

# Exhibit

# A

# **BPM MISSION**

The mission of the Board of Podiatric Medicine is to ensure protection of consumers under the laws of California through the setting and enforcement of contemporary standards and the provision of accurate and timely information that promotes sound consumer decision-making.

Approved March 3, 2006

# Exhibit B



KAREN L. WRUBEL, D.P.M., *President*  
KRISTINA M. DIXON, M.B.A.

EDWARD E. BARNES

NEIL B. MANSDORF, D. P. .M., *Vice President*  
JAMES J. LONGOBARDI, D.P.M.

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4 **California Board of Podiatric Medicine**  
5 **Public Board Meeting Minutes**  
6 **Los Angeles, California**  
7 **September 23, 2011**  
8  
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10 A public meeting of the California Board of Podiatric Medicine (BPM) was held September  
11 23, 2011 in Room 1050, Los Angeles City Hall, 200 N. Spring Street, Los Angeles, CA.  
12

13 Due notice had been sent to all known interested parties.  
14

15  
16 **1. Call to order/Member roll call**  
17

18 President Wrubel called the meeting to order at 10:00 AM.  
19

20 A quorum was established with the following Members present:  
21

- 22 • Karen L. Wrubel, DPM
- 23 • Edward E. Barnes
- 24 • Neil B. Mansdorf, DPM
- 25 • Kristina M. Dixon, MBA
- 26 • James J. Longobardi, DPM

27  
28 Dr. Wrubel introduced and welcomed BPM's new Board Member, Mr. Barnes, as well as the  
29 following attendees:  
30

- 31 • Amanda Friedman, Center for Public Interest Law (CPIL)
- 32 • Carlos Ramirez, Department of Justice
- 33 • Jeffrey Haupt, DPM, California Podiatric Medical Association (CPMA)
- 34 • Michael A. Zapf, DPM
- 35 • Jacqueline T. Zapf

36  
37 The Board's Legal Counsel Gary Duke and Executive Officer Jim Rathlesberger also were  
38 present.  
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2 **2. Attorney General Report**  
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4 Mr. Carlos Ramirez, Senior Assistant Attorney General, Health Quality Enforcement Section,  
5 California Department of Justice, briefed the Board on current physician discipline procedures  
6 and issues affecting the Medical and Podiatric Medical Boards.  
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9 **3. President's Report**  
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11 Dr. Longobardi moved and Dr. Mansdorf seconded a motion approving the February 11  
12 minutes, which passed 4-0.  
13

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15 **4. Enforcement Committee**  
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17 Pursuant to the Board's policy on the selection, training and evaluation of medical consultants,  
18 Dr. Longobardi moved, Mr. Barnes seconded and the Board passed 5-0 the approval of five  
19 new medical consultants: Drs. Jason M. Hiatt, Ernest J. Hook, Franklin Kase, Thomas J.  
20 Kaschak, and J. Scott Rosenthal.  
21

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23 **5. Manual of Disciplinary Guidelines**  
24

25 To remain consistent with the Medical Board, Dr. Mansdorf moved, Dr. Longobardi seconded,  
26 and the Board voted 5-0 to amend Conditions 9-11 and the Violation of Probation section of  
27 the *BPM Manual of Disciplinary Guidelines*, using language identical to the Medical Board's,  
28 pursuant to SB 1441 of 2008 and the Department's *Uniform Standards Regarding Substance-*  
29 *Abusing Healing Arts Licensees* as amended in 2011.  
30

31 Ms. Dixon made and Dr. Longobardi seconded a motion passing 5-0 authorizing staff to notice  
32 a proposed rulemaking to update the reference to the *Manual* in Section 1399.710 of the *BPM*  
33 *Regulations*.  
34

35  
36 **6. 2011 Sunset Review Report**  
37

38 Ms. Dixon moved and Mr. Barnes seconded approval of the draft *Sunset Review Report* with  
39 the authorization of further staff edits subject to approval by the current President and Vice  
40 President prior to its November 1 submission to the Legislature. This motion passed 5-0.  
41

42 Dr. Longobardi made and Mr. Barnes seconded a motion that BPM will have licensees  
43 renewing online on the BreEZe system pay the Departmental charge for covering credit card  
44 convenience fees, which the Department currently estimates at \$18 per renewal (2% of the  
45 \$900 renewal fee), and that this be included in the *Sunset Review Report*. This motion passed  
46 5-0.  
47

48 Board Members expressed concern over the alternative suggestion that BPM pay an estimated  
49 \$15,000 a year for only 833 renewals.  
50  
51  
52

**7. Election of Officers for 2012**

Dr. Wrubel moved and Dr. Longobardi seconded that Dr. Mansdorf be elected President for calendar 2012. Dr. Mansdorf moved and Ms. Dixon seconded that Dr. Longobardi be Vice President for 2012. These two motions were voted on together and passed 5-0.

**8. 2012 Meeting Dates**

Dr. Mansdorf will propose and announce 2012 meeting dates later in the year or early in 2012.

**9. Adjournment**

Upon completing its agenda and acting on all action items, the Board adjourned at 11:33 AM.

