Good morning. It’s very nice to be back at a CAC annual meeting, and I hope you have had a nice time here in San Francisco. It is a privilege to be speaking to you today, and I thank David Swankin and Becky LeBuhn for giving me the opportunity.

Introduction to CPIL

Before I get started, I want to tell you a little bit about me and my organization — the Center for Public Interest Law (CPIL) — so you know who I am, what I do, and where I’m coming from.

I regret to inform you that I am a lawyer.

I am not only a lawyer — I am a law professor.

My husband, Bob Fellmeth, and I run the Center for Public Interest Law at the University of San Diego School of Law.

For 22 years, we have taught a class in state regulatory and administrative law to law students. We teach them about agencies like yours — agencies that regulate business, professions, and trades.

We teach our students the state laws that govern the way agencies conduct business and make decisions — laws like the Open Meeting Act, the Public Records Act, and the Administrative Procedure Act, which is our statute that governs the procedure agencies must follow to adopt regulations and to discipline licensees.

We teach them about limitations on agency authority — like constitutional limitations and antitrust limitations.

We teach them to step back — to look at the forest instead of the trees — and question why we are doing what we are doing. Why are we regulating this particular profession? Is that regulation — that government intrusion into the marketplace — justified? If so, is it effective? How do we know? How do we measure that?
As part of their coursework, we assign our law students to monitor the activities of two different agencies for a year. They attend board meetings, they read agency enabling acts and regulations, they scour their agencies’ Web sites, they get agency documents and meeting packets, they learn to track both legislation and litigation affecting their agencies and their licensees, and — twice during the year — they write fairly detailed articles on what their agencies are doing. Their articles cover regulations the agency has recently adopted, major disciplinary decisions, agency responses to and/or studies of major abuses in the profession, legislation recently passed or pending, and litigation recently decided that affects the agency or its licensees.

I edit those written reports and we publish them in our journal, the *California Regulatory Law Reporter*, which is intended to shine some light on the activities of state regulatory agencies — which otherwise operate in relative invisibility.

In the *Reporter*, we monitor the activities of 25 different state agencies in California — and not just health care agencies. We look at everyone from the Medical Board to the Pharmacy Board to the Accountancy Board to the Department of Managed Health Care to the Department of Insurance to our Public Utilities Commission.

So we don’t look solely at the Podiatry Board or the Pharmacy Board, or even at the health care boards. We look broadly at many different types of occupational licensing boards — because we have found that they’re all different (or at least they think they’re all different), yet they’re all the same — because they are all supposed to protect the public as their highest priority. Your primary theme this week is collaboration — and yet we know for a fact that these agencies don’t talk to each other, and that they could really learn a lot from each other.

In some ways, CPIL connects them — sometimes against their will and much to their chagrin. In addition to our academic program and the publication of this journal, I attend a lot of the meetings of these boards and advocate the public interest. For example, I go to the Accountancy Board meeting and watch them — with equal parts amusement and frustration — struggle with a problem the Medical Board solved 15 years ago. But then I go the Medical Board meeting and show them ways in which the Accountancy Board’s Web site is superior .... and on and on.

We work on a number of different levels to try to make sure these boards do what they’re supposed to do: (1) we appear before the boards themselves; (2) we work closely with the California Department of Consumer Affairs, the parent agency of many of these boards, to address issues that cut across a wide variety of boards; (3) we are active in the California legislature; and (4) because we’re lawyers, we can also function in the court system when we need to.

Over the past 15 years, we have specialized in studying and evaluating the enforcement programs at California occupational licensing agencies.

We started with our own profession — the legal profession — and completed a five-year project studying and recommending changes to the California State Bar’s attorney discipline system in 1992.
During the same time period, we published *Physician Discipline in California: A Code Blue Emergency*, a very critical report on the Medical Board’s physician discipline system in 1989, and have spent the last 12 years working to implement recommendations made in that report.

Recently, I’ve worked on a two-year project evaluating the enforcement program of our agency that licenses construction contractors. Thus, we have a broad background in agency enforcement systems.

With that background, David asked me to talk this morning about the consumer perspective. What do consumers want and expect from the enforcement programs of your regulatory agencies?

