TITLE 16. BOARD OF PODIATRIC MEDICINE

NOTICE IS HEREBY GIVEN that the Board of Podiatric Medicine (hereinafter "board") is proposing to take the action described in the Informative Digest. Any person interested may present statements or arguments orally or in writing relevant to the action proposed at a hearing to be held at the San Francisco Health Commission, 101 Grove Street, Room 300, San Francisco, California, at 9:00 AM, on May 16, 2003. Written comments, including those sent by mail, facsimile, or e-mail to the addresses listed under Mischa Matsunami in this Notice, must be received by the board at its office not later than 5:00 p.m. on May 14, 2002 or must be received by the board at the hearing. The board, upon its own motion or at the instance of any interested party, may thereafter adopt the proposals substantially as described below or may modify such proposals if such modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified proposal will be available for 15 days prior to its adoption from the person designated in this Notice as contact person and will be mailed to those persons who submit written or oral testimony related to this proposal or who have requested notification of any changes to the proposal.

Authority and Reference: Pursuant to the authority vested by Sections 803, 803.1 and 2470 of the Business and Professions Code and Section 6253 of the Government Code, and to implement, interpret or make specific Sections 803, 803.1, 2027, 2236.1, and 2470 of the Business and Professions Code, Sections 6250, 6253 and 11504 of the Government Code and Section 1798.24 of the Civil Code, the board is considering changes to Division 13.9 of Title 16 of the California Code of Regulations as follows:

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Business and Professions Code section 2470 authorizes the board to adopt, amend, or repeal, in accordance with the provisions of the Administrative Procedure Act, regulations which are necessary to enable the board to carry into effect the provisions of law relating to the practice of podiatric medicine.

1. Amend Section 1399.650. Citation:

Existing regulation refers to the body of Division 13.9 of Title 16 of the California Code of regulations as “This chapter.”

This proposal would change this reference to “This division” to be consistent with the organization of these regulations.

2. Add Section 1399.700

This proposal would add to the Board’s regulations, a section which expresses the overall goal of the Board to permit maximum information access to consumers and members of the public consistent with statutory and constitutional law.

3. Add Section 1399.701

The addition of this section to the Board’s regulations was mandated by SB 1950 in 2002, and requires the Board to adopt regulations defining the status of a licensee by January 1, 2004. This designated status will be used either in response to public inquiries, or, in posting information on its website regarding doctors of podiatric medicine.

4. Add Section 1399.702:

The addition of this section to the Board’s regulations was mandated by SB 1950 in 2002, and requires the Board to “develop standard terminology that accurately describes [certain] types of disciplinary filings and actions.”

5. Amend Section 1399.700:

Existing regulation defines the types of information that the Board will disclose (if known) regarding any doctor of podiatric medicine licensed in California.

This proposal would renumber this section to be consistent with Article 9 regulations in accordance with the proposed additions contained in this notice.

This proposal would also make changes to the following subdivisions:

Subdivision (b) – Proposed changes are primarily for the purposes of clarification to fill in gaps in the types of disciplinary actions taken against a doctor of podiatric medicine that will be disclosed.

Subdivision (c) – Existing subdivision (c) requiring the disclosure of medical malpractice judgments in excess of $30,000 was deleted because it has been replaced and expanded by new subdivision (d). Medical malpractice

judgments in any amount will now be reported regardless of whether reversed on appeal. This information will be accompanied by a disclaimer which states any judgment is subject to appeal and reversal by a higher court. The Board believes this expanded disclosure requirement is consistent with the policy of providing maximum amount of information permissible for purposes of consumer protection. The latter portion of old subdivision (b) was redesignated as subdivision (c).

Subdivision (d) – Old subdivision (d) was deleted because it is redundant with subdivision (b) as modified.

Subdivision (e) – New subdivision (e) regarding disclosure of arbitration awards is consistent with new language added to Section 803.1 by SB 1950.

Subdivision (f) - Old subdivision (e) was redesignated as subdivision (f).

Subdivision (g) – New subdivision (g) regarding disciplinary actions taken at a hospital or other type of health care facility is consistent with language in Business and Professions Code Section 2027. It requires postings on the internet of disciplinary actions taken at hospitals against physicians and surgeons resulting in a loss of staff privileges.

