

# California Orthopaedic Assn

## Ex Parte Issues



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**No Relevant Disclosure**

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# Ex Parte Gotchas

1. **Due Process**
2. **Undue Influence**
3. **Ex Parte By a Party**
4. **Ex Parte By an IW or Dependents**
5. **Substantive v. Procedural**
6. **Ex Parte By a Physician**
7. **Communication or Information?**





# 1. Due Process



“One-sided” (**or Ex Parte**) communication may result in a violation of the opposing party’s **due process rights** and is therefore prohibited.

- Was notice of an issue given to one party, but not to the opposing party?
- Did one party receive information that was concealed from the opposing party?
- Was one party barred from taking an action, such as deposing the physician, due to lack of information given to the opposing party?

# 1. Due Process



*Grannis v. Ordean*, (1914) 234 U.S. 385, the US Supreme Court stated, “The fundamental requisite of due process of law is the **opportunity to be heard**. (Citations omitted.) And it is to this end, of course, that summons or equivalent **notice** is employed.” (Emphasis added.)

Courts must be mindful not to impose binding determinations upon parties without giving them appropriate **notice** of the issue and an **opportunity to present their side of the story**.

# 1. Due Process



*Rucker v. WCAB*, (2000) 65 Cal Comp Cases 805

The 2<sup>nd</sup> DCA stated, "The Board " 'is bound by the due process clause of the 14<sup>th</sup> Amendment of the US Constitution to give the parties before it a fair and open hearing.' The right to such a hearing is one of 'the rudiments of fair play' [citation] assured to every litigant by the 14<sup>th</sup> Amendment as a minimal requirement." [Citations] ... "**All parties must be fully apprised of the evidence submitted or to be considered**, and must be given opportunity to cross-examine witnesses [**or depose doctors**], to inspect documents and to offer evidence in explanation or rebuttal. **In no other way can a party maintain its rights or make its defense.**" (Citation.)

## 2. Undue Influence

### Labor Code §4062.3(d):

“In any formal medical evaluation, the AME or QME shall identify the following:

- (1) All information received from the parties.
- (2) All information reviewed in preparation of the report.
- (3) All information relied upon in the formulation of his or her opinion.”



## 2. Undue Influence

“One-sided” (**or Ex Parte**) communication may result in the evaluating physician being unduly influenced by information she should not have seen or heard?

**Has QME been unduly influenced by information that might affect his or her ability to issue an objective report?**



## 2. Undue Influence

*PT Gaming v WCAB (Pecoraro)*, (2017)  
82 CCC 405

D sent IW's Facebook page to AME.

The WCAB found that Dr. Fenton's review of non-medical material might have caused substantial prejudice and irreparable harm by exposing the PQME to impermissible records that could have influenced his fair and unbiased opinion.





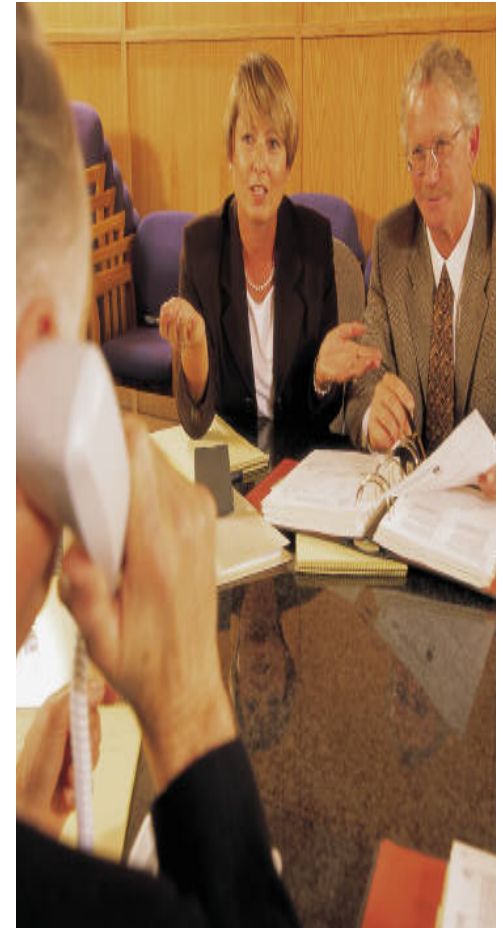
## 2. Undue Influence

*Turner v. PT Gaming,*

2018 Cal Wrk Comp PD LEXIS 102

Because of the wording of D's advocacy letter to QME, and lack of letter by AA, QME thought he was hired as D's QME and failed to serve AA with his reports. **Violation???**

WCAB majority explained, "There is no evidence in the record that applicant objected to defendant's letter or found it misleading regarding whether applicant was represented. Previous panel decisions have held that a party may not wait until after an adverse report issues to raise an irregularity but must do so at the earliest opportunity."



