this standard places the burden on the licensee to show that the agency acted without due regard for his or her rights.¹³⁰ Administrative mandamus allows a more searching review by the trial court, especially when a fundamental vested right is implicated.¹³¹ Under such circumstances, the trial court may exercise its independent judgment on the evidence presented at the agency level.¹³² This form of mandamus review has been described as a “limited trial de novo” and greatly improves the licensee’s ability to reverse an agency decision.¹³³

In addition to the well-established standards of review for administrative and traditional mandamus actions, some opinions have suggested a higher standard. In cases involving procedural due process concerns, more searching judicial review may be warranted.¹³⁴ Default decisions inherently involve due process questions, therefore this additional scrutiny may be appropriate. In addition, civil courts have held that decisions denying set aside relief also warrant a more searching review.¹³⁵ Finally, case law instructs that doubts should be resolved in favor of the party requesting set aside relief.¹³⁶ These opinions are rooted in civil proceedings, but the same principles should apply when courts review administrative set aside decisions.

3. *Scope of Review*

The trial court’s limited scope of review also presents challenges to defaulted licensees. In most circumstances, the trial court can only consider evidence that was presented at the administrative level.¹³⁷ Evidence not considered at the administrative level can only be presented during judicial review if it could not “in the exercise of reasonable diligence” have been presented to the agency.¹³⁸

The limited scope of review in a mandamus proceeding is problematic for a number of reasons. First, an administrative set aside decision is

¹²⁹ *Shapell Indus. v. Governing Bd.*, 1 Cal. Rptr. 2d 818, 824 (Cal. App. Ct. 1991).

¹³⁰ *Miller Family Home, Inc. v. Dep’t of Soc. Servs.*, 67 Cal. Rptr. 2d 171, 172 (Cal. App. Ct. 1997).

¹³¹ *Bixby v. Pierno*, 481 P.2d 242, 251 (Cal. 1971) (*en banc*).

¹³² *Id.*

¹³³ *Hand v. Bd. of Exam’rs*, 136 Cal. Rptr. 187, 193 (Cal. App. Ct. 1977).

¹³⁴ *Bixby v. Pierno*, 481 P.2d 242, 251 (Cal. 1971) (*en banc*).

¹³⁵ *Brill v. Fox*, 297 P. 25, 26 (Cal. 1931).

¹³⁶ *Jergins v. Schneck*, 124 P. 426, 426 (Cal. 1912).

¹³⁷ *Evans v. Dep’t of Motor Vehicles*, 26 Cal. Rptr. 2d 460, 464 (Cal. App. Ct. 1994).

¹³⁸ *Fukuda v. City of Angels*, 977 P.2d 693, 698 (Cal. 1999) (quoting *Dare v. Bd. of Med. Exam’rs*, 136 P.2d 304, 309 (Cal. 1943) (*en banc*)).

made without a hearing and at the agency's sole discretion.¹³⁹ As such, no record is created at the administrative level, severely limiting the trial court's ability to review the agency's decision. Further, the decision is made behind closed doors and typically results in a cursory order containing little explanation of the agency's reasoning. This also limits the trial court's ability to perform a meaningful review of agency findings. Second, the seven-day deadline to prepare and request administrative set aside relief limits the licensee's ability to present all necessary evidence in support of the motion. These two factors result in trial courts reviewing only what evidence could be hastily prepared by an often pro per licensee during the brief seven-day administrative set aside window.

4. Recommendations

While deference to agency decisions makes the writ process an uphill battle for defaulted licensees, there are strategies that can increase the likelihood of success. First and foremost, it is critical that licensees seek judicial review under the administrative mandamus provisions described in Section 1094.5 of the California Code of Civil Procedure. Under traditional mandamus, it is simply too easy for a reviewing court to uphold an agency set aside denial. Courts are willing to review administrative set aside denials under administrative mandamus, therefore licensees should petition for judicial review under this section in order to be afforded independent review of the agency's decision.