Subdivision (h) – New subdivision (h) adds a requirement regarding disclosure of referrals to the Attorney General for purposes of disciplinary action. It would permit the Board to disclose the referral of a matter to the Attorney General for the filing of a disciplinary action against a doctor of podiatric medicine.

6. Add Section 1399.704:

This section is consistent with the Board's overall policy of maximizing disclosure to the public, and will require the release of information concerning past or pending complaints against a doctor of podiatric medicine. These complaints will only be disclosed if they have resulted in a referral to the Attorney General or a formal legal action. Complaints found to be without merit or that result in no legal action being taken following a referral will be dropped from the Board's disclosure system. A disclaimer will accompany disclosure of complaints that have resulted in a referral. Finally, to protect the privacy rights of the complainant, information that would identify or lead to his or her identification will not be disclosed.

7. Add Section 1399.705:

The addition of this section to the Board's regulations was mandated by SB 1950 in 2002, which, in accordance with Section 803.1 of the Business and Professions Code, places restrictions on the types of information that can be disclosed with respect to settlement of civil cases involving professional

malpractice of physicians and surgeons and doctors of podiatric and osteopathic medicine.

8. Add Section 1399.706:

In accordance with Section 2027 of the Business and Professions Code and Section 1399.703 of these regulations, this regulation would describe parameters for the disclosure of information on the Board's website concerning licensed doctors of podiatric medicine.

9. Amend Section 1399.705:

This proposal would renumber this section to be consistent with the proposed changes and additions contained in the proposed language under Article 9.

FISCAL IMPACT ESTIMATES

Fiscal Impact on Public Agencies Including Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State: none

Nondiscretionary Costs/Savings to Local Agencies: none

Local Mandate: none

Cost to Any Local Agency or School District for Which Government Code Section 17561 Requires Reimbursement: none

Business Impact:

The board has made an initial determination that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

AND

The following studies/relevant data were relied upon in making the above determination:

Aside from technical changes, this proposal contains amendments

pertaining to the extent to which the Board will disclose information about its licensees pursuant to Section 803.1 of the Business and Professions Code as amended by SB 1950 in 2002. It is not anticipated that an expanded information disclosure policy will have any adverse impact on California businesses, as the primary goal of this proposal is consistent with the Board's overall goal to permit maximum information access for consumers and members of the public consistent with statutory and constitutional law. In addition, these amendments will apply to all doctors of podiatric medicine licensed in California, and therefore, will not impose any significant adverse economic impact on individual businesses.

Impact on Jobs/New Businesses:

The board has determined that this regulatory proposal will not have a significant impact on the creation of jobs or new businesses or the elimination of jobs or existing businesses or the expansion of businesses in the State of California.

Cost Impact on Representative Private Person or Business:

The board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Effect on Housing Costs: None

EFFECT ON SMALL BUSINESS

The board has determined that the proposed regulations would not affect small businesses. Substantive changes will affect the parameters of the Board's information disclosure policy, which applies to every licensed doctor of podiatric medicine practicing in the state of California.

CONSIDERATION OF ALTERNATIVES

The board must determine that no reasonable alternative which it considered or that has otherwise been identified and brought to its attention would either be more effective in carrying out the purpose for which the action is proposed or

would be as effective and less burdensome to affected private persons than the proposal described in this Notice.

Any interested person may present statements or arguments orally or in writing relevant to the above determinations at the above-mentioned hearing.

INITIAL STATEMENT OF REASONS AND INFORMATION

The board has prepared an initial statement of the reasons for the proposed action and has available all the information upon which the proposal is based.

TEXT OF PROPOSAL

Copies of the exact language of the proposed regulations and of the initial statement of reasons, and all of the information upon which the proposal is based, may be obtained at the hearing or prior to the hearing upon request from the Board of Podiatric Medicine at 1420 Howe Avenue #8, Sacramento, California 95825-3291.

AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE

All the information upon which the proposed regulations are based is contained in the rulemaking file which is available for public inspection by contacting the person named below.

You may obtain a copy of the final statement of reasons once it has been prepared, by making a written request to the contact person named below, or by accessing the website listed below.