## 2. Undue Influence

*Turner v. PT Gaming,*

2018 Cal Wrk Comp PD LEXIS 102

**WCAB dissent:** The QME's belief that he was acting as a defense QME and the resulting service of his reports only on defendant necessitates a replacement QME panel to preserve the integrity of the medical-legal evaluation process. As stated by the *Alvarez* Court, "[i]n a field that is dependent on expert medical opinions, the impartiality and *appearance of impartiality of the PQME is critical.*" (*Alvarez, supra*, at p. 589 (emphasis added).) In a perfect world, a QME's opinions would be the same whether the physician is acting as a party's own medical-legal evaluator or as an evaluator from a panel. Unfortunately, we do not live in that world.



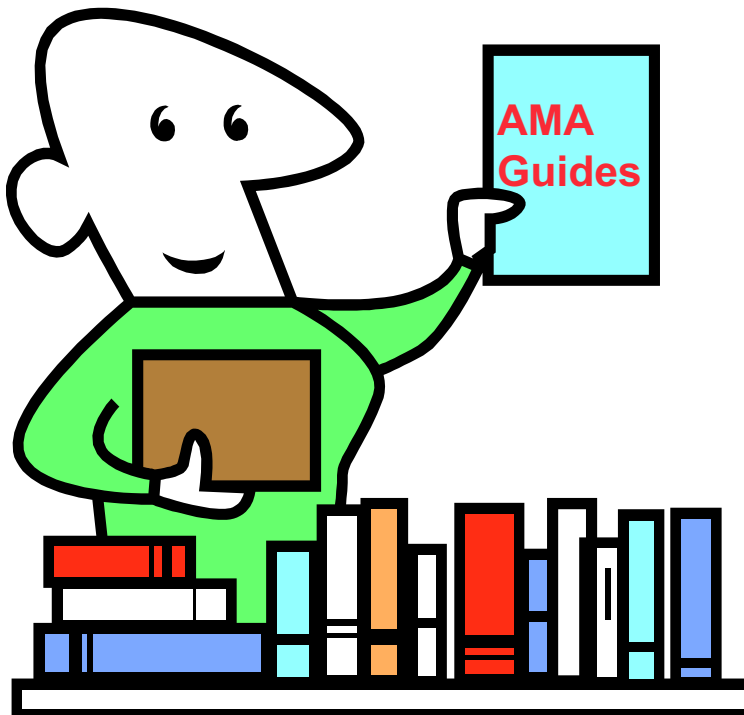


## 2. Ex Parte By a Party

### Labor Code §4062.3(g):

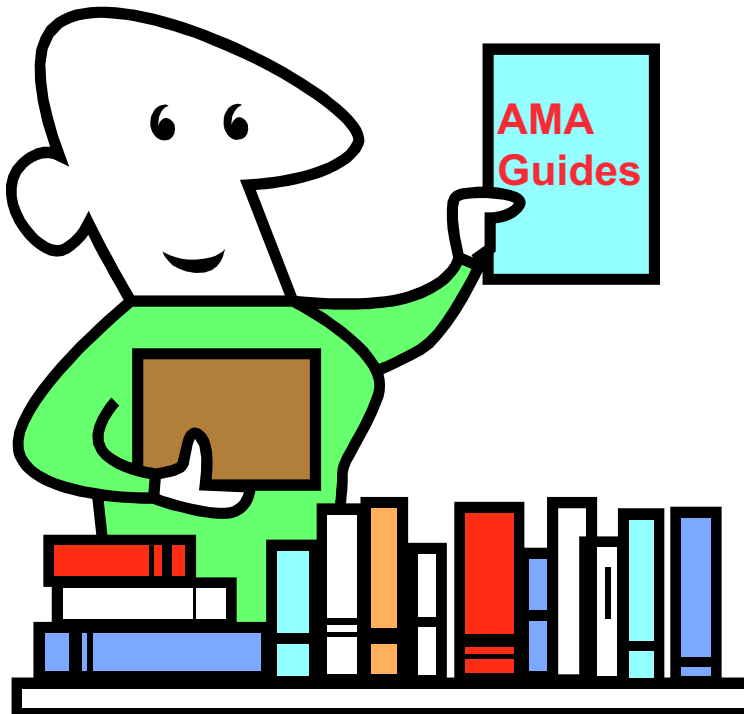
“Ex parte communication by a party with an AME or a PQME is prohibited.