Submitted to the Board for approval on \_\_\_\_\_, 2012.

**APPROVED:**

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President  
California Board of Podiatric Medicine

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# Exhibit C



## STRATEGIC PLAN

2011-2014

Adopted February 11, 2011

### OUR MISSION

The mission of the Board of Podiatric Medicine is to ensure protection of consumers under the laws of California through the setting and enforcement of contemporary standards and the provision of accurate and timely information that promotes sound consumer decision-making.

### OUR VISION

The Board's public policy leadership will enhance continuing competence standards, informed consumer choice, and open access to high-quality foot and ankle care.

### OUR VALUES

BPM values . . .

- representing the public
- responsiveness to consumers and licensees
- public access to information, assistance and service
- integrity and competence in serving the public
- collaboration with other organizations
- proactive approaches that prevent patient harm



## GOALS AND OBJECTIVES

GOAL 1. *Maintain excellence of service within current resources.*

Objectives:

1.1 Continue operations without backlogs.

Major activities:

- Manage licensing and enforcement programs to stay current daily without additional staff
- Support licensing and enforcement coordinators as chief program officers of Board
- Keep focused on core functions of licensing and enforcement

1.2 Maintain the issuance of licenses the same day all requirements met.

Major activities:

- Maintain close communication with applicants
- Maintain primary source verification and enforce it

1.3 Keep expediting investigation of consumer complaints and prosecution of open cases.

Major activities:

- Support Enforcement Coordinator
- Achieve Staff Manager promotion recognizing breadth of responsibility
- Continue monitoring enforcement matrix reports on case processing timeframes

1.4 Maintain quality probation monitoring.

Major activities:

- Continue retired annuitant program
- Insure Board's final orders are effectively enforced

### 1.5 Support Continuing Competence initiatives.

#### Major activities:

- Support the Licensing Coordinator, recognizing the importance of good licensing in Licensing Board effectiveness in consumer protection and efficient use of public resources
- Monitor the longitudinal decline in consumer complaints and respond appropriately to opportunities to serve as ambassadors for preventing patient harm rather than responding to it once harm has been done
- Urge Federation of Podiatric Medical Boards (FPMB) to encourage other State licensing agencies to implement its *Model Law* Continuing Competence provisions
- Support Department of Consumer Affairs (DCA) and other boards in Continuing Competence as appropriate

### 1.6 Continue licensure of all residents and annual review and approval of graduate medical education programs.

#### Major activities:

- Maintain the Residency License requirement
- Seek sunseting of the four-year cap on graduate medical training
- Consider whether residency approvals should be nationalized now or in the future, or if California's program should be maintained

GOAL 2. *Maintain credibility and respect of BPM's integrity.*

Objectives:

- 2.1 Continue the public-service ethic so many have contributed to over succeeding decades, realizing BPM as an institution is of great importance to patients and the profession.

Major activities:

- Emphasize the statutory mission
- Support Board development and the Members' importance as a Board
- Promote the goals and objectives of the Board

- 2.2 Remain open, candid and responsive.

Major activities:

- Maintain unspotted positive press coverage
- Build on confidence from profession to enhance consumer outreach
- Support Departmental programs

- 2.3 Represent the public

Major activities:

- Maintain BPM culture that licensee and lay Board Members are equal
- Maintain BPM culture that licensee and lay Board Members have same statutory role
- Maintain BPM culture that licensee and lay Board Members all represent the public at large

- 2.4 Maintain good government values

Major activities:

- Reflect well on California State government
- Focus on the positive aspects and developments
- Take opportunities as they present themselves to advance public policy

GOAL 3. *Work collaboratively with other organizations.*

Objectives:

3.1 Utilize Departmental services and follow its lead.

Major activities:

- Implement BreEZe in 2012-13 for online credit card transactions
- Distribute *You and Your DPM* brochure
- Pursue Spanish language *You and Your DPM*
- Participate in DCA Board and Bureau Conferences

3.2 Maintain liaison with California Podiatric Medical Association.

Major activities:

- Maintain good liaison with CPMA Board
- Continue participation at House of Delegates
- Continue exhibiting at Western Foot and Ankle Conference

3.3 Continue involvement with Federation of Podiatric Medical Boards.

Major activities:

- Seek election of a California representative on FPMB Board
- Support updates to *Model Law* as indicated, e.g., equivalent exams

GOAL 4. *Remove barriers to podiatric medical care.*

Objectives:

4.1 Support Legislative consideration of full FPMB *Model Law* scope of practice for benefit of Californians.

Major activities:

- Coordinate with CPMA in five-year follow-up to AB 932 of 2004
- Support efficient delivery of high quality care in all California health facilities
- Work with the profession as it develops its evolution, standards and direction for the future

4.2 Support inclusion in State's publicly-supported health science teaching centers.

Major activities:

- Support complementary CPMA and podiatric medical school initiatives
- Keep focus on obtaining UC-sponsored podiatric medical residency programs

## OUR STAKEHOLDERS -- THEIR NEEDS AND WANTS

BPM's success depends on a clear understanding of our statutory mission and the needs of the public. Our public stakeholders include:

- Consumers, who seek accurate and timely information about providers.
- Licensees, who seek expeditious and accurate services, fair administration of the law, and timely and accurate communication on issues of interest to them.
- Applicants, who seek expeditious and accurate services, fair administration of the application process, and timely and accurate communication on issues of concern.
- Health facilities, which seek clear licensing information.
- Staff, who seek clear direction, recognition by management, and training programs to better serve our stakeholders and grow professionally.
- Other state agencies, which seek accurate and timely information.
- The Legislature, exercising its lawmaking, authorization, budgeting and oversight roles.