Coinciding with the above recommendation is the importance of arguing that a fundamental, vested right is at issue. In an administrative mandamus proceeding, independent review is only applied where the administrative decision affects such a right.¹⁴⁰ Courts must make this determination on a case-by-case basis, but have repeatedly held that a license revocation proceeding implicates a fundamental, vested right.¹⁴¹ For individuals subject to license revocation by way of a default decision, it is crucial that the fundamental nature of the right to practice one's profession be emphasized in a writ proceeding.

When appropriate, defaulted licensees should also challenge conclusory agency orders denying set aside relief.¹⁴² The above recommendations will place the defaulted licensee in the best position to challenge an agency decision on the substantive facts presented, but an ancillary

¹³⁹ CAL. GOV'T CODE § 11520(c) (West 2016).

¹⁴⁰ *Bixby v. Pierno*, 481 P.2d 242, 251 (Cal. 1971) (*en banc*).

¹⁴¹ *See id.*

¹⁴² CAL. GOV'T CODE § 11425.50(a) (West 2016) (requiring that a decision include a statement of the factual and legal basis for the decision).

argument may exist if the agency was too brief in denying the administrative set aside request.

In *Fadaei v. California Department of Real Estate*, the trial court decided in favor of the defaulted licensee on the basis that the agency's order denying set aside relief "[did] not contain any findings other than a conclusory statement that there is no good cause"¹⁴³ In this rare instance in which the licensee prevailed, the trial court noted that meaningful review is impossible if the agency fails to explain its reasoning.¹⁴⁴ If the licensee is presented with a brief or conclusory order denying set aside relief at the administrative level, he or she should advance the argument relied upon in *Fadaei* as well as the substantive arguments as to why good cause did exist to overturn the default decision.

CONCLUSION

The default and set aside procedures described above are woefully deficient in protecting California's licensed professionals. The right to practice one's profession is paramount, as recognized in the eloquent excerpt below:

The right to practice a profession has been called a property right, but it is more. To obtain a license and proficiency requires the expenditure of money and years of preparation, attended by toil and self-denial. Such right is the capital stock of its possessor from which dividends are expected sufficient to protect him from the infirmity of old age, and to provide his family with the comforts of life. There is moreover a prestige and good name and should be a pride attached to the practice of an honorable profession superior to any material possessions. To cancel a professional license is to take the entire capital stock of its possessor and to leave him in most instances the equivalent of a bankrupt. But it does much more than this; it takes from him his professional standing and in a manner whatever good name he has, which leaves him "poor indeed."¹⁴⁵

Working against this significant private interest is the concert of licensee-averse provisions described herein. Limited service requirements, stunningly short deadlines, biased agency decision-making, and limited

¹⁴³ Decision for Petition on Writ of Mandate, *Fadaei v. Cal. Dep't of Real Estate*, 2013 WL 1386821, No. BS 136655 (Mar. 13, 2013).

¹⁴⁴ Decision for Petition on Writ of Mandate, *Fadaei v. Cal. Dep't of Real Estate*, 2013 WL 1386821, No. BS 136655 (Mar. 13, 2013) (quoting *Topanga Ass'n for a Scenic Cmty. v. Cnty of L.A.*, 522 P.2d 12, 17 (Cal. 1974)).

¹⁴⁵ *Waller v. State*, 68 S.W.2d 601, 605 (Tex. Civ. App. 1934).

judicial review combine to place California licensees in a precarious position.

California licensees have an enormous private interest at stake in license disciplinary proceedings and the risk that such interests could be erroneously deprived is very real. The United States Supreme Court has instructed that the interest to be deprived should be considered along with the fiscal and administrative burdens of additional protections when evaluating due process.¹⁴⁶ The recommendations above will better protect licensees and reflect these considerations. The first recommendation, allowing licensees additional time to respond or request set aside relief, would do little to prejudice the administrative agencies. The second, vesting decision-making authority in a neutral ALJ, could be easily accommodated by allowing California's existing central panel ALJs to review administrative set aside petitions. Both suggestions can be implemented with minimal fiscal and administrative burden and would substantially improve the rights of the state's hundreds of thousands of licensed professionals. Without these changes, licensees should be advised to monitor their mail with care and abide by agency deadlines, for administrative set aside bears little resemblance to its civil counterpart.

¹⁴⁶ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).