If a party communicates with the agreed medical evaluator or the qualified medical evaluator in violation of subdivision (e), **the aggrieved party may elect to terminate the medical evaluation and seek a new evaluation from another qualified medical evaluator...**”



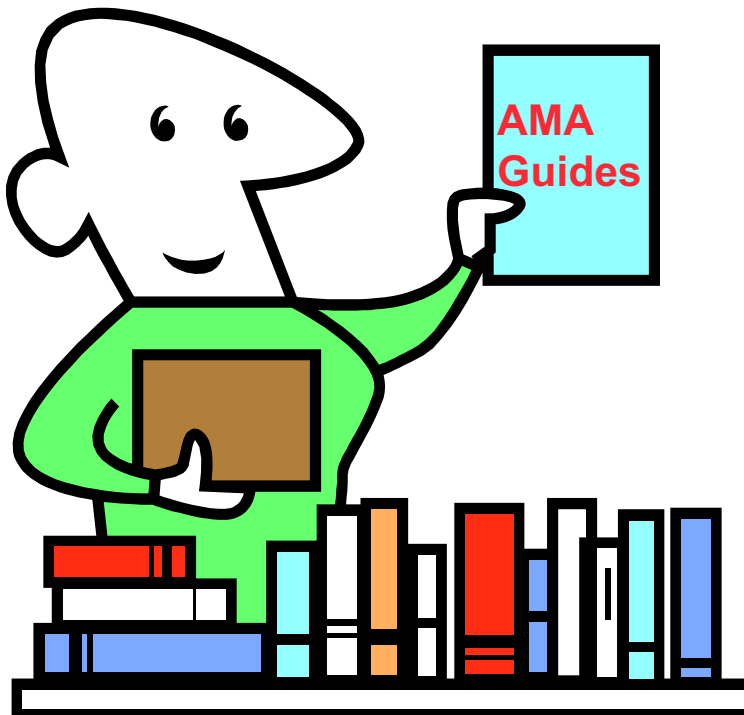
## 2. Ex Parte By a Party

### Labor Code §4062.3(g):



“The party making the communication prohibited by this section shall be subject to being charged with contempt before the appeals board and shall be liable for the costs incurred by the aggrieved party as a result of the prohibited communication, including the cost of the medical evaluation, additional discovery costs, and attorney's fees for related discovery.”

## 2. Ex Parte By a Party



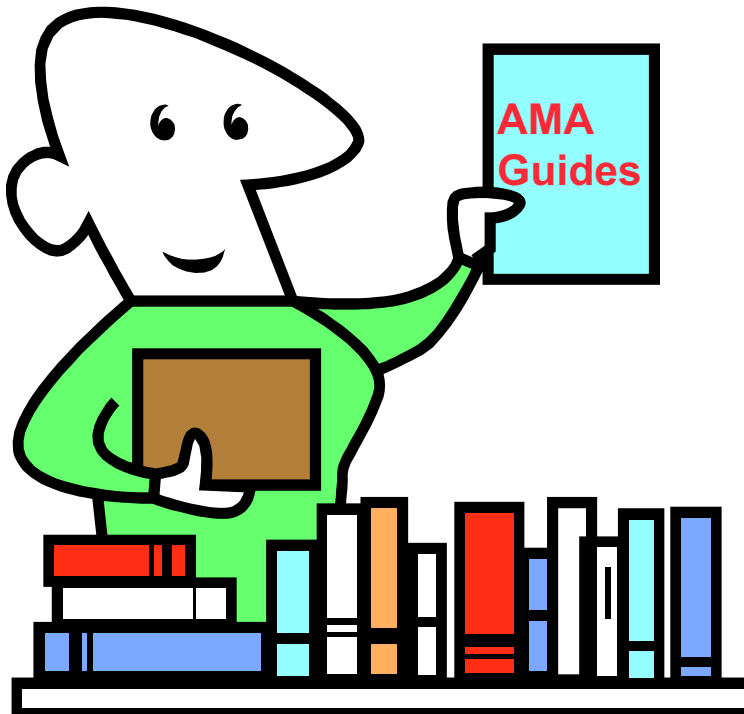
### Reg §35 (b)(1):

“All communications by the parties with the Panel QME shall be in writing and sent simultaneously to the opposing party when sent to the medical evaluator, except as otherwise provided in subdivisions (c), (k) and (l) of this section.