## ENVIRONMENTAL SCAN

External environment factors include:

- Fiscal Challenges -- BPM must do the best job possible with the resources available.
- Accountability -- BPM seeks to follow the soundest possible administrative procedures.
- Advancing Technology -- BPM attempts to stay current to the fullest extent practicable.
- Business and the Economy -- As an agency that licenses doctors treating millions of Californians annually, the health care community expects BPM to operate efficiently and partner to protect podiatric medical patients.
- Changing Demographics -- California's population is increasing, aging and growing more diverse every day.

# Exhibit D



## POSTION DESCRIPTION FOR BOARD MEMBERS

As a **Board of Directors**, the Board is responsible for good governance of the agency. Appointed as representatives of the **public**, the Board presses for realization of opportunities for service and fulfillment of its obligations to all constituencies. The Board meets fiduciary responsibility, guards against the taking of undue risks, determines priorities, and generally directs organizational activity. It delegates administration to its executive officer, but remains involved through oversight and policy making. The board members are ultimately accountable for all agency actions.

As a **judicial body**, the Board serves as a jury. The members must be careful to avoid *ex parte* communications with licensees, attorneys, and staff regarding upcoming proposed decisions from administrative law judges that the Board must review based only on the legal record.

### Specific Contributions

1. Articulate agency mission, values, and policies.
2. Review and assure executive officer's performance in faithfully managing implementation of Board policies through achievement of staff goals and objectives.
3. Ensure that staff implementation is prudent, ethical, effective, and timely.
4. Assure that management succession is properly being provided.
5. Punctuate ongoing review of executive officer performance with annual evaluation against written Board policies at a noticed public meeting.
6. Ascertain that management effectively administers appropriate staff policies including a code of ethics and conflict of interest statements.
7. Ensure staff compliance with all laws applicable to the Board.
8. Maximize accountability to the public.

Adopted by the Board of Podiatric Medicine 12/6/91





## **POSITION DESCRIPTION FOR BOARD PRESIDENT**

The President is responsible for the effective functioning of the Board, the integrity of Board process, and assuring that the Board fulfills its responsibilities for governance. The President instills vision, values, and strategic thinking in Board policy making. She/he sets an example reflecting the Board's mission as a state licensing and law enforcement agency. She/he optimizes the Board's relationship with its executive officer and the public.

### Specific Contributions

1. Chair meetings to ensure fairness, public input, and due process.
2. Appoint Board committees.
3. Support the development and assist performance of Board colleagues.
4. Obtain the best thinking and involvement of each Board member. Stimulate each one to give their best.
5. Coordinate evaluation of the executive officer.
6. Continually focus the Board's attention on policy making, governance, and monitoring of staff adherence to and implementation of written Board policies.
7. Facilitate the Board's development and monitoring of sound policies that are sufficiently discussed and considered and that have majority Board support.
8. Serve as a spokesperson.
9. Be open and available to all, remaining careful to support and uphold proper management and administrative procedure.

Adopted by the Board of Podiatric Medicine 12/6/91



## **POSITION DESCRIPTION FOR EXECUTIVE OFFICER**

The chief executive officer reports and is accountable to the full Board. He/she accepts responsibility for the success or failure of all Board operations.

### Specific Contributions

1. Lead staff planning to achieve Board goals and ensure that implementation adheres to Board policies, and is effective, prudent, ethical, and timely.
2. Ensure that the Board is properly informed on the condition of the agency and major factors influencing it, without bogging it down in detailed staff work or with unorganized information.
3. Annually evaluate the agency's performance.
4. Make certain there is adequate funding to achieve the Board's policies.
5. Manage agency's enforcement program so as to ensure both (a) vigorous prosecution of Medical Practice Act violations and (b) fairness, due process, and proper administrative procedures as required under the Administrative Procedure Act.
6. See that there is adequate, effective staffing. Motivate staff. Develop training, professional development, and career ladder opportunities. Build teamwork. Delegate responsibilities without abdicating accountability.
7. Develop an office climate and organizational culture that attracts and keeps quality people.
8. Provide for management succession.
9. Develop annual goals and objectives and other appropriate staff policies.
10. Serve as the agency's chief spokesperson and see that the Board is properly presented to its various publics.

Adopted by the Board of Podiatric Medicine 12/6/91



**POLICY DECISION: Delegation of Authority Concerning Stay Orders**

The authority to approve or deny a Petition for Stay Order is delegated to the board's executive officer.