CONTACT PERSON

Inquiries or comments concerning the proposed administrative action may be addressed to:

Name:	Mischa Matsunami
Address:	1420 Howe Avenue, Suite #8 Sacramento, CA 95825
Telephone No.:	(916) 263-0315
Fax No.:	(916) 263-2651
E-Mail Address:	Mischa_Matsunami@dca.ca.gov

The backup contact person is:

Name:	Jim Rathlesberger
Address:	1420 Howe Avenue, Suite #8 Sacramento, CA 95825
Telephone No.:	(916) 263-2647
Fax No.:	(916) 263-2651

Inquiries concerning the substance of the proposed regulations may be directed to Mischa Matsunami, (916) 263-0315.

Materials regarding this proposal can be found at: http://www.dca.ca.gov/bpm/about/pendregs.htm.

BOARD OF PODIATRIC MEDICINE

PROPOSED LANGUAGE

Title 16, Division 13.9, California Code of Regulations

ARTICLE 1. GENERAL PROVISIONS

§ 1399.650. Citation

This ~~chapter~~ division may be cited and referred to as the "Podiatric Medicine Regulations."

* * * *

ARTICLE 9. INFORMATION DISCLOSURE

§ 1399.700. Statement of Policy.

It is the policy of the Board of Podiatric Medicine to permit the maximum public access to information in its possession consistent with the requirements of the California Public Records Act (Govt. Code § 6250 et seq.), the Information Practices Act (Civ. Code § 1798 et seq.), Section 803.1 of the Business & Professions Code and the individual's right of privacy guaranteed by the California Constitution (Art. I, § 1).

NOTE: Authority cited: Sections 803, 803.1 and 2470, Business and Professions Code; Section 6253 Government Code.
Reference: Sections 803 and 803.1, Business and Professions Code; Sections 6250 and 6253, Government Code.

§ 1399.701. Status of Licensees.

The Board shall use the following categorical description when referring to licensed doctors of podiatric medicine either in response to public inquiries or in posting information on its website.

(a) A licensed doctor of podiatric medicine is not considered to be in "good standing" if he or she:

1) Is subject to an order issued by the Board or any other civil, criminal or administrative court or agency that limits or in any way restricts his or her practice.
2) Has entered into a settlement with either the Board, any other administrative agency, the Attorney General, or any civil or criminal prosecutor which in any way limits or restricts his or her practice.
3) Has been suspended following conviction of any crime referred to in Business and Professions Code Section 2237 or Penal Code Sections 187, 261, 262, or 288.
4) Has been incarcerated following conviction of a felony.

(b) Any licensed doctor of podiatric medicine who does not have a "good standing" designation may petition the Board to have this designation changed. The petition shall be heard before an administrative law judge designated in Section 11371 of the Government Code and pursuant to the provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Division 3 of Title 2 of the Government Code).

NOTE: Authority cited: Sections 803, 803.1 and 2470, Business and Professions Code; Section 6253, Government Code.
Reference: Sections 803, 803.1, 2027, 2236.1, Business and Professions Code; Section 11504, Government Code.

§ 1399.702. Standard Terminology Describing Different Types of Disciplinary Actions Listed in Subdivision (a) of Section 803.1 of the Business and Professions Code.

(a) Temporary Restraining Order

A temporary restraining order is a procedural device which State agencies can seek to prevent violations of the law or to suspend a license before formal disciplinary action is taken. It is also used to preserve the status quo or prevent the occurrence of irreparable injury pending further judicial or administrative proceedings. Such an order can only be issued by a court. Except in very severe emergency situations, the agency must give the licensee notice in order that he or she can be heard by the court.

(b) Interim Suspension Order

Interim suspension orders may be issued by administrative law judges following an application by the Board when it appears that continued practice by a doctor of podiatric medicine would endanger the public health, safety, or welfare. The doctor of podiatric medicine is entitled to advance notice of such proceedings unless there is a showing that serious injury will result to the public before a hearing can be held. If an interim suspension order is issued, an accusation must be filed by the Board, a hearing conducted, and a decision issued by the administrative law judge on a very accelerated time frame. If these deadlines are not met, the interim suspension order is dissolved by operation of law.

(c) Revocations, suspensions, probations, or limitations on practice ordered by the Board

These penalties may be imposed by the Board, but only after the doctor of podiatric medicine is notified of such proposed action and given an opportunity to be heard before an independent administrative law judge. The most severe penalty is revocation of the license to practice. Lesser penalties include a specified period of probation including the imposition of limitations on the manner or type of practice by the doctor of podiatric medicine.

(d) Public Letters of Reprimand

Public letters of reprimand or reproