

Exhibit O



Medical Board of California
BOARD OF PODIATRIC MEDICINE
2005 Evergreen Street, Suite 1300, Sacramento, CA 95815
PHONE: 916.263.2647 FAX: 916.263.2651

WWW.BPM.CA.GOV



NEIL B. MANSDORF, D.P.M., *President*
KRISTINA M. DIXON, M.B.A.

JAMES J. LONGOBARDI, D.P.M., *Vice President*

EDWARD E. BARNES
KAREN L. WRUBEL, D.P.M.

ENFORCEMENT COMMITTEE

a. Overview.....O

b. Data Reports.....P

Complaint and Disciplinary Data Report, Continuing Competence Report, BPM and MBC Matrix Reports, the Monthly Enforcement Report to DCA, Enforcement Measures Report and the Probation Report are exhibited in Tab P.

c. June 8 Medical Consultant Training.....Q

The training went well and was attended by the following BPM Consultants: Carl Wagreich, Randy Sarte, Scott Rosenthal, Victoria Foley, Martin Taubman, Frank Kase, and Jack Bois. The June 8 Medical Consultant Training Agenda is exhibited in Tab Q.

d. Conforming to Medical Board Uniform Standards.....R

As indicated in exhibit R, the Director vetoed BPM's proposed regulation updating section 1399.710 re the revision date of our *Manual of Disciplinary Guidelines* from 2005 to 2011. In a courtesy call prior to the issuance of this veto letter, DCA Legislative and Policy Review Manager Luis Portillo indicated he understood BPM had adopted the Medical Board's manual language (which DCA approved) *verbatim*, but that DCA would be asking the Medical Board to revise its language as well pursuant to additional guidance being developed by the Department. BPM staff indicated we would monitor MBC action and proposed follow up action once again by BPM to remain consistent with the Medical Board. The Medical Board is meeting July 19-20. Staff will report at BPM's next meeting.

Submitted by:

Bethany DeAngelis
Enforcement Coordinator
July 2012



May 10, 2012

Notice of Citation Closure

Jim Rathlesberger
Board of Podiatric Medicine
2005 Evergreen Street, Ste 1300
Sacramento, CA 95815-3831

BPM '12MAY11 PM12:02

Re: Case Number CH 2012-10639

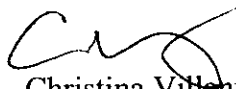
Dear Mr. Rathlesberger,

The Board of Chiropractic Examiners (Board) has completed its investigation of the above-referenced complaint you submitted against **John Krage, D.C.**

In accordance with Business and Professions Code section 125.9 and California Code of Regulations section 390, the Board issued Citation Number 2012-10639 and a fine against Dr. Chiropractor for violation of CCR 311 – advertising. He has satisfied the conditions of the citation and fine, and we are closing our file in this matter. Please be advised that citations issued against licensees are a matter of public record.

If you have any questions regarding this matter, my contact information is listed below.

Sincerely,



Christina Villanueva
Associate Analyst
Compliance Unit
(916) 263-5373

Exhibit P

COMPLAINT & DISCIPLINARY DATA

FY 11/12 July 1, 2011 - June 30, 2012

Fiscal Year	00/01	01/02	02/03	03/04	04/05	05/06	06/07	07/08	08/09	09/10	10/11	11/12
Numbers of Licensees*:	1755	1808	1834	1868	2016	2004	2000	2014	2022	2039	2041	2050
Complaints Received**:	229	226	200	178	147	109	116	104	108	127	90	124
Open Cases:56												
Discipline Cases Pending at Attorney General:10												
Licensees on Probation: 22	5	5	5	1	1	4	1	0	4	4	0	0
Citations and Fines	24	16	2	7	10	5	6	4	5	2	0	0
Cease/desist Letters***												
Referred to Attorney General	15	23	14	14	12	12	13	9	6	9	11	4
Referred to District Attorney	2	6	0	2	0	0	1	0	0	0	0	0
Accusations/Petitions to	10	12	9	11	9	7	12	8	4	8	8	5
Revoke Probation/SOI	4	4	1	2	1	0	1	1	1	2	1	1
Penalty Relief Petitions Filed	6	7	6	6	4	2	2	5	2	2	2	1
Hearings****												
Prop. Dec. Non-adopted	1	1	0	1	0	1	0	0	0	0	0	0
Prop. Dec. Adopted	3	6	6	6	2	1	2	1	2	2	1	0
Stipulations Adopted	7	5	9	5	6	6	9	5	8	5	2	7
Probations	5	1	12	6	4	4	9	5	6	5	2	5
Suspensions	0	1	1	2	1	0	1	2	1	1	0	0
Revocations	1	1	1	3	1	2	0	1	2	1	0	0
Surrenders During Prosecution	2	1	2	2	1	2	0	0	0	1	1	1
Public Letter of Reprimand	0	2	0	0	0	0	0	0	0	0	1	1
Other	2	2	0	0	0	0	0	0	2	0	0	0
Criminal arrests/ convictions	2/1	1/1	0/0	2/1	0/0	0/0	1/0	0/0	0/1	0/0	0/0	0/0
Temporary Restraining Orders/ Interim Suspensions/ Automatic Suspensions/PC-23 Orders	0	3	1	2	1	0	2	1	1	1	0	0

* includes all licensees with a status code 10 (E)