Method of Adoption: Board Vote

Date of Adoption: May 5, 1995



**POLICY DECISION: Promotional Reference to the Board of Podiatric Medicine (BPM) by Consultants, Expert Reviewers/Witnesses, Practice Monitors and Examination Commissioners**

Licensees acting as medical consultants, expert reviewers/witnesses, practice monitors and/or examination commissioners shall not reference their affiliation with the BPM in any promotional activity or advertisement.

Method of Adoption: Board Vote

Date of Adoption: February 28, 1986

Revision Date: May 3, 2002  
October 15, 2010



**POLICY DECISION: Minimum Requirements for New Medical Consultants, Experts, and Examiners**

1. Hold a current, valid and unrestricted California license to practice podiatric medicine.
2. Be active in the practice of podiatric medicine in the subject area being reviewed.
3. Have completed a postgraduate medical education program approved by the Council on Podiatric Medical Education.
4. Be certified by the American Board of Podiatric Surgery and must maintain a current certificate.
5. Have surgical staff privileges in at least one general acute care hospital facility.
6. Must not have been subject to disciplinary action by the BPM, i.e., the filing of an Accusation or Statement of Issues that was not withdrawn or dismissed.
7. Must not be under BPM investigation for a violation of any laws relating to the practice of medicine at the time of appointment or be the subject of such a case pending in the Attorney General's office.
8. Must not have been the subject of a field investigation by the BPM within the last five (5) years that was not closed and deleted from Medical Board records.
9. In the event of a conflict of interest, must recuse themselves from the review or examination.
10. Must not misrepresent his or her credentials, qualifications, experience or background.

Method of Adoption: Board Vote  
Date of Adoption: June 5, 1987  
Revision Date(s): December 7, 1990  
January 25, 1994  
November 6, 1998  
May 5, 2000  
November 3, 2000  
June 6, 2003  
October 15, 2010  
February 11, 2011



**POLICY DECISION: Selection, Training and Evaluation of Board of Podiatric Medicine (BPM) Medical Consultants**

1. Potential DPM Medical Consultants shall be reviewed and nominated to the Consultant pool by the Board's Enforcement Committee.
2. New candidates must be approved by unanimous vote of the Board Members present at a noticed public meeting.
3. Following approval by the Board, Consultants shall certify in writing prior to beginning work that they have received and read the current *BPM Enforcement Manual*.
4. Likewise, all consultants shall so certify receipt and reading of each revision to the *BPM Enforcement Manual*.
5. Consultants shall be evaluated at least on an annual basis.
6. Staff shall organize training sessions for consultants every two years as practicable, and each working consultant must have participated in a BPM training session before beginning work and within the past four years at all times.
7. Consultants may serve for eight consecutive years, and have at least a two-year break in service before being eligible for re-nomination by the Enforcement Committee.

Method of Adoption: Board Vote

Date of Adoption: February 11, 2011

Exhibit

E

**Rathlesberger, Jim@DCA**

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**From:** Stiger, Brian@DCA  
**Sent:** Monday, October 31, 2011 8:34 AM  
**To:** Wedge, Janelle@DCA; Madsen, Kim@DCA; Robert.Puleo@chiro.ca.gov; Hubble, Lori@DCA; DeCuir, Richard@DCA; Linda.Whitney@mbc.ca.gov; Martin, Heather@DCA; Maggio, Mona@DCA; Moraga, Teresa@DCA; Krpan, Donald@DCA; Davies, Francine@DCA; Herold, Virginia@DCA; Marco, Rebecca@DCA; Elberta.Portman@mbc.ca.gov; Rathlesberger, Jim@DCA; Kahane, Robert@DCA; Bailey, Louise@DCA; Nunez, Stephanie@DCA; DelMugnaio, Annemarie@DCA; Geranen, Susan@DCA  
**Cc:** Johnson, Doreathea@DCA; Everhart, Reichel@DCA  
**Subject:** SB 1441 Legal Opinion from the Legislative Counsel Bureau  
**Attachments:** SB 1441.pdf

Dear SACC members:

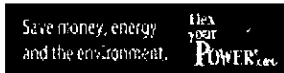
Happy Monday! Last Thursday, I received a faxed copy of a recent legal opinion from Legislative Counsel that I want to share with you. Although DCA's legal staff has not yet had an opportunity to thoroughly review this opinion, I'm sending it to you for informational purposes only. Please remember that our committee is subject to Bagley-Keene requirements.

Thanks.  
-Brian



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## Lisa M. Plummer

925 L Street  
Sacramento, California 95814  
Office: (916) 341-8313



Lisa Plummer is a deputy legislative counsel. She joined the office in 2001.

Ms. Plummer practices in the areas of state and local government. She has also practiced in the areas of business, financial institutions, healing arts, health care service plans, health insurance, professions and vocations, streets and highways, and transportation.

Ms. Plummer received her J.D. from the University of the Pacific, McGeorge School of Law, graduating with distinction. While at McGeorge, Ms. Plummer was editor-in-chief and a writer for "The California Initiative Review," a governmental affairs publication. She received her undergraduate degree from St. Mary's College of California, where she graduated magna cum laude.

Ms. Plummer is a member of the California State Bar.



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October 27, 2011

Honorable Curren D. Price Jr.  
Room 2053, State Capitol

**HEALING ARTS BOARDS: ADOPTION OF UNIFORM STANDARDS - #1124437**

Dear Senator Price:

You have asked two questions with regard to the adoption of uniform standards by the Substance Abuse Coordination Committee pursuant to Section 315 of the Business and Professions Code. You have asked whether the Substance Abuse Coordination Committee is required to adopt the uniform standards pursuant to the rulemaking procedures under the Administrative Procedure Act (Ch. 3.5 (commencing with Sec. 11340), Pt. 1, Div. 3, Title 2, Gov. C.). You have also asked, if the uniform standards are properly adopted by the Substance Abuse Coordination Committee, whether the healing arts boards are required to implement them.

By way of background, Section 315 of the Business and Professions Code<sup>1</sup> provides as follows:

"315. (a) For the purpose of determining uniform standards that will be used by healing arts boards in dealing with substance-abusing licensees, there is established in the Department of Consumer Affairs the Substance Abuse Coordination Committee. The committee shall be comprised of the executive officers of the department's healing arts boards established pursuant to Division 2 (commencing with Section 500), the State Board of Chiropractic Examiners, the Osteopathic Medical Board of California, and a designee of the State Department of Alcohol and Drug Programs. The Director of Consumer Affairs shall chair the committee and may invite individuals or stakeholders who have particular expertise in the area of substance abuse to advise the committee.

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<sup>1</sup> All further section references are to the Business and Professions Code, unless otherwise referenced.

"(b) The committee shall be subject to the Bagley-Keene Open Meeting Act (Article 9 (commencing with Section 11120) of Division 3 of Title 2 of the Government Code).

"(c) By January 1, 2010, the committee shall formulate uniform and specific standards in each of the following areas that each healing arts board shall use in dealing with substance-abusing licensees, whether or not a board chooses to have a formal diversion program:

"(1) Specific requirements for a clinical diagnostic evaluation of the licensee, including, but not limited to, required qualifications for the providers evaluating the licensee.

"(2) Specific requirements for the temporary removal of the licensee from practice, in order to enable the licensee to undergo the clinical diagnostic evaluation described in paragraph (1) and any treatment recommended by the evaluator described in paragraph (1) and approved by the board, and specific criteria that the licensee must meet before being permitted to return to practice on a full-time or part-time basis.

"(3) Specific requirements that govern the ability of the licensing board to communicate with the licensee's employer about the licensee's status and condition.

"(4) Standards governing all aspects of required testing, including, but not limited to, frequency of testing, randomness, method of notice to the licensee, number of hours between the provision of notice and the test standards for specimen collectors, procedures used by specimen collectors, the permissible locations of testing, whether the collection process must be observed by the collector, backup testing requirements when the licensee is on vacation or otherwise unavailable for local testing, requirements for the laboratory that analyzes the specimens, and the required maximum timeframe from the test to the receipt of the result of the test.

"(5) Standards governing all aspects of group meeting attendance requirements, including, but not limited to, required qualifications for group meeting facilitators, frequency of required meeting attendance, and methods of documenting and reporting attendance or nonattendance by licensees.

"(6) Standards used in determining whether inpatient, outpatient, or other type of treatment is necessary.

"(7) Worksite monitoring requirements and standards, including, but not limited to, required qualifications of worksite monitors, required methods of monitoring by worksite monitors, and required reporting by worksite monitors.

"(8) Procedures to be followed when a licensee tests positive for a banned substance.

"(9) Procedures to be followed when a licensee is confirmed to have ingested a banned substance.

"(10) Specific consequences for major violations and minor violations. In particular, the committee shall consider the use of a deferred prosecution stipulation similar to the stipulation described in Section 1000 of the Penal Code, in which the licensee admits to self-abuse of drugs or alcohol and surrenders his or her license. That agreement is deferred by the agency unless or until the licensee commits a major violation, in which case it is revived and the license is surrendered.

"(11) Criteria that a licensee must meet in order to petition for return to practice on a full-time basis.

"(12) Criteria that a licensee must meet in order to petition for reinstatement of a full and unrestricted license.

"(13) If a board uses a private-sector vendor that provides diversion services, standards for immediate reporting by the vendor to the board of any and all noncompliance with any term of the diversion contract or probation; standards for the vendor's approval process for providers or contractors that provide diversion services, including, but not limited to, specimen collectors, group meeting facilitators, and worksite monitors; standards requiring the vendor to disapprove and discontinue the use of providers or contractors that fail to provide effective or timely diversion services; and standards for a licensee's termination from the program and referral to enforcement.

"(14) If a board uses a private-sector vendor that provides diversion services, the extent to which licensee participation in that program shall be kept confidential from the public.

"(15) If a board uses a private-sector vendor that provides diversion services, a schedule for external independent audits of the vendor's performance in adhering to the standards adopted by the committee.