### Reg §35(c):

“provides that 20 days before sending info to QME, parties must list and serve all documents on opposing party, and provide 10 days to object.

## 2. Ex Parte By a Party



### Reg §35:

(k) If any party communicates with QME evaluator in violation of LC 4062.3, a new panel QME will be provided.

See *Quintero v. Pacific Triple*,  
2014 Cal Wrk Comp PD Lexis 506

### 3. Ex Parte by a Party

Communications w/ “**regular physicians**”  
appointed by a WCJ per LC 5701:

Reg §10324. Ex Parte and Prohibited  
Communications (and what WCJ should  
do if this occurs)

Reg §10324(d): **All correspondence** concerning  
the examination by and the reports of a  
physician appointed by a WCJ or the WCAB  
pursuant to LC 5701, 5703.5, 5706, or 5906  
shall be made, respectively, **through the**  
**WCJ** or the WCAB, and no party, attorney or  
representative shall communicate with that  
physician regarding the merits of the case  
unless ordered to do so.



### 3. Ex Parte by a Party

Communications w/ “**regular physicians**” appointed by a WCJ per LC 5701:

*Foster v. Express Employment*, 2018 Cal  
Wrk PD LEXIS -- , ADJ10777856

After multiple failed attempts to schedule a PQME, WCJ selected a “regular physician”, “**The parties are ordered to communicate with Dr. Renbaum in the same manner as they would if he were appointed as a QME.**”



## 4. Ex Parte by IW or Dependents

### Reg §35:

(k)...**Communications by the IW, (or dependent if IW is dead) made in the course of the exam** or at the request of the QME in connection with the examination **shall not provide grounds for a new QME** unless the WCAB has made a specific finding of an impermissible ex parte communication.



## 4. Ex Parte by IW or Dependents

***Rodriquez (Dec'd) v. Kenan Advantage Group*, 2018**

Cal Wrk Comp PD LEXIS 74

WCAB affirmed WCJ's decision to allow AME to question deceased's wife and daughters, and allowed \$999 in sanctions against D for delay under LC 5813.

“Before his claim was resolved or adjudicated, decedent committed suicide by a gunshot wound to the head on May 10, 2013 while in Mexico.”

“AME explicitly testified that if the family members have evidence regarding decedent's mental state before the suicide, that evidence is "a key piece of evidence.”





## 4. Ex Parte by IW or Dependents

***Rodriquez (Dec'd) v. Kenan Advantage Group*, 2018**  
Cal Wrk Comp PD LEXIS 74

“It is not entirely clear what "due process" must be afforded to defendant prior to the AME's interviews with the family members and there is no evidence in the record that defendant has not been given due process regarding this dispute. (See ***Hamilton v. Lockheed***, (2001) 66 CCC 473, 478.) [decisions by the Appeals Board must be based on admitted evidence in the record].) Nothing prevents defendant from deposing decedent's spouse and daughter to obtain their sworn testimony.”



## 5. Substantive v. Procedural



**Labor Code 4062.3(g)** prohibits ex parte communications with the Agreed Medical Evaluators (AMEs) and PQMEs.

**Labor Code 4062.3(f)** provides for limited ex parte communication w/ the AME for procedural purposes only, (not substantive purposes).

# 5. Substantive v. Procedural



## Reg §35(b)(1):

“Oral or written communications with physician staff or, as applicable, with the **AME**, relative to **nonsubstantial** matters such as the scheduling of appointments, missed appointments, the furnishing of records and reports, and the availability of the report, **do not constitute ex parte** communication in violation of this section unless the appeals board has made a specific finding of an impermissible ex parte communication.”

## 5. Substantive v. Procedural

**Is this AME “administrative” exception applicable to PQMEs (as well as AMEs)?**

*Martinsen v H&H Enterprises*, 2017 Cal Wrk Comp PD LEXIS 420. WCAB notes:

- We may only consider the “admitted evidence.” The exhibit which supports a finding of ex parte communications involving PQME Dr. Madrid was marked for ID purposes only, NOT ORDERED into evidence.
- We also note that the **alleged ex parte communications** were on the subject of furnishing materials to Dr. Madrid, a **non-substantial matter** explicitly provided for in LC 4062.3(f).



## 6. Ex Parte by a Physician

**Labor Code 4062.3(g)** prohibits ex parte communications with the Agreed Medical Evaluators (AMEs) and PQMEs.

**Labor Code 4062.3(f)** provides for limited ex parte communication w/ the AME for procedural purposes only, (not substantive purposes).



## 6. Ex Parte by a Physician

### Reg §41:

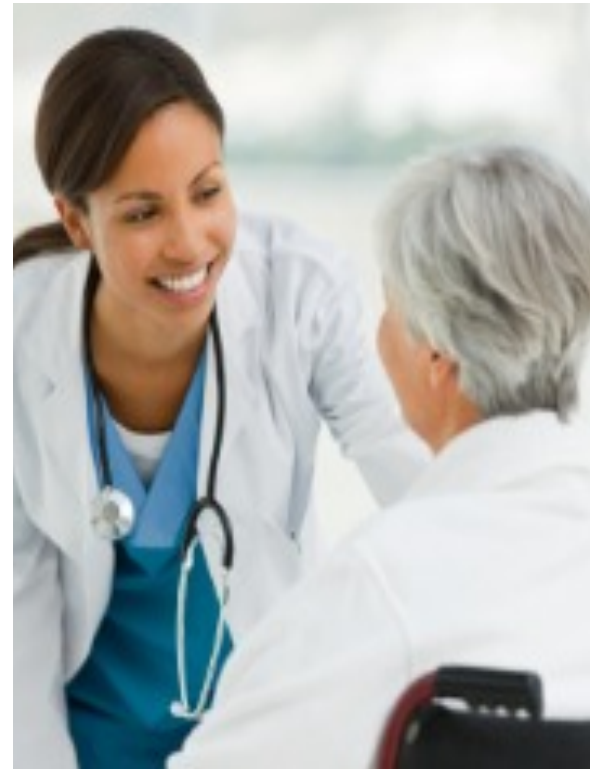
(b)... “Evaluators selected from a QME panel provided by the Administrative Director shall not engage in ex parte communication in violation of Labor Code section 4062.3.”



## 6. Ex Parte by a Physician

*Amedee v. Pac Bell*,  
2018 Cal Wrk Comp 63

Applicant, a technician/splicer for Pac Bell filed a psych claim and was evaluated by QME. Afterwards, QME made emergency call and discussed case w/assistant to A's attorney to alert him that A was "suicidal." The WCAB held the communication was not "insignificant" or "administrative."





## 6. Ex Parte by a Physician

*Amedee v. Pac Bell*, 2018 Cal Wrk Comp 63

“The note reflects that QME provided psychiatric diagnoses including stating that A ‘has bad depression’ and ‘PTSD.’ He also commented on Applicant’s psychiatric symptoms reporting that he ‘cries at home in a dark room and hallucinates.’ QME expressed his conclusion that A ‘is really incapacitated,’ a comment presumably on A's ability to perform ADLs, as well as return to work.”

“This 6 minute call does not fall under the exception to LC 4062.3 and **constitutes more than a technical violation**; Dr. Raffle essentially disclosed his substantive findings as a psychiatric medical-legal evaluator.”





## 6. Ex Parte by a Physician

### Quiz Question - for Panel QMEs:

If the applicant attorney or defense attorney calls you to set the date of your deposition, you should:

- (a) hang up the phone without saying a word,
- (b) have a long discussion with her about your findings in the case; or
- (c) restrict your conversation the procedural issue of setting the date of deposition.
- (d) Explain you can only communicate through the WCJ handling the case.



## 6. Ex Parte by a Physician

### Quiz Question - for Panel AMEs:

- If a party calls you to set the date of your deposition, you should:
- (a) hang up the phone without saying a word,
  - (b) have a long discussion with her about your findings in the case; or
  - (c) restrict your conversation the procedural issue of setting the date of deposition.
  - (d) Explain you can only communicate through the WCJ handling the case.