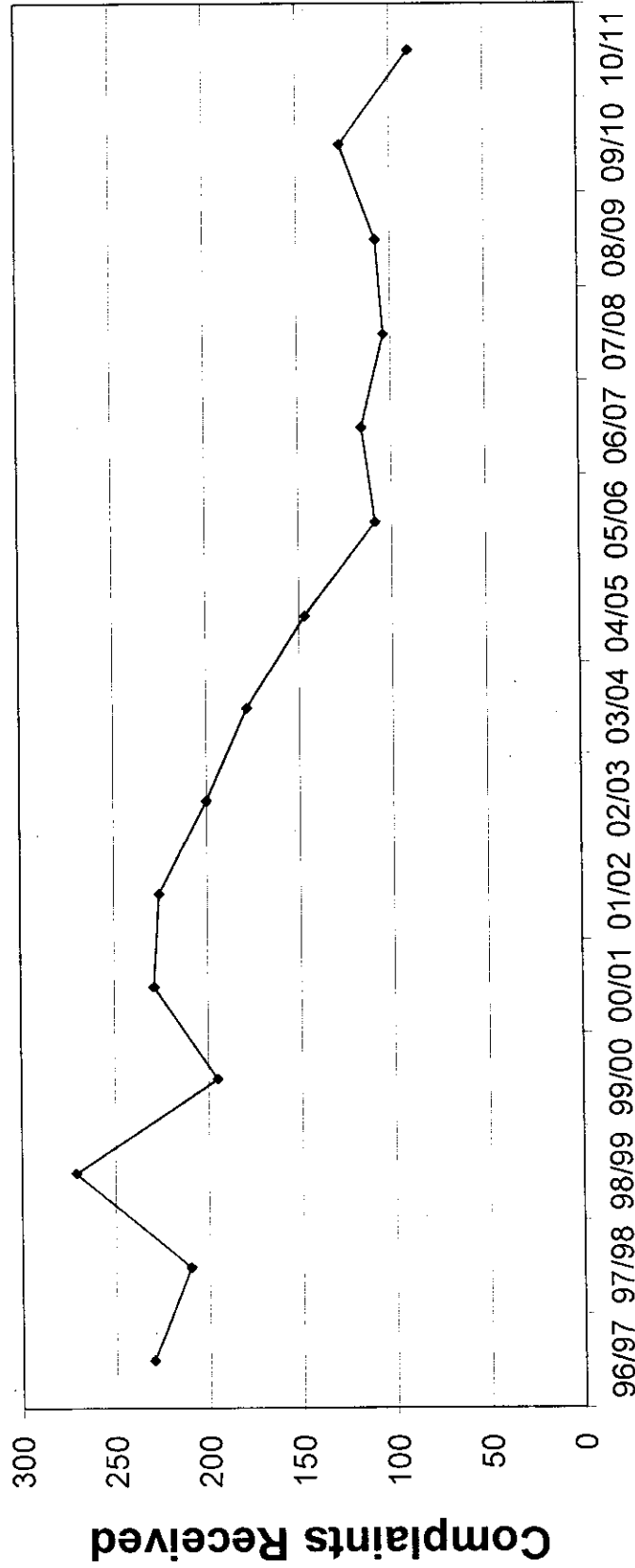
** includes multiple complaints against individual licensees

*** cease and desist letters were discontinued in 2010

**** includes reinstatements, penalty relief petitions, and any other cases heard by an Administrative Law Judge (ALJ)

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Complaints Received Since Implementation of BPM's Continuing Competence Program (January 1, 1999)



Fiscal Year (FY)

Fiscal Year	Complaints Received
96/97	230
97/98	210
98/99	271
99/00	195
00/01	229
01/02	226
02/03	200
03/04	178
04/05	147
05/06	109
06/07	116
07/08	104
08/09	108
09/10	127
10/11	90

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FOR: 1B BOARD OF PODIATRIC MEDICINE

DAYS:	M O N T H S		Y E A R S				TOTAL		
	0-3 (0-90)	4-6 (91-180)	7-9 (181-270)	10-12 (271-364)	1 (365-728)	2 (729-1092)		3 (1093-1456)	4 (1457-1820)
CAT/ CSR/ CSA	22	8	1						31
CONSULTANT	11								11
EXEC OFFICER	1	1							2
INVESTIGATION	7	2	2	4					17
AG - PRE					1				1
AG - POST		2	3	1					6
** REPORT TOTALS:	41	13	6	1	3	4			68

INITIAL COMPLAINT REVIEWED BY CONSUMER ASSISTANT TECHNICIAN / CONSUMER SERVICES REPRESENTATIVE / ANALYST.

CONSULTANT REVIEW DURING EVALUATION OF COMPLAINT.

CASES AWAITING FILING OF ACCUSATION BY ATTORNEY GENERAL'S OFFICE.

CASES AFTER FILING OF AN ACCUSATION BY ATTORNEY GENERAL'S OFFICE.

=UDK=
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 ^M510,17,4,8,660
 ^Y20,10,3250,7,2
 ^Y30,10,3250,7,2
 ^Y40,10,3250,7,2
 ^Y50,10,3250,7,2
 ^Y60,10,3250,7,2
 ^Y70,10,3250,7,2
 ^Y80,10,3250,7,2
 ^Y90,10,3250,7,2
 ^Y100,10,3250,7,2
 ^Y110,10,3250,7,2

AVERAGE NUMBER OF DAYS FOR OPEN CASES AS OF 06/30/2012

FOR: 1B BOARD OF PODIATRIC MEDICINE

CAT/CSR CSA (1)	CONSULT (2)	EXEC OFFICER	INVEST- IGATION	PRE (3)	ATTORNEY GENERAL POST (4)
67	32	55	322	412	209

BOARD OF PODIATRIC MEDI

*** AVERAGE AGING CASES CALCULATED USING OPEN CASES ONLY ***

- (1) INITIAL COMPLAINT REVIEWED BY CONSUMER ASSISTANT TECHICIAN / CONSUMER SERVICES REPRESENTATIVE / ANALYST.
- (2) CONSULTANT REVIEW DURING EVALUATION OF COMPLAINT.
- (3) CASES AWAITING FILING OF ACCUSATION BY ATTORNEY GENERAL'S OFFICE.
- (4) CASES AFTER FILING OF AN ACCUSATION BY ATTORNEY GENERAL'S OFFICE.

FOR: IDENTIFIERS OF PHYSICIANS AND SURGEONS

DAYS:	M O N T H S		Y E A R S		TOTAL				
	0-3 (0-90)	4-6 (91-180)	7-9 (181-270)	10-12 (271-364)		1 (365-728)	2 (729-1092)	3 (1093-1456)	4 (1457-1820)
CAT/ CSR/ CSA	746	198	23	2					969
CONSULTANT	207	1							208
EXEC OFFICER									
INVESTIGATION	350	269	171	151	162	7	1		1111
AG - PRE	83	40	10	4	8		1		146
AG - POST	104	75	69	45	74	20	7	2	401
** REPORT TOTALS:	1490	583	273	202	244	27	9	2	2835

INITIAL COMPLAINT REVIEWED BY CONSUMER ASSISTANT TECHICIAN / CONSUMER SERVICES REPRESENTATIVE / ANALYST.
 CONSULTANT REVIEW DURING EVALUATION OF COMPLAINT.
 CASES AWAITING FILING OF ACCUSATION BY ATTORNEY GENERAL'S OFFICE.
 CASES AFTER FILING OF AN ACCUSATION BY ATTORNEY GENERAL'S OFFICE.