"(16) Measurable criteria and standards to determine whether each board's method of dealing with substance-abusing licensees protects patients from harm and is effective in assisting its licensees in recovering from substance abuse in the long term." (Emphasis added.)

Thus, the Legislature has established in the Department of Consumer Affairs (hereafter department) the Substance Abuse Coordination Committee (subd. (a), Sec. 315; hereafter committee). The committee is comprised of the executive officers of each healing arts board within the department,<sup>2</sup> the State Board of Chiropractic Examiners, and the

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<sup>2</sup> The department's healing arts boards are those boards established under Division 2 (commencing with Section 500) to license and regulate practitioners of the healing arts. Those boards include, among others, the Dental Board of California, the Medical Board of California, the Veterinary Medical Board, and the Board of Registered Nursing.

Osteopathic Medical Board of California (hereafter, collectively, healing arts boards), and a designee of the State Department of Alcohol and Drug Programs (*Ibid.*). The Director of Consumer Affairs chairs the committee and is authorized to invite individuals or stakeholders who have particular expertise in the area of substance abuse to advise the committee (*Ibid.*).

The committee is required to formulate uniform and specific standards in each of 16 areas provided by the Legislature, but otherwise has discretion to adopt the uniform standards each healing arts board shall use in dealing with substance-abusing licensees (subd. (c), Sec. 315). The committee adopted its initial set of uniform standards in April 2010, and revised those initial standards as recently as April 2011.<sup>7</sup> Although the committee has adopted the uniform standards pursuant to its own procedures, it has yet to adopt those standards pursuant to the rulemaking procedures of the Administrative Procedure Act (Ch. 3.5 (commencing with Sec. 11340), Pt. 1, Div. 3, Title 2, Gov. C.; hereafter APA).

You have asked whether the committee is required to adopt the uniform standards pursuant to the rulemaking procedures of the APA.

The APA establishes basic minimum procedural requirements for the adoption, amendment, or repeal of administrative regulations by state agencies (subd. (a), Sec. 11346, Gov. C.). The APA is applicable to the exercise of any quasi-legislative power conferred by any statute (*Ibid.*). Quasi-legislative powers consist of the authority to make rules and regulations having the force and effect of law (*California Advocates for Nursing Home Reform v. Bonta* (2003) 106 Cal.App.4th 498, 517; hereafter *California Advocates*). The APA may not be superseded or modified by any subsequent legislation except to the extent that the legislation does so expressly (subd. (a), Sec. 11346, Gov. C.).

The term "regulation" is defined for purposes of the APA to mean "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure" (Sec. 11342.600, Gov. C.; emphasis added). The APA provides that a state agency shall not issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation under the APA, unless properly adopted under the procedures set forth in the APA, and the Office of Administrative Law is empowered to determine whether any such guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule is a regulation under the APA (Sec. 11340.5, Gov. C.).

In *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571 (hereafter *Tidewater*), the California Supreme Court found as follows:

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<sup>7</sup> See [http://www.dea.ca.gov/about\\_dea/sacc/index.shtml](http://www.dea.ca.gov/about_dea/sacc/index.shtml) (as of September 20, 2011).

"A regulation subject to the APA thus has two principal identifying characteristics. (See *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497 [272 Cal.Rptr. 886] [describing two-part test of the Office of Administrative Law].) First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. (*Roth v. Department of Veterans Affairs* (1980) 110 Cal.App.3d 622, 630 [167 Cal.Rptr. 552].) Second, the rule must 'implement, interpret, or make specific the law enforced or administered by [the agency], or ... govern [the agency's] procedure.' (Gov. Code, § 11342, subd. (g).)"

If a policy or procedure falls within the definition of a "regulation" within the meaning of the APA, the adopting agency must comply with the procedures for formalizing the regulation, which include public notice and approval by the Office of Administrative Law (*County of Butte v. Emergency Medical Services Authority* (2010) 187 Cal.App.4th 1175, 1200). The Office of Administrative Law is required to review all regulations adopted pursuant to the APA and to make its determinations according to specified standards that include, among other things, assessing the necessity for the regulation and the regulation's consistency with the agency's statutory obligation to implement a statute (subd. (a), Sec. 11349.1, Gov. C.).

Applying these principles to the question presented, the uniform standards are subject to the rulemaking procedures of the APA if the following criteria are met: (1) Section 315 does not expressly preclude application of the APA, (2) the committee is a state agency under the APA, (3) the uniform standards are regulations subject to the APA, and (4) no exemption applies under the APA.

With respect to the first criterion, Section 315 is silent on the application of the APA. Thus, Section 315 does not expressly preclude application of the APA, and the APA will apply to any regulation adopted under Section 315.

We turn next to the second criterion, and whether the committee is an "agency" for purposes of the APA. The word "agency" is defined, for purposes of the APA, by several separate provisions of law. For purposes of the rulemaking procedures of the APA, "agency" is defined to mean a state agency (Sec. 11342.520, Gov. C.). That reference to state agency is defined elsewhere in the Government Code to include every state office, officer, department, division, bureau, board, and commission (subd. (a), Sec. 11000, Gov. C.). The APA does not apply to an agency in the judicial or legislative branch of the state government (subd. (a), Sec. 11340.9, Gov. C.).

Along those lines, the APA is applicable to the exercise of any quasi-legislative power conferred by any statute (subd. (a), Sec. 11346, Gov. C.). Quasi-legislative powers consist of the authority to make rules and regulations having the force and effect of law (*California Advocates*, supra, at p. 517). Thus, for purposes of our analysis, we think that an "agency" means any state office, officer, department, division, bureau, board, or commission that exercises quasi-legislative powers.

Here, the committee is a state office comprised of executive officers of the healing arts boards and the Director of Consumer Affairs. Although the Legislature has set forth 16 areas in which the committee is required to adopt standards, the committee itself is required to exercise quasi-legislative powers and adopt uniform standards within those areas. Those standards shall have the force and effect of law, since the healing arts boards, as discussed more extensively below, are required to use the standards in dealing with substance-abusing licensees and the standards are required to govern matters such as when a licensee is temporarily removed from practice or subject to drug testing or work monitoring (paras. (2), (4), and (7), subd. (c), Sec. 315). Accordingly, we think the committee is an agency to which the APA applies.

As to the third criterion, two elements must be met for the uniform standards at issue to be a regulation: they must apply generally and they must implement, interpret, or make specific a law enforced or administered by the agency or that governs its procedures (*Tidewater, supra*, at p. 571; Sec. 11342.600, Gov. C.). Section 315 requires the committee to formulate uniform and specific standards in specified areas that each healing arts board within the department shall use when dealing with substance-abusing licensees, whether or not the board chooses to have a formal diversion program. The uniform standards will not be limited in application to particular instances or individuals but, instead, will apply generally to those licensees. Further, under this statutory scheme, the uniform standards will implement Section 315 and will be enforced and administered by, and will govern the procedures of, each healing arts board that is a member of the committee. Thus, the uniform standards are, in our view, a regulation under the APA.

Lastly, we turn to the fourth criterion, and whether the regulation is exempt from the APA. Certain policies and procedures are expressly exempted by statute from the requirement that they be adopted as regulations pursuant to the APA. In that regard, Section 11340.9 of the Government Code provides as follows:

"11340.9. This chapter does not apply to any of the following:

"(a) An agency in the judicial or legislative branch of the state government.

"(b) A legal ruling of counsel issued by the Franchise Tax Board or State Board of Equalization.

"(c) A form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation on any requirement that a regulation be adopted pursuant to this chapter when one is needed to implement the law under which the form is issued.

"(d) A regulation that relates only to the internal management of the state agency.

"(e) A regulation that establishes criteria or guidelines to be used by the staff of an agency in performing an audit, investigation, examination, or inspection, settling a commercial dispute, negotiating a commercial



arrangement, or in the defense, prosecution, or settlement of a case, if disclosure of the criteria or guidelines would do any of the following:

"(1) Enable a law violator to avoid detection.

"(2) Facilitate disregard of requirements imposed by law.

"(3) Give clearly improper advantage to a person who is in an adverse position to the state.

"(f) A regulation that embodies the only legally tenable interpretation of a provision of law.

"(g) A regulation that establishes or fixes rates, prices, or tariffs.

"(h) A regulation that relates to the use of public works, including streets and highways, when the effect of the regulation is indicated to the public by means of signs or signals or when the regulation determines uniform standards and specifications for official traffic control devices pursuant to Section 21400 of the Vehicle Code.

"(i) A regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state."

None of the exemptions contained in the APA can be reasonably construed to apply to the committee or the uniform standards to be used by the healing arts boards. In addition, we are aware of no other applicable exemption.

Thus, because all four of the criteria are met, it is our opinion that the Substance Abuse Coordination Committee is required to adopt the uniform standards pursuant to the rulemaking procedures under the Administrative Procedure Act (Ch. 3.5 (commencing with Sec. 11340), Pt. 1, Div. 3, Title 2, Gov. C.).

Having reached this conclusion, we next turn to whether the healing arts boards are required to use the uniform standards if those standards are properly adopted. In addressing that question, we apply certain established rules of statutory construction. To ascertain the meaning of a statute, we begin with the language in which the statute is framed (*Leroy T. v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 434, 438; *Visalia School Dist. v. Workers' Comp. Appeals Bd.* (1995) 40 Cal.App.4th 1211, 1220). Significance should be given to every word, and construction making some words surplusage is to be avoided (*Lambert Steel Co. v. Heller Financial, Inc.* (1993) 16 Cal.App.4th 1034, 1040). In addition, effect should be given to statutes according to the usual, ordinary import of the language employed in framing them (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388).

As set forth above, subdivision (c) of Section 315 provides that "the committee shall formulate uniform and specific standards in each of the following areas that each healing arts board shall use in dealing with substance-abusing licensees, whether or not a board chooses to have a formal diversion program" (emphasis added). Section 19 provides that "shall" is mandatory and "may" is permissive. The word "may" is ordinarily construed as permissive, whereas the word "shall" is ordinarily construed as mandatory (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443).