### LC 4062.3(f) **Change per SB863:** (8 CCR 35(b)(1)):

“Oral or written communications with physician staff or, as applicable, with the **AME**, relative to **nonsubstantial** matters such as the scheduling of appointments, missed appointments, the furnishing of records and reports, and the availability of the report, **do not = ex parte violation.**”

## 6. Ex Parte by a Physician

### Quiz Questions - for “regular physicians” appointed by a WCJ per LC 5701:

If a parties calls you to set the date of your deposition, you should:

- (a) hang up the phone without saying a word,
- (b) have a long discussion with her about your findings in the case; or
- (c) restrict your conversation the procedural issue of setting the date of deposition.
- (d) Explain you can only communicate through the WCJ handling the case, UNLESS the WCJ ordered otherwise.



## 7. Communication v. Information?

**“Communication”**  
Everything else ???



**“Information”**  
medical records or non-  
medical records re med issue



# 7. Communication v. Information?



**“Communication”**

## Ltrs to QME:

### **LC 4062.3(e)**

Communications to QME < eval - Send to OC\*  
20 days < eval. If > eval, send to OC at same  
time as to QME. (**No need for OC's approval.**)

## Ltrs to AME:

### **LC 4062.3(e)**

Send communications to OC at the same time as  
sent to AME. (**No need to agree on content.**)

\*OC = Opposing Counsel

## 7. Communication v. Information?

### Ltrs to QME:

#### **LC 4062.3(b)**

Send information to OC 20 days before sending to QME. If OC objection, then don't send information. (**Need approval.**)

### Ltrs to AME:

#### **LC 4062.3(c)**

Parties must agree on information sent to AME. (**Must meet and confer.**)



**“Information”**

## 7. Communication v. Information?

*Maxham v. Cal Dept of Corrections*, 82 Cal Comp Cases 136 (WCAB en banc)



W/o an Order from WCJ, AA sent **advocacy** letter to AMEs interpreting case law re *Benson, Guzman and Cannon*, (as opposed to sending actual cases or the holdings of these cases.) D's objected to this action by AA.



**Communication?**

**Information?**



## 7. Communication v. Information?



**Did advocacy letter =  
Communication?**

**Did advocacy letter =  
Information?**



## 7. Communication v. Information?

**Advocacy** letters are generally considered OK “communication.”



“Correspondence engaging in “**advocacy**” or asserting a “legal or factual position” can, however, cross the line into “information” if it has the effect of **disclosing impermissible “information”** to the AME without explicitly containing, referencing, or enclosing it.”



**Communication?**

**Information?**

## 7. Communication v. Information?

***Jacobellis v. Ohio***, (1964) 378 US 184, Justice Potter Stewart, “**I know it when I see it**, and the motion picture involved in this case is not that.”



# 7. Communication v. Information?

“There are 3 ways in which a party might attempt to convey purported **“information”** to a medical examiner to which the opposing party has not agreed.”

“(1) Misrepresentation of **case law or legal holdings**,

(2) engaging in sophistry regarding factual or legal issues, or

(3) misrepresentation of actual **“information”** in a case.”



**Communication?**

**Information?**

## 7. Communication v. Information?



- Copy of a judicial case? Does it matter what type of case? S.Ct. or WCAB panel? (As opposed to counsel's interpretation of what that case holds.)
- Personnel records
- Facebook Page
- Applicant's criminal record
- DEU rating
- Sub Rosa Video (Yes, See *Wan v. Comm Health*, 2015 Cal Wrk Comp PD LEXIS 243)



## 7. Communication v. Information?

*Soun v. Cal Dairies*, (2018) 83 CCC 1803  
(WCAB en banc) **Holding:**



1. Disputes over what information to provide to the QME are to be presented to the WCJ if the parties cannot resolve the dispute.
2. The opposing party must object to the provision of medical records to the QME within a reasonable time in order to preserve the objection.



## 7. Communication v. Information?

*Soun v. Cal Dairies*, (2018) 83 CCC 1803  
(WCAB en banc) **Holding:**



3. If the aggrieved party elects to terminate the evaluation and seek a new evaluation due to an ex parte communication, the aggrieved party must do so within a reasonable time following discovery of the prohibited communication.
3. The trier of fact has wide discretion to determine the appropriate remedy for a violation of section 4062.3(b).