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 ^CO
 ^XCP14iso-L
 ^L
 ^M510,17,4,8,660
 ^Y20,10,3250,7,2
 ^Y30,10,3250,7,2
 ^Y40,10,3250,7,2
 ^Y50,10,3250,7,2
 ^Y60,10,3250,7,2
 ^Y70,10,3250,7,2
 ^Y80,10,3250,7,2
 ^Y90,10,3250,7,2
 ^Y100,10,3250,7,2
 ^Y110,10,3250,7,2

FOR: IDENTIFIERS OF PHYSICIANS AND SURGEONS

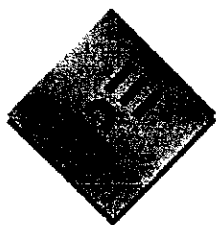
CAT/CSR CSA (1)	CONSULT (2)	EXEC OFFICER	INVEST- IGATION	PRE (3)	ATTORNEY GENERAL POST (4)	
PHYSICIANS & SURGEONS	60	20	0	202	111	306

*** AVERAGE AGING CASES CALCULATED USING OPEN CASES ONLY ***

- (1) INITIAL COMPLAINT REVIEWED BY CONSUMER ASSISTANT TECHICIAN / CONSUMER SERVICES REPRESENTATIVE / ANALYST.
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CONSUMER PROTECTION ENFORCEMENT INITIATIVE

Monthly Enforcement Report to DCA

Month: May

Year: 2012

Program: California Board of Podiatric Medicine

Date Submitted: 06-15-2012

Complaint Intake

Complaints Received by the Program. Measured from date received to assignment for investigation or closure without action.

Complaints

Received: 15

Closed without Assignment for Investigation: 0

Assigned for Investigation: 20

Average Days to Close or Assigned for Investigation: 9

Pending: 1

Convictions/Arrest Reports

Received: 2

Closed: 2

Average Days to Close: 2

Pending: 0

Investigation

Complaints investigated by the program whether by desk investigation or by field investigation. Measured by date the complaint is received to the date the complaint is closed or referred for enforcement action. If a complaint is

never referred for Field Investigation, it will be counted as "Closed" under Desk Investigation. If a complaint is referred for Field Investigation, it will be counted as "Closed" under Non-Sworn or Sworn.

Desk Investigation

Initial Assignment for Desk Investigation: 22

Closed: 22

Average Days to Close: 74

Pending: 38

Field Investigation (Non-Sworn)

Assignment for Non-Sworn Field Investigation: 3

Closed: 2

Average Days to Close: 375

Pending: 16

Field Investigation (Sworn)

Assignment for Sworn Field Investigation: 0

Closed: 0

Average Days to Close: 0

Pending: 0

All Investigation

Closed: 24

Average Days to Close: 99

Pending: 54

Enforcement Actions**AG Cases**

AG Cases Initiated: 0

AG Cases Pending: 7

SOIs/Accusations

SOIs Filed: 0

SOIs Withdrawn: 0

SOIs Dismissed: 0

SOIs Declined: 0

Average Days to Complete SOIs: 0

Accusations Filed: 0

Accusations Withdrawn: 0

Accusations Dismissed: 0

Accusations Declined: 0

Average Days to Complete Accusations: 0

Decisions/Stipulations

Proposed/Default Decisions: 0

Stipulations: 0

Disciplinary Orders

Final Orders (Proposed Decisions Adopted, Default Decisions, Stipulations): 0

Average Days to Complete: 0

Interim Suspension Orders: 0

Citations

Final Citations: 0

Average Days to Complete: 0

Comments:

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Performance Measures

Q3 Report (January - March 2012)

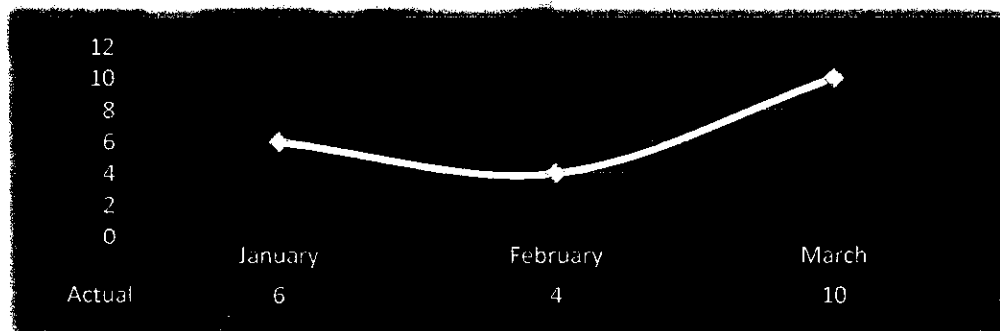
To ensure stakeholders can review the Board's progress toward meeting its enforcement goals and targets, we have developed a transparent system of performance measurement. These measures will be posted publicly on a quarterly basis.

Volume

Number of complaints and convictions received.

Q3 Total: 20

Q3 Monthly Average: 7

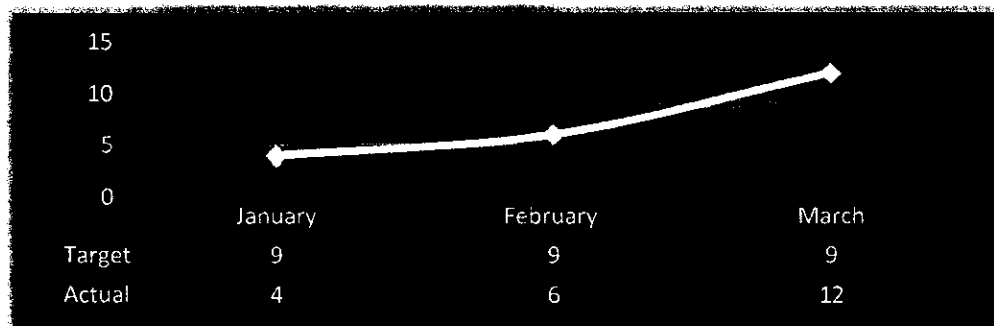


Intake

Average cycle time from complaint receipt, to the date the complaint was assigned to an investigator.

Target: 9 Days

Q3 Average: 9 Days



Probation Violation Response

Average number of days from the date a violation of probation is reported, to the date the assigned monitor initiates appropriate action.

Target: 14 Days

Q3 Average: N/A

The Board did not handle any probation violations this quarter.

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**Board of Podiatric Medicine's
Probation Surveillance Program
July 2, 2012**

Complaint No.	Subject's Name	Probation Officer	Medical Consultant	Practice Monitor	Status	Completion Date
Active Status:						
1B-2008-189509	Kobayashi, Wesley	Seamons	Wagreich		Active	03/05/13
1B-2005-163869	Lawrence, Eric	Emilio	Walburg	Labovitz	Active	11/19/13
1B-2004-162844	Graves, Richard	Seamons	Labovitz	Alavy	Active	03/09/14
1B-2007-181509	Servatjoo, Parviz	Brown	Walburg	Walburg	Active	05/08/14
1B-2004-162454	Hernandez, Virgil	Brown	Giacopelli	Wagreich	Active	07/09/14
1B-2008-194027	Subotnick, Steven	Seamons	Bois		Active	08/12/14
1B-2005-169051	Nguyen, Tan	Seamons	Bois	Bois	Active	08/17/14
1B-2009-200359	Redko, Peter	Sherer	Bois		Active	09/14/14
1B-2009-198964	Eng, Steven	Brown	Rosenthal		Active	03/01/15
1B-2008-192098	Nordyke, Randolph	Seamons	Wagreich	Wagreich	Active	04/08/15
1B-2004-162196	Carrasco, Pete	Emilio	Wagreich	PEP	Active	07/02/15
1B-2004-158802	Moy, Richard	Emilio	Labovitz	Taubman	Active	12/30/15
1B-2009-199047	Moussavi, Ramyar	Unassigned	Unassigned	Unassigned	Active	05/29/17
1B-2005-167595	Truong, Vinncente	Seamons	Greenwald	Greenwald	Active	07/28/18
Subtotal	14					

Complaint No.	Subject's Name	Probation Officer	Medical Consultant	Practice Monitor	Status	Completion Date
---------------	----------------	-------------------	--------------------	------------------	--------	-----------------

Tolled Status: (Out of State)						
IB-1990-3602	Marek, Neal	Seamons			Tolled	
IB-2000-105396	Salz, Joseph	Seamons			Tolled	
IB-2006-179270	O'Meara, Sean	Seamons			Tolled	
					Subtotal	3

Tolled Status: (In State)						
IB-1990-5979	Metz, Douglas	Seamons			Pended	
IB-1996-64516	Levy, Sherwin	Seamons			Pended	
IB-1995-52592	Weber, Bennie	Seamons			Pended	
IB-1998-090267	Jarvis, Brian	Seamons			Pended	
IB-2002-133194	Fowler, Morris	Seamons			Pended	
					Subtotal	5

COMPLIANCE CASES – NON-PROBATIONARY

IB-2005-165008 Brim, Mark Avery Pending

Conditions: Due Dates:

1) 65 hours of CME for three calendar years July 13, 2009 – deadline to submit for approval OK

2) Enroll in a Medical Recordkeeping Course July 13, 2009 – deadline to enroll OK

3) Pay \$15,000 for cost recovery May 14, 2012 – deadline to pay cost recovery in full

Issue Public Reprimand May 14, 2012 – if successfully completed all terms and conditions

Exhibit Q



AGENDA

Enforcement Meeting/Consultant Training Session 8:30 am -12:00 pm - June 8, 2012

Disneyland Hotel
Frontier Tower – Western Room
1600 South Disneyland Drive
Anaheim, CA
(714) 635-2300

1. **Introductions** 8:30 - 8:35
Presenter: Bethany DeAngelis, BPM Enforcement Coordinator
2. **Role of the Consultant** 8:35 – 8:45
Presenter: Bethany DeAngelis, BPM Enforcement Coordinator
3. **Report Format** 8:45 – 9:15
Presenters: Harinder Kapur, DAG
John Hirai, MBC Supervising Investigator
4. **Field Investigations** 9:15 - 10:00
Presenters: John Hirai, MBC Supervising Investigator
Harinder Kapur, DAG
 - a. MBC Investigation Procedures
 - b. Vertical Prosecution
 - c. What can be done when the subject cancels or is a no show?
5. **Probation** 10:00 - 10:15
Presenter: John Hirai, MBC Supervising Investigator
 - a. MBC Probation Procedures
 - b. Roundtable Discussion on being a Practice Monitor
6. **Communication between Parties** 10:15 - 10:30
Roundtable question and answer discussion on what communications are allowed between Consultants, Experts and other involved parties and how to improve communication for effective case management.
7. **Case Reviews** 10:30 - 12:00
Presenters: Martin Taubman, DPM
Randall Sarte, DPM

Exhibit

R

Executive Office

1625 N. Market Boulevard, Suite S-308, Sacramento, CA 95834
P (916) 574-8200 F (916) 574-8613 | www.dca.ca.gov



May 3, 2012

Neil Mansdorf, DPM
President
Board of Podiatric Medicine
2005 Evergreen Street, Ste. 1300
Sacramento, CA 95815

RE: Proposed Regulations 16 CCR §1399.710 Disciplinary Guidelines

Dr. Mansdorf:

I regret to inform you that I am disapproving the proposed regulations by the Board of Podiatric Medicine (Board), specifically, as it relates to the implementation of the Uniform Standards for Substance-Abusing Licensees (Uniform Standards).

Business and Professions (B&P) Code section 315 established the Substance Abuse Coordination Committee to create Uniform Standards to be used by the healing arts boards when dealing with substance-abusing licensees. The intent of the Uniform Standards is to protect the public by ensuring that, at a minimum, a set of best practices or standards are adopted by health-care related boards to deal with practitioners with alcohol or drug problems (Assembly Committee on Business and Professions, analysis of SB 1441 (2008-2009 regular session), as amended June 16, 2008). A board cannot disregard a specific standard because it does not like the standard or because it believes that the standard is too cumbersome.

The opinions of the Office of Legislative Counsel and the Office of the Attorney General, as well as the Department's Legal Affairs Office, conclude that section 315 of the B&P Code requires that the Uniform Standards must be applied, without deviation, where the subject is found to be a substance abuser. The regulations proposed by the Board do not implement all of the Uniform Standards as required by law. Additionally, the proposed regulations, which include a few of the Uniform Standards, allow the Board the discretion to deviate from those Uniform Standards, which is inconsistent with the law. The Uniform Standards are crucial to the protection of the public from potential harm by substance-abusing licensees. Therefore, under the authority granted to me by B&P Code section 313.1 (d), I must disapprove the proposed regulations for the reasons previously stated.

I encourage the Board to work with your legal counsel to make the necessary changes to the proposed regulation to address the Department's concerns. Should you have any questions, please contact Doreathea Johnson, Deputy Director of Legal Affairs at (916) 574-8220.

Sincerely,

A handwritten signature in cursive script that reads "Denise Brown".

Denise Brown
Director
Department of Consumer Affairs

Attachments: Legislative Counsel Legal Opinion October 27, 2011
Office of the Attorney General Legal Opinion February 29, 2012

cc: Awet Kidane, Chief Deputy Director, Department of Consumer Affairs
Doreathea Johnson, Deputy Director, Department of Consumer Affairs
Jim Rathlesberger, Executive Officer, Board of Podiatric Medicine

BOARD OF PODIATRIC MEDICINE
Disciplinary Guidelines

Specific Language

Amend section 1399.710 in Article 11 of Title 16, Division 13.9, to read as follows:

1399.710. Disciplinary Guidelines.

In reaching a decision on a disciplinary action under the Administrative Procedure Act (Government Code Section 11400, et seq.), the board shall consider the disciplinary guidelines entitled "Manual of Disciplinary Guidelines with Model Disciplinary Orders" [revised September ~~2005~~ 2011] which are hereby incorporated by reference. Deviation from these guidelines and orders, including the standard terms of probation, is appropriate where the board in its sole discretion determines that the facts of the particular case warrant such a deviation -for example: the presence of mitigating factors; the age of the case; evidentiary problems.

Note: Authority cited: Section 2470, Business and Professions Code; and Section 11400.20, Government Code. Reference: Sections 11400.20 and 11425.50(e), Government Code.

Board of Podiatric Medicine

Manual

Of
Disciplinary Guidelines

With

Model Disciplinary Orders



Department of Consumer Affairs
State of California

9. Controlled Substances- Abstain from Use

Respondent shall abstain completely from the personal use or possession of controlled substances as defined in the California Uniform Controlled Substances Act, dangerous drugs as defined by Business and Professions Code section 4022, and any drugs requiring a prescription. This prohibition does not apply to medications lawfully prescribed to respondent by another practitioner for a bona fide illness or condition.

Within 15 calendar days of ~~or~~ receiving any lawfully prescribed lawful prescription medications, respondent shall notify the Board or its designee of the: issuing practitioner's name, address, and telephone number; medication name, and strength, and quantity; and issuing pharmacy name, address, and telephone number.

If respondent has a confirmed positive biological fluid test for any substance (whether or not legally prescribed) and has not reported the use to the Board or its designee, respondent shall receive a notification from the Board or its designee to immediately cease the practice of medicine. The respondent shall not resume the practice of medicine until final decision on an accusation and/or a petition to revoke probation. An accusation and/or petition to revoke probation shall be filed by the Board within 15 days of the notification to cease practice. If the respondent requests a hearing on the accusation and/or petition to revoke probation, the Board shall provide the respondent with a hearing within 30 days of the request, unless the respondent stipulates to a later hearing. A decision shall be received from the Administrative Law Judge or the Board within 15 days unless good cause can be shown for the delay. The cessation of practice shall not apply to the reduction of the probationary time period.

If the Board does not file an accusation or petition to revoke probation within 15 days of the issuance of the notification to cease practice or does not provide respondent with a hearing within 30 days of such a request, the notification to cease practice shall be dissolved.

10. Alcohol - Abstain from Use

Respondent shall abstain completely from the use of products or beverages containing alcohol.

If respondent has a confirmed positive biological fluid test for alcohol, respondent shall receive a notification from the Board or its designee to immediately cease the practice of medicine. The respondent shall not resume the practice of medicine until final decision on an accusation and/or a petition to revoke probation. An accusation and/or petition to revoke probation shall be filed by the Board within 15 days of the notification to cease practice. If the respondent requests a hearing on the accusation and/or petition to revoke probation, the Board shall provide the respondent with a hearing within 30 days of the request, unless the respondent stipulates to a later hearing. A decision shall be received from the Administrative Law Judge or

the Board within 15 days unless good cause can be shown for the delay. The cessation of practice shall not apply to the reduction of the probationary time period.

If the Board does not file an accusation or petition to revoke probation within 15 days of the issuance of the notification to cease practice or does not provide respondent with a hearing within 30 days of such a request, the notification to cease practice shall be dissolved.

11. **Biological Fluid Testing**

Respondent shall immediately submit to biological fluid testing, at respondent's expense, upon the request of the Board or its designee. "Biological fluid testing" may include, but is not limited to, urine, blood, breathalyzer, hair follicle testing, or similar drug screening approved by the Board or its designee. Prior to practicing medicine, respondent shall contract with a laboratory or service approved in advance by the Board or its designee that will conduct random, unannounced, observed, biological fluid testing. The contract shall require results of the tests to be transmitted by the laboratory or service directly to the Board or its designee within four hours of the results becoming available. Respondent shall maintain this laboratory or service contract during the period of probation.

A certified copy of any laboratory test results may be received in evidence in any ~~may~~ proceedings between the Board and the respondent. ~~Failure to submit to, or failure to complete the required biological fluid testing, is a violation of probation.~~

If respondent fails to cooperate in a random biological fluid testing program within the specified time frame, respondent shall receive a notification from the Board or its designee to immediately cease the practice of medicine. The respondent shall not resume the practice of medicine until final decision on an accusation and/or a petition to revoke probation. An accusation and/or petition to revoke probation shall be filed by the Board within 15 days of the notification to cease practice. If the respondent requests a hearing on the accusation and/or petition to revoke probation, the Board shall provide the respondent with a hearing within 30 days of the request, unless the respondent stipulates to a later hearing. A decision shall be received from the Administrative Law Judge or the Board within 15 days unless good cause can be shown for the delay. The cessation of practice shall not apply to the reduction of the probationary time period.

If the Board does not file an accusation or petition to revoke probation within 15 days of the issuance of the notification to cease practice or does not provide respondent with a hearing within 30 days of such a request, the notification to cease practice shall be dissolved.

VIOLATION OF PROBATION

Minimum penalty: 30 day suspension ~~Impose actual period of suspension~~

Maximum penalty: Revocation ~~Impose penalty that was stayed~~

The maximum penalty should be given for repeated similar offenses or for probation violations revealing a cavalier or recalcitrant attitude. A violation of any of the following conditions of probation ~~Other violations of probation~~ should result in, draw at minimum, a 60 day least a period of actual suspension; ~~preferably 90 days or more.~~

1. Controlled Substances - Maintain Records and Access to Records and Inventories [8]
2. Biological Fluid Testing [11]
3. Professional Boundaries Program [18]
4. Psychiatric Evaluation [21]
5. Psychotherapy [22]
6. Medical Evaluation and Treatment [23]
7. Third Party Chaperone [26]


It is the expectation of the Board of Podiatric Medicine that the appropriate penalty for a doctor of podiatric medicine who did not successfully complete a clinical training program ordered as part of his or her probation is revocation.



MEMORANDUM

DATE April 5, 2012

TO ALL HEALING ARTS BOARDS

FROM 
DOREATHEA JOHNSON
Deputy Director, Legal Affairs
Department of Consumer Affairs

SUBJECT Opinion Regarding Uniform Standards for Substance-Abusing Licensees (SB 1441)

This memo addresses a number of questions that have been raised concerning the discretion of healing arts boards, with respect to the Uniform Standards for Substance-Abusing Healing Arts Licensees ("Uniform Standards") that were formulated by the Substance Abuse Coordination Committee and mandated by Business and Professions Code section 315. Previously, there have been discussions and advice rendered, opining that the boards retain the discretion to modify the Uniform Standards. This opinion, largely influenced by the fact that the rulemaking process necessarily involves the exercise of a board's discretion, has been followed by a number of boards as they completed the regulatory process.

Two opinions, one issued by the Legislative Counsel Bureau ("Legislative Counsel") dated October 27, 2011, and an informal legal opinion, rendered by the Government Law Section of the Office of the Attorney General ("Attorney General"), dated February 29, 2012, have been issued and address the discretion of the boards, in adopting the Uniform Standards. This memo is to advise the healing arts boards of this office's opinion regarding the questions raised, after a review of these two opinions. A copy of each opinion is attached for your convenience.

Questions Presented

- 1. Do the healing arts boards retain the discretion to modify the content of the specific terms or conditions of probation that make up the Uniform Standards?**

Both Legislative Counsel and the Attorney General concluded that the healing arts boards do not have the discretion to modify the content of the specific terms or conditions of probation that make up the Uniform Standards. We concur with that conclusion.

- 2. Do the healing arts boards have the discretion to determine which of the Uniform Standards apply in a particular case?**

Legislative Counsel opined that, unless the Uniform Standards specifically so provide, all of the Uniform Standards must be applied to cases involving substance-abusing licensees, as it was their belief that the Legislative intent was to "provide for the full implementation of the Uniform Standards." The Attorney General agreed with Legislative Counsel. Following our review and analysis of Business and Professions Code Section 315, we concur with both the Office of the Attorney General and the Legislative Counsel.

- 3. Is the Substance Abuse Coordination Committee (SACC) the entity with rulemaking authority over the uniform standards to be used by the healing arts boards?**

The Legislative Counsel concluded that the SACC had the authority to promulgate regulations mandating that the boards implement the Uniform Standards. However, the Office of the Attorney General disagreed and concluded that the SACC was not vested with the authority to adopt regulations implementing the uniform standards. We agree with the Office of the Attorney General. It is our opinion that the authority to promulgate the regulations necessary to implement the Uniform Standards, lies with the individual boards that implement, interpret or make specific, the laws administered by those boards. As the SACC is limited to the creation or formulation of the uniform standards, but is not authorized to implement the laws of the healing arts boards, it does not have authority to adopt regulations to implement those standards. Consequently, we agree with the Attorney General's opinion that the SACC is not the rule-making entity with respect to the Uniform Standards, and therefore has no authority to adopt the Uniform Standards as regulations.

It is our recommendation that healing arts boards move forward as soon as possible to implement the mandate of Business and Professions Code section 315, as it relates to

the Uniform Standards. Some of the standards are appropriate for inclusion in an agency's disciplinary guidelines, which necessarily will involve the regulatory process. Others are administrative in nature and not appropriate for inclusion in the disciplinary guidelines. For example, Uniform Standard No. 16 which sets forth reporting requirements would not be appropriate for inclusion in disciplinary guidelines.

Please work with your assigned legal counsel to determine how best to implement the Uniform Standards. This should include a discussion as to whether : (1) the Uniform Standards should be placed in a regulation separate from the disciplinary guidelines; (2) the implementing regulation should include a definition of (or criteria by which to determine) what constitutes a "substance-abusing licensee."

It is hopeful that the foregoing information addresses your concerns with respect to the implementation of the mandatory uniform standards.

Attachments

cc: Denise Brown, DCA Director
Awet Kidane, DCA Chief Deputy Director
DCA Legal Affairs Attorneys



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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 Code¹ 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.

¹ 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. (2), Sec. 315, hereafter committee). The committee is comprised of the executive officers of each healing arts board within the department,² the State Board of Chiropractic Examiners, and the

²The 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 2011.⁹ 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:

⁹ See 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. 5, 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."

Notwithstanding 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.⁴

⁴ 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,

Diane F. Boyer-Vine
Legislative Counsel



By
Lisa M. Plummer
Deputy Legislative Counsel

LMP:syl

M e m o r a n d u m

To : Doreathea Johnson
Deputy Director & Chief Counsel
Department of Consumer Affairs
Legal Affairs Division

Date: February 29, 2012
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From : Kathleen A. Lynch
Deputy Attorney General
Government Law Section
Office of the Attorney General – Sacramento

Subject : Uniform Standards Related to Substance-Abusing Licensees (Bus. & Prof. Code, §§ 315 - 315.4)

Executive Summary

Issues

You asked us to review Legislative Counsel's letter of October 27, 2011, which rendered certain opinions regarding the Substance Abuse Coordination Committee (SACC), which was created by Business and Professions Code section 315 to formulate uniform standards for use by the healing arts boards to deal with substance-abusing licensees. Legislative Counsel opined that:

- (1) SACC was required to formally promulgate the uniform standards as regulations pursuant to the Administrative Procedures Act (APA), and
- (2) the healing arts boards are required to use such standards under Business and Professions Code sections 315.

Summary of Responses

With respect to question (1), we see things differently from Legislative Counsel, in two respects.

First, we believe that SACC's adoption of uniform standards does not need to undergo the formal rule-making process under the APA. While other laws could potentially require the adoption of regulations when the standards are implemented by the boards (such as statutes governing particular boards or the APA's provisions applicable to disciplinary proceedings), we disagree that section 315 itself triggers the need to issue the uniform standards as regulations.

Second, even assuming the uniform standards must be adopted as regulations, we disagree with Legislative Counsel's apparent assumption that SACC would issue the regulations under section 315. The legislative histories of the relevant laws and statutory authorities of the

individual boards indicate that the boards would issue the regulations to implement the uniform standards.

As to question (2), we agree with Legislative Counsel that the healing arts boards must use the uniform standards under sections 315. A board cannot simply disregard a specific standard because it does not like the standard or because it believes that the standard is too cumbersome. However, some specific uniform standards themselves recognize a board's discretion whether to order a particular action in the first place. Thus, boards still retain authority to determine if they will undertake certain types of actions if permitted under a specific uniform standard.

Statutory Background

In 2008, SACC was legislatively established within the Department of Consumer Affairs to create uniform standards to be used by the healing arts boards when addressing licensees with substance abuse problems. (Bus. & Prof. Code, § 315, subd. (a); Stats. 2008, ch. 548 (SB 1441).) By January 1, 2010, SACC was required to "formulate uniform and specific standards" in 16 identified 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." (*Id.* at § 315, subd. (c).) These 16 standards include requirements for: clinical diagnostic evaluation of licensees; the temporary removal of the licensee from practice for clinical diagnostic evaluation and any treatment, and criteria before being permitted to return to practice on a full-time or part-time basis; aspects of drug testing; whether inpatient, outpatient, or other type of treatment is necessary; worksite monitoring requirements and standards; consequences for major and minor violations; and criteria for a licensee to return to practice and petition for reinstatement of a full and unrestricted license. (*Ibid.*) SACC meetings to create these standards are subject to Bagley-Keene Act open meeting requirements. (*Id.* at subd. (b).)

On March 3, 2009, SACC conducted its first public hearing, which included a discussion of an overview of the diversion programs, the importance of addressing substance abuse issues for health care professionals, and the impact of allowing health care professionals who are impaired to continue to practice. (Sen. Com. on Business, Professions, and Economic Development, Analysis of SB 1172 (2010-2011 Reg. Sess.), as amended April 12, 2010.) During this meeting, SACC members agreed to draft uniform guidelines for each of the standards, and during subsequent meetings, roundtable discussions were held on the draft uniform standards, including public comments. (*Ibid.*) In December 2009, the Department of Consumer Affairs adopted the uniform guidelines for each of the standards required by SB 1441. (*Ibid.*) These standards have subsequently been amended by SACC, and the current standards were issued in April of 2011.