Here, in Section 315, the Legislature uses the term “shall” rather than “may” in providing that each healing arts board “shall use” the specific and uniform standards adopted by the committee when dealing with substance-abusing licensees. The Legislature uses the term “shall use” as compared to “shall consider,” “may consider,” or “may use.” The Legislature’s use of the term “shall” indicates that the healing arts boards are required to use the standards adopted by the committee rather than being provided the discretion to do so. Moreover, as employed in this context, the word “use” implies that the healing arts boards must implement and apply those standards rather than merely considering them. Finally, the use of the term “uniform” suggests that the Legislature intended each board to apply the same standards. If the healing arts boards were not required to use the standards as adopted by the committee, the standards employed by these boards would vary rather than being “uniform.”

Norwithstanding the plain meaning of Section 315, one could argue that the enactment of Section 315.4 indicates that the Legislature intended that implementation of the uniform standards by the boards be discretionary. Section 315.4, which was added by Senate Bill No. 1172 of the 2009-10 Regular Session (Ch. 517, Stats. 2010; hereafter S.B. 1172), provides that a healing arts board “may adopt regulations authorizing the board to order a licensee on probation or in a diversion program to cease practice for major violations and when the board orders a licensee to undergo a clinical diagnostic evaluation pursuant to the uniform and specific standards adopted and authorized under Section 315.” Section 315.4 could be read to imply that a healing arts board is not required to implement those uniform standards because the board was given discretion to adopt the regulations that would allow that board to implement the standards, if necessary.

It is a maxim of statutory construction that a statute is to be construed so as to harmonize its various parts within the legislative purpose of the statute as a whole (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 788). As discussed above, we believe that the plain meaning of Section 315 requires the healing arts boards to implement the uniform standards adopted by the committee. Thus, whether Section 315.4 indicates, to the contrary, that the Legislature intended the boards to have discretion in that regard depends upon whether there is a rational basis for harmonizing the two statutes.

In harmonizing Sections 315 and 315.4, we note that S.B. 1172 did not make any changes to Section 315, such as changing the term “shall” to “may” in subdivision (c) of Section 315 or deleting any subdivisions of Section 315. S.B. 1172 did not diminish the scope of the authority provided to the committee to adopt the uniform standards. In fact, the analysis of the Senate Committee on Business, Professions and Economic Development for S.B. 1172, dated April 19, 2010 (hereafter committee analysis), describes the purpose of S.B. 1172 and the enactment of Section 315.4, as follows:

“The Author points out that pursuant to SB 1441 (Ridley-Thomas, Chapter 548, Statutes of 2008), the DCA was required to adopt uniform guidelines on sixteen specific standards that would apply to substance abusing health care licensees, regardless of whether a board has a diversion program. Although most of the adopted guidelines do not need additional statutes for

implementation, there are a couple of changes that must be statutorily adopted to fully implement these standards. This bill seeks to provide the statutory authority to allow boards to order a licensee to cease practice if the licensee tests positive for any substance that is prohibited under the terms of the licensee's probation or diversion program, if a major violation is committed and while undergoing clinical diagnostic evaluation." (Committee analysis, at p. 4.)

The committee analysis further provides that the purpose of S.B. 1172 was to grant specific authority to implement those standards and "provide for the full implementation of the Uniform Standards" (committee analysis, at p. 11). The committee analysis at no time implies that the Legislature intended the Section 315 uniform standards to be revised or repealed by S.B. 1172 or that, in enacting Section 315.4, the Legislature intended that the implementation of the uniform standards be subject to the discretion of each healing arts board.

Thus, in our view, Section 315.4 may be reasonably construed in a manner that harmonizes it with Section 315. Specifically, we think that the intent of the Legislature in enacting Section 315.4 was not to make the uniform standards discretionary but to "provide for the full implementation of the Uniform Standards" by providing the authority to adopt regulations where the Legislature believed that further statutory authority was needed. Accordingly, we think implementation by the various healing arts boards of the uniform standards adopted under Section 315 is mandatory.<sup>4</sup>

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<sup>4</sup> Although Section 108 and Division 2 (commencing with Section 500) authorize the healing arts boards to set standards and adopt regulations (see, for example, Secs. 1224, 1614, 2018, 2531.95, 2615, 2715, 2854, 2930, 3025, 3510, and 3546), it is an axiom of statutory construction that a particular or specific provision takes precedence over a conflicting general provision (Sec. 1859, C.C.P.; *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 420, app. dism. *Kubo v. Agricultural Relations Bd.* (1976) 429 U.S. 802; see also Sec. 3534, Civ. C.). Thus, in our view, the specific requirement under Section 315 that the uniform standards be adopted supersedes any general provision authorizing the boards to set standards and adopt regulations.

Thus, it is our opinion that, if the uniform standards are properly adopted by the Substance Abuse Coordination Committee, the healing arts boards are required to implement them.

Very truly yours,

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By  
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