I’m going to tick off some characteristics of a good enforcement program, and then discuss ways to approach them.

**FIRST: Existence and Purpose**

First, and most fundamentally, consumers want to know that your board — and its enforcement program — exist. They want to know what you do, who you do it to, and how they can reach you, complain to you, and learn from you. That means you must engage in strong outreach and public education.

*Example:* A few years ago, the California Board of Pharmacy contracted with an outside consulting firm to perform a survey of California consumers as to their opinions on the Board, its performance, their feelings about their pharmacists, etc. Over 75% of the people surveyed had never even heard of the Board of Pharmacy. And of the 23% who had, most of them thought the Board represents pharmacists, and not the public interest.

*Example:* Earlier this year, a California newspaper printed a series of articles on a southern California ob-gyn with a horrendous record — his negligence and incompetence had killed or permanently injured a number of infants and devastated their families. Although the newspaper primarily blamed our Medical Board for not having taken the doctor’s license earlier, the bigger picture revealed systemic failures on a number of levels — including the failure of the private peer review process in hospitals, the failure of court clerks and insurers to inform the Board of civil judgments and settlements against this physician, and a number of loopholes in our laws.

But one of the most shocking failures — to me, anyway — was the fact that the victims of these horrible tragedies did not know who to tell, so that what happened to them would not happen to a future family. Of about a dozen victims of this doctor’s extreme incompetence, only one filed a complaint with the Medical Board. That complaint led the Board’s investigator to victim after victim after victim, none of whom had filed a complaint with the Board.
Many people simply don’t know who licenses health care providers — the state? the feds? a local agency? Is a “local county medical society” a government agency? Some people think so — it’s got the word “county” in it. Some of those “local county medical societies” think so too — but they’re not. They are private clubs. And when they get complaints against their members, they should be required to disabuse consumers of the notion that they have governmental authority and refer those complaints to the state medical board.

Many hospital patients don’t even know what kind of license their health care provider holds. Is she a doctor? a nurse? a nurse practitioner? a physician assistant? How are you, as government, educating patients about these various practitioners and who regulates them? How are you, as government, educating consumers as to your existence and your purpose?

Why is it that when we go into our car repair shop, we are immediately bombarded with posters and brochures and toll-free telephone numbers and required disclosures on our estimates and our invoices about the regulator of our car repair guy — and yet we refuse to do the same kind of thing for physicians and other health care practitioners?

One of my observations over the many years I’ve been doing this is that the health care professions, particularly physicians, think it’s unseemly for a regulator to be visible — as if the visibility of the regulator somehow stimulates complaints and lawsuits (all of which are, of course, frivolous.....).

That is absolute nonsense. Physicians and other health care practitioners are members of highly regulated professions, and in no other area is it more vitally important that the regulator be visible and that consumers be aware of that regulator’s existence and purpose.

And in attempting to be visible, you must think deeply and learn much about your audience. How many of you publish your Web site and your publications in languages other than English? Almost 40% of Californians speak a language other than English. And don’t think you are immune from this — this is coming to a neighborhood near you.

How many of you post your complaint form on the Internet and allow consumers to fill it out and return it to you online?

How many of you replicate all of the information on your Web site on paper for people who have no access to the Internet?

How many of you send all of your publications to all public libraries in the state?

How many of you have subjected all of your consumer education publications to the Flesch Reading Ease Test and the Flesch-Kincaid Reading Grade Level Scale, to ensure that the people you are charged with protecting and educating actually understand what you are saying?

How many of you offer your consumer education publications in large print for seniors?
How many of you offer a toll-free line to your office, to make it easy for people to contact you?

How many of you do outreach to grassroots community organizations interested in health care issues — so you can help them help you reach populations you would not otherwise reach?

**SECOND: Information Collection and Disclosure**

Consumers want to know what you know about the people you license — which means you must do four things:

- insist on getting the information you need in order to make informed decisions;
- once you get the information, establish a strong public disclosure policy whereby you disclose the information you have gathered to the public;
- once you get it and decide to disclose it, create an easy way for consumers to get access to that information; and
- tell consumers what you don’t disclose.