According to the author of SB 1441 (Ridley-Thomas), the intent of the legislation was to protect the public by ensuring that, at a minimum, a set of best practices or standards were adopted by health-care-related boards to deal with practitioners with alcohol or drug problems. (Assem. Com. on Business and Professions, Analysis of SB 1441 (2008-2009 Reg. Sess.), as amended June 16, 2008.) The legislation was also meant to ensure uniformity among the

standards established throughout the healing arts licensing boards under the Department of Consumer Affairs. (*Ibid.*) Specifically, the author explains:

SB 1441 is not attempting to dictate to [the health-related boards] how to run their diversion programs, but instead sets parameters for these boards. The following is true to all of these boards' diversion programs: licensees suffer from alcohol or drug abuse problems, there is a potential threat to allowing licensees with substance abuse problems to continue to practice, actual harm is possible and, sadly, has happened. The failures of the Medical Board of California's (MBC) diversion program prove that there must be consistency when dealing with drug or alcohol issues of licensees.

(Assem. Com. on Business and Professions, Analysis of SB 1441 (2008-2009 Reg. Sess.), as amended June 16, 2008.)

In the view of its author, "[t]his bill allows the boards to continue a measure of self-governance; the standards for dealing with substance-abusing licensees determined by the commission set a floor, and boards are permitted to establish regulations above these levels." (*Ibid.*)

In 2010, additional legislation was enacted to further implement section 315. Specifically, it provided that the healing arts boards, as described in section 315 and with the exception of the Board of Registered Nursing, "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." (Bus. & Prof. Code, § 315.4, subd. (a); Stats. 2010, ch. 517 (SB 1172).) An order to cease practice does not require a formal hearing and does not constitute a disciplinary action. (*Id.* § 315.4 subds. (b), (c).)

According to the author of SB 1172 (Negrete McLoud), this subsequent statute was necessary "because current law does not give boards the authority to order a cease practice." (Sen. Com. on Business, Professions, and Economic Development, Analysis of SB 1172 (2010-2011 Reg. Sess.), as amended April 12, 2010.) The author explains:

Although most of the adopted guidelines do not need additional statutes for implementation, there are a few 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. [¶] The ability of a board to order a licensee to cease practice under these circumstances provides a delicate balance to the inherent confidentiality of diversion programs. The protection of the public remains the top priority of boards when dealing with substance abusing licensees.

(Senate Third Reading, Analysis of SB 1172 (2010-2011 Reg. Sess.); as amended June 22, 2010.)

Legal Analysis

1a. Section 315 should be construed as not requiring that the uniform standards be adopted as regulations.

Legislative Counsel opined that SACC must adopt the uniform standards as regulations under section 315, because (1) the standards meet the definition of regulations, (2) none of the express exemptions under Government Code section 11340.9 remove them from the APA rule-making process, and (3) section 315 contains no express language precluding application of the rulemaking provisions of the APA. (October 27, 2011 Letter, p. 5.) We have a different view on the threshold issue of whether the standards qualify as a regulation under section 315.

Under the APA, a regulation is defined as "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." (Gov. Code, § 11342.600.) "No state agency shall 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 as defined in Section 11342.600, unless [it has been adopted in compliance with the APA]." (*Id.* § 11340.5, subd. (a).) This requirement cannot be superseded or modified by subsequent legislation, unless the statute does so expressly. (*Id.* § 11346, subd. (a).)

An agency standard subject to the APA has two identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. Second, the rule must "implement, interpret, or make specific the law enforced or administered by [the agency], or . . . govern [the agency's] procedure." (*Morning Star Co. v. State Bd. of Equalization* (2006) 38

Cal.4th 324, 333, quoting *Tidewater Marine Western, Inc. et al. v. Bradshaw* (1996) 14 Cal.4th 557, 571.)

Whether a particular standard or rule is a regulation requiring APA compliance depends on the facts of each case, considering the rule in question, and the applicable statutory scheme. Generally speaking, courts tend to readily find the need for such compliance. We understand that certain healing arts boards have already adopted regulations incorporating the uniform standards. (See, e.g., Cal. Code Regs., tit. 16, § 4147 [Board of Occupational Therapy].) This approach is understandable in light of the usually broad requirement that agency rules be adopted as regulations and, as noted below, may be required by other laws when they are implemented by the boards. Here, however, the wording and intent of section 315 indicate the Legislature did not intend that the initial act of formulating and adopting the uniform standards is within the purview of the formal APA rule-making process.

“The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law.” (*Bodell Const. Co. v. Trustees of California State University* (1998) 62 Cal.App.4th 1508, 1515.) In determining that intent, courts “first examine the words of the statute itself. Under the so-called ‘plain meaning’ rule, courts seek to give the words employed by the Legislature their usual and ordinary meaning. If the language of the statute is clear and unambiguous, there is no need for construction. However, the ‘plain meaning’ rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose. If the terms of the statute provide no definitive answer, then courts may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history.” (*Ibid.* [citations omitted].) Courts “must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.” (*Ibid.* [citation omitted].) “The legislative purpose will not be sacrificed to a literal construction of any part of the statute.” (*Ibid.*)

In *Paleski v. State Department of Health Services* (2006) 144 Cal.App.4th 713, the Court of Appeal applied these rules of statutory construction and found that the challenged agency criteria were not required to be adopted as regulations under the APA. (*Id.* at pp. 728-729.) In *Paleski*, plaintiff challenged an agency’s criteria for the prescription of certain drugs because the department had not promulgated them in compliance with the APA. (*Ibid.*) The statute, however, expressly authorized the criteria to be effectuated by publishing them in a manual. (*Ibid.*) According to the court, the “necessary effect” of this language was that the Legislature did not intend for the broader notice procedure of the APA to apply when the agency issued the criteria. (*Ibid.*)

Similar reasoning should apply here. Under the plain meaning of section 315, SACC was legislatively established to create uniform standards to be used by the healing arts boards when addressing licensees with substance abuse problems. (Bus. & Prof. Code, § 315, subd. (a).) The intent of the legislation was to protect the public and to ensure that minimum standards are met and to ensure uniformity among the standards established throughout the healing arts

licensing boards under the Department of Consumer affairs. (Assem. Com. on Business and Professions, Analysis of SB 1441 (2008-2009 Reg. Sess.), as amended June 16, 2008.) In formulating these uniform standards, SACC was subject to the Bagley-Keene Act, which requires noticed public meetings. Many roundtable discussions were held on the draft uniform standards, including public vetting and public comments. In that way, the affected community learned about the standards and had the opportunity to comment. This is a prime requirement and purpose of the APA rule-making process (see Gov. Code, § 11343 *et seq.*), but it has already been fulfilled by the procedures set forth in section 315. To now require SACC to repeat that process by promulgating the standards as regulations would make little sense and be duplicative.

Nor does the process for the formulation of the standards set forth in section 315 comport with the other purposes and procedures of the APA. During the APA rule-making process, an agency must provide various reasons, justifications, analyses, and supporting evidence for the proposed regulation. (Gov. Code, § 11346.2.) Those provisions and other provisions of the APA are intended to address the proliferation, content, and effect of regulations proposed by administrative agencies. (*Id.* §§ 11340, 11340.1.) Here, the agency is not proposing to adopt the uniform standards. The Legislature has required that the standards adopted by SACC, be uniform, and be used by the boards. Given this statutory mandate that they be implemented, subjecting the uniform standards to substantive review under the APA again makes little sense.¹

1b. The SACC would not be the rule-making entity, even if the uniform standards would have to be adopted as regulations.

Even assuming that APA compliance was required under section 315, it is doubtful that SACC would carry the responsibility to adopt regulations. The second component of a regulation requires that the rule must “implement, interpret, or make specific the law enforced or administered by [the agency], or . . . govern [the agency’s] procedure.” (*Morning Star Co.*, *supra*, 38 Cal.4th at p. 333.) Here, SACC was mandated to create the uniform standards to be used by separate boards; the SACC’s creation of the uniform standards does not implement,

¹ Even though the standards do not have to be promulgated as regulations by SACC under section 315, this does not mean that certain regulations would not arguably be required on the part of some or all of the boards under other statutory schemes, such as the laws applicable to a particular board or the APA’s provisions on quasi-adjudicatory proceedings. This type of analysis would require a fact specific, case-by-case study of each board’s practices and its regulatory scheme and may include consideration of: (1) whether a board’s statutory authority requires the adoption of regulations related to actions against substance-abusing licensees, (2) whether current regulations conflict with the standards, and (3) whether in an administrative adjudicative setting, the standards are considered “penalties” and thus must be adopted as regulations under section 11425.50, subdivision (e), of the Government Code.

interpret, or make any law more specific. (Bus. & Prof. Code, § 315, subds. (a), (c).) The only express statutory role of the SACC is to determine the uniform standards in the first place.²

The boards are then required to use and apply the standards and have much clearer authority to adopt regulations. “Each of the boards [within the Department of Consumer Affairs] exists as a separate unit, and has the function of setting standards, holding meetings, and setting dates thereof, preparing and conducting examinations, passing upon applicants, conducting investigations of violations of laws under its jurisdiction, issuing citations and hold hearings for the revocation of licenses, and the imposing of penalties following such hearings, in so far as these powers are given by statute to each respective board.” (Bus. & Prof. Code, § 108.)

The legislative history for section 315 also supports this conclusion. According to its author, section 315 was adopted to protect the public by ensuring that, at a minimum, a set of best practices or standards *were adopted by health care related boards to deal with practitioners with alcohol or drug problems*. (Assem. Com. on Business and Professions, Analysis of SB 1441 (2008-2009 Reg. Sess.), as amended June 16, 2008, emphasis added.)³ Practically speaking, it would be difficult for the SACC (or the Department of Consumer Affairs) to draft regulations applicable to all boards, given that they are unique and deal with different subject areas, unless such regulations were adopted wholesale, on a one-size-fits-all basis. As explained below, while the healing arts boards must use the standards, they only have to use the ones that apply to their procedures.

Thus, while section 315 does not require regulations to initially adopt the standards, the boards (and not SACC) would more reasonably be tasked with this responsibility.

2. The healing arts boards must use the uniform standards to the extent that they apply.

The original language of section 315 is clear that the standards must be used. (Bus. & Prof. Code, § 315, subd. (a) [“uniform standards that will be used by healing arts boards”], subd. (b) [“uniform standards . . . that each healing arts board shall use in dealing with substance-abusing licenses”].) Legislative Counsel was asked to opine on whether subsequent legislation (Bus. & Prof. Code, § 315.4) somehow made these uniform standards discretionary. We agree with

² The SACC is a committee formed by various executive officers of healing arts boards and other public officials formed within the Department of Consumer Affairs. (Bus. & Prof. Code, § 315, subds. (a).)

³ As discussed shortly, the legislative history for follow-up legislation similarly explains that its purpose was to provide statutory authority for some healing arts boards to issue regulations to implement certain of the uniform standards. (Sen. Com. on Business, Professions, and Economic Development, Analysis of SB 1172 (2010-2011 Reg. Sess.), as amended April 12, 2010.)

Legislative Counsel's conclusion that section 315.4 did not make the uniform standards optional. (Oct. 27, 2011, Letter, p. 9.)

Section 315.4 was enacted two years after section 315, and provides that that the healing arts boards, as described in section 315 and with the exception of the Board of Registered Nursing, "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." (Bus. & Prof. Code, § 315.4, subd. (a); Stats. 2010, ch. 517, (SB 1172).) If a board adopts such regulations, there is nothing to indicate that use of uniform standards created under section 315 is optional. Such an interpretation would be contrary to the legislative intent. Section 314.5 was enacted for the limited purpose to give boards the authority to order a licensee to cease practice, as this was not provided for in section 315. (Sen. Com. on Business, Professions, and Economic Development, Analysis of SB 1172 (2010-2011 Reg. Sess.), as amended April 12, 2010.) By no means was the intent to transform the mandatory uniform standards of section 315 into optional suggestions. As the author explains:

Although most of the adopted guidelines do not need additional statutes for implementation, there are a few 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.

(Senate Third Reading, Analysis of SB 1172 (2010-2011 Reg. Sess.), as amended June 22, 2010.)

In addition, some specific uniform standards themselves recognize a board's discretion whether to order a particular action in the first place. (See e.g. Uniform Standard # 1 ["If a healing arts board orders a licensee . . . to undergo a clinical diagnosis evaluation, the following applies: ..."].) The standards must be applied, however, if a board undertakes a particular practice or orders an action covered by the standards. A determination regarding a board's specific application (or not) of certain uniform standards would have to be based on a fact specific, case-by-case review of each board and its regulatory scheme. However, once a board implements a procedure covered by the uniform standards, it cannot disregard the applicable uniform standard because it disagrees with the standard's substance.

Conclusion

For the reasons stated above, in our view, section 315 can be read to preclude the necessity to adopt regulations when the uniform standards are issued initially. And even if regulations were required under section 315, SACC would not be tasked with this responsibility. We also

Doreathea Johnson
February 29, 2012
Page 9

believe that the healing arts boards must use the uniform standards where an agency undertakes an action covered by the standards.

Please feel free to contact me if you have any questions or would like to discuss the above.

:KAL

cc: Peter K. Southworth, Supervising Deputy Attorney General