(1) **Get the information you need in order to make informed decisions.**

This can include everything from getting a complainant’s medical records from an accused practitioner, to getting medical records and peer review records from hospitals, to getting information regarding malpractice payouts from insurance carriers, to getting information regarding prior criminal history and civil malpractice history from courts and from licensees themselves.

Do you know whether your board gets this information? Find out! If you don’t already get this information, get it! Secure the authority to get it, and ensure that you do get it.

If you have the authority but don’t get the information, figure out how to get it, either by “carrot” methods (i.e., establish good working relationships with hospitals and courts and other mandated reporters) or by “stick methods” (i.e., impose penalties for its nonproduction).

Here in California, we have all kinds of laws requiring all kinds of reports to our health care boards on all this information — but people don’t always comply with those laws, and there are no (or insufficient) penalties for failure to comply. So you as a regulator need to get real, get serious, and get that information.

(2) **Establish a strong public disclosure policy and disclose the information you have gathered to the public.**

In our view, many of you have a long way to go in this area. Many of you have engaged in lengthy deliberations over what to disclose and when to disclose it, but you largely limit yourselves to your own disciplinary actions. That’s all well and good, and we believe you should disclose information regarding your disciplinary actions. But you should be equally interested in obtaining and disclosing other information about your licensees, including criminal convictions, civil judgments, settlements,
and arbitration awards, and hospital disciplinary actions — much of which is public information, and all of which is related to substandard practice as a licensee.

You as regulators need to know all this information so you can make informed licensing and disciplinary decisions. And much of this is public information — so why not disclose it to consumers?

In addition, every other stakeholder has this information. No medical board would license, no malpractice carrier would insure, no hospital would grant privileges, and no HMO would hire a physician without knowing his/her complete disciplinary history, malpractice history, criminal history, and hospital privileges history. If everybody else has this information, why shouldn’t consumers be allowed to know that very same information to protect the lives and health of themselves and their families? If this information is relevant to those people for purposes of making business decisions, why is it not just as relevant to consumers for purposes of making personal health care decisions?

This is a huge issue in California right now, and I hope it is a huge issue in your state. If it’s not, maybe you are not doing your job.

We have fought this battle in California for nine years, and we’ve heard the tired old refrain from the professions time and time again: “Public disclosure of civil judgments/settlements and criminal convictions is the lazy board’s way out. If a practitioner is really that bad, take his license away and publicize that. Public disclosure is a poor substitute for discipline.”

Our response? Public disclosure is a complement to discipline, not a substitute for discipline. Let’s face it:

- Most of your discipline programs are controlled by members of the very profession being regulated.
- Your discipline programs are slow, they are tiny, they are run by bureaucrats and not prosecutors, they are underfunded, and they will never be able to catch up with all the bad actors and all the abuses out there that can and do seriously and permanently hurt consumers.

So we do the best we can and keep plugging away at enforcement, but we also — as a complement to discipline — empower consumers by giving them access to information, information that is true and accurate and complete and related to the practice of a regulated trade or profession, so consumers can protect themselves from dangerous people who are recognized as such by other state actors.

(3) Create an easy way for consumers to get access to that information— post the information on your Web site, or make it accessible via a toll-free phone number.
(4) **Important Corollary: Tell people what you’re not telling them**

If you are not authorized to disclose certain information or you choose not to disclose it, tell people that. Tell consumers what you are not telling them. If it’s otherwise public information and it is important to a consumer in making an informed choice, they can get it elsewhere.

But they won’t look elsewhere if they think you are providing that information. Many consumers who see a blank screen assume that there are no criminal convictions, no malpractice payouts, no hospital disciplinary actions — and they may be sadly mistaken in making that assumption. It’s up to you to tell them what you don’t disclose so they don’t make that assumption.

**THIRD: Public Protection is Your Highest Priority**

Consumers want you to establish public protection — in word and in deed — as your highest priority. They don’t just want to hear those words come from your mouths or read those words in your mission statement on your Web site — anybody can mouth the words. They want to see that concept in your actions. They know that many of you are dominated by members of the very profession you regulate — so they are already suspicious of you, and have set a very high bar in front of you.

Consumers want to believe that both board members and staff members understand that public protection is your highest priority.

How do you accomplish that? You sponsor legislation and stick it in your statute, so all the world — including Board members, staff members, the profession, and the public — knows that your job is public protection.

Thirteen years ago, we published a report about the enforcement program of our Medical Board. This report was not rocket science. We simply described the long and complex and multi-step process, and then we exposed the Board’s output numbers (which were so pathetic they spoke for themselves).

And then we proposed changes to the system to improve it. Our very first proposal was to amend the Board’s statute — which at that time stated that “physician rehabilitation” was the primary goal and top priority of the Board’s enforcement program.

We crossed that out. Instead, we wrote a law that says that public protection is the highest priority of the Board’s enforcement program. We left in the part about physician rehabilitation being important and being a goal, but we further clarified that where physician rehabilitation and public protection are inconsistent, “public protection shall be paramount.”

If you like that, it’s California Business and Professions Code section 2229. It is the law. New governors and legislators inherit it. New board members and staff members inherit it. It’s been on the books for 12 years, and you know the most important part? Courts inherit it too. Courts that
are hearing challenges to Medical Board actions scour the Medical Practice Act looking for evidence of legislative intent regarding the purpose of the Board, and they find it in section 2229. Courts cite to it, they rely on it, and they uphold Medical Board actions in the public interest.

And this past year, we wrote a bill adding a similar provision to the statutes of every single licensing program in the Department of Consumer Affairs: Public protection is the highest priority, and where public protection conflicts with some other interest, public protection is paramount.

**FOURTH: Professional, Efficient, And Effective Complaint Handling Process**

Consumers want a complaint handling process that is reasonably quick and decisive in the normal course, and they also want to know that you can move quickly in very serious, very egregious cases. This sounds simple but — as you know — it is not. This requires at least **six interrelated things:**

1. **Professional, trained complaint handling staff.** Years ago in California, and still today in some states, some agencies use untrained volunteers or even licensees to process and investigate complaints. This is not the optimum way to run a law enforcement process. I want to repeat that, because this is a critically important concept. You are regulators, overseeing and participating in a law enforcement process. Your staff must be trained professionals in complaint handling and investigation. Your investigators must be professional investigators first, and trained in the subject matter of your complaints second.

   Going one step further, in our view, your complaint handlers and investigators should be overseen by the prosecutors who will file cases and try cases, so they have legal guidance on the elements of the offense, the evidence it will take to prove those elements, and the way to secure that evidence so it is admissible at the hearing.

   That’s not the way it works at most California agencies, and I’m willing to bet it doesn’t work that way at most of your agencies. But that is how district attorney’s offices work, and how many attorney general’s offices work. The optimum model in most white-collar-crime-type law enforcement offices investigating serious offenses is a team approach — professional investigators and professional prosecutors who work together as a team from the day the case comes in.

2. **Appropriate case prioritization.** As cases move through the system, your agency staff has got to be able to separate the wheat from the chaff — the drug diversion from the bad bedside manner — to prioritize cases and recognize those that require expedited handling. This means that you as board members must do three things:

   - establish case processing priorities for staff;
   - ensure that your complaint handling staff are properly trained to recognize serious cases quickly, and are not so overloaded that complaints sit for days and weeks and months; and
   - demand that staff give you detailed data on complaint handling/investigation case cycle times so you can meaningfully oversee the process.
(3) meaningful interim authority. Related to appropriate case prioritization is meaningful interim authority. When you come across that egregious case — that nurse on drugs, that doctor botching deliveries and killing infants, you must be armed with adequate authority to remove that practitioner from the marketplace now — in the interim, and until the formal disciplinary matter is concluded — to protect the public.

In California, our agencies used to have to go into superior court and get a temporary restraining order from a superior court judge — a very difficult challenge, because superior courts are not accustomed to hearing these types of cases and will rarely grant TROs over the objection of a doctor represented by a relatively fat cat lawyer of the type a physician might be expected to hire.

Now, our agencies can seek what’s called an “interim suspension order” from the same administrative law judges that preside over their disciplinary cases. These judges are familiar with occupational licensing issues and will more readily grant these interim orders in appropriate cases.

And we believe your authority should include interim license restriction in addition to suspension, because sometimes it is not necessary to shut down a person’s entire practice. For example, if the problem is money, restrict the licensee from handling money and make him hire someone to handle money. If a physician consistently botches a particular procedure, prohibit her from performing that procedure, or require direct supervision of that procedure by another physician. If the allegation is sexual misconduct and it’s contested, prohibit him from seeing female patients, or require an independent third-party chaperone during all examinations until the conclusion of the disciplinary proceeding. You should be able to restrict on an interim basis without suspending in appropriate cases — and it’s arguable you should be able to do that on a lesser showing than is required for interim suspension.

(4) ability to detect patterns of misconduct. You know that many of the complaints you get from consumers do not rise to the level of a disciplinary violation. A consumer may complain about conduct that is absolutely unprofessional and rude, but it does not violate the law — and it is simply not worth the expenditure of your limited resources or all the time that a formal disciplinary proceeding consumes.

On the other hand, if you get ten of those complaints about minor violations within a short period of time, you may have a real problem on your hands.

During our study of the State Bar’s attorney discipline system, we found the Bar was simply throwing away / discarding minor complaints about attorneys who — for example — would not return the telephone calls of their clients, or were late for appointments, or late for court hearings, or missed deadlines. Those kinds of things — standing alone — simply do not violate the law, and we did not expect the Bar to impose disciplinary action for them. However, in looking at Bar investigative files, we found that enough of them in a short period of time and from different clients often revealed a lawyer with a drug or alcohol problem. And if an agency throws those complaints away instead of entering them into its system for pattern detection, it will never be able to detect that problem and intervene as appropriate.
(5) a spectrum of remedies that match the violation. Related to pattern detection is the idea of a spectrum of remedies, so you are not forced to choose between full-blown adjudication and revocation on the one hand vs. nothing on the other, for an intermediate violation that does not really warrant revocation but should not be ignored. Agencies should have a wide range of sanctions, ranging from a private letter of reprimand to a public letter of reproval to a citation, fine, order of abatement, probation, suspension, and revocation — so that the penalty matches the gravity of the offense.

(6) resources. Obviously, agencies need adequate resources to be able to do their job. Enforcement is very expensive. Not only does the agency have the burden of proof in an enforcement proceeding, but the agency also has to front the cost of the entire enforcement program — from complaint handlers to investigators, prosecutors, judges, court reporters, probation monitors, and appellate attorneys to defend agency decisions that are appealed in court. This is very expensive — and is usually financed by licensing fees paid by the regulated profession.

And if your state is like my state, those licensing fees are set by the legislature, and the legislature is overwhelmingly influenced by the trade association whose members are regulated by the agency. If your state is like my state, that trade association has de facto control over the resources used by the agency to police its members. That is completely unacceptable, because that trade association is generally not interested in vigorous discipline. That trade association is probably interested in as little discipline as possible. The lower the licensing fees, the less enforcement the agency can do. Absolutely unacceptable. But that’s the way it is in most states. You as board members have a duty to police your enforcement budget and enforcement needs and to alert the legislature as often as is necessary and as loudly as necessary so you are adequately resourced to be able to do the job the public is depending on you to do.

And you as public members have a particular responsibility in this area.

And we believe you should consider supplementing your enforcement budgets with what we call “cost recovery” here in California. We have a statute that allows a regulatory agency to recover some of its investigative costs in a particular proceeding against the licensee who is ultimately disciplined in that proceeding. Rather than spreading the cost of investigating the bad apples across the entire regulated profession, “cost recovery” attempts to impose some of those costs on the bad apples themselves — the ones who are requiring the agency’s cost expenditure. This is a controversial subject, but our cost recovery statute has recently been upheld as constitutional by the California Supreme Court.
**FIFTH: Consumers Expect a Decisionmaker who is Informed, Unbiased, and Independent from the Profession, and Has Access to Subject Matter Expertise**

Now I’m really going to get legal on you. I want to talk a bit about the decisionmaker in agency disciplinary decisions.

The decisionmaking process differs greatly from state to state, but most states employ a system wherein an evidentiary hearing on the disciplinary charges is presided over by a judge of some sort — usually an administrative law judge.

After the hearing, that judge — the one who sees the witnesses, has opportunity to observe their demeanor and credibility, and receives all the evidence — writes a decision. However, that decision is just a “proposed decision” which goes back to the agency members themselves for review and final decision.

That process — from receipt of the complaint to final agency decision — can take years. The number of steps in that process is excessive, often more than we give criminal defendants. This delay is especially egregious in the health care professions, where incompetence or impairment — if left unchecked for even a day — can cause irreparable harm to multiple patients. And the monetary cost of this process is momentous, for both the agency and the licensee.

Yet we leave the final agency decision in that long process to people who were not at the hearing, had no opportunity to observe the witnesses or the evidence, don’t have the transcript of the hearing, are not judges, have no familiarity with the rules of evidence or administrative procedure, may not have any familiarity with the subject matter of the particular case, usually have no idea how similar cases have been decided, and usually consist in majority of people in the same profession or trade as the accused licensee.

Does that make sense? Are those people in the best position to make a high-quality decision? Based on 22 years of observation and experience, we would say no. That decisionmaker does not have optimum information. That decisionmaker is not necessarily unbiased. That decisionmaker is not independent from the profession — in many cases, that decisionmaker is the profession, and is not in the best position to make a decision in the public interest.

In our view, we should try to create a decisionmaker who has both subject matter expertise and independence from the profession.

We have always believed that the judge who presides over the hearing is in the best position to make the final decision.

That judge was at the hearing and has seen and heard the witnesses, including expert testimony needed in quality of care cases.
That judge is familiar with the rules of procedure and evidence in administrative proceedings.

That judge has knowledge of the evidence and is independent of the profession — the two qualities we think are most important in making a decision in the public interest.

And you can do other things to enhance that judge’s ability to make high-quality decisions:

- If your state is large enough, you can let judges specialize — create panels of judges who specialize in certain types of occupational licensing cases, so they are familiar with the subject matter and the vocabulary and the statute and the defenses.
- You can fashion a system whereby the judges on a given panel learn of each other’s decisions, enabling them to issue consistent decisions in similar cases.
- You as boards can develop disciplinary guidelines to guide the judge in assessing the sanction you think is most appropriate for a given violation.
- Those judges can be given access to their own expert witnesses — neutral experts who can be called by the judge, subject to cross-examination by both sides, who can help the judge wade through the “hired gun” expert testimony offered by each side.

On the whole, we think that judge is in a much better position to make that decision than a board that is made up of volunteers, whose membership is constantly changing, which meets every three or four months, who were not at the hearing, and who generally have no idea how similar cases have been decided.

We think that judge is in a better position to make a faster decision in the public interest. And if the judge is wrong — as judges sometimes are, that case will go to court more quickly and at less cost for both the agency and the respondent.

Now if you are positively horrified, don’t feel alone.

Nobody sitting on a board ever likes this idea. It calls upon you to give up authority — to give up turf, to hand over part of your job to someone else over whom you do not have complete control — which most board members consider unthinkable.

But it would lead to faster decisions, more consistent decisions, decisions that are based on the evidence in the case — without imposing decisionmaker on top of decisionmaker on top of decisionmaker, and requiring each one to relearn the case in wasteful and endless fashion.

It would also free you up to make more important decisions — to establish standards of practice in response to abuses and to learn freely about problems in the profession you regulate, which you are not always at liberty to do under the current system because of your role as final judges in disciplinary matters.
We believe multimember boards made up of volunteers are better positioned to establish rules, not find facts in individual cases.

It’s something to think about.

I hope these comments have given all of you something to think about this morning. You may think you are stuck in an unchangeable system, but it doesn’t have to be that way. Some people say “due process takes time” — but those people are usually lawyers, and lawyers bill by the hour. It doesn’t have to be that way.

There is much room for thought, and for discussion, and for agreement, and for disagreement, and I’m thankful that CAC provides this unique forum for these exchanges. The only things there is no room for are ignorance and an unwillingness to learn about these important issues. Step outside the box.

Thank you for your attention. I’m happy to answer questions if you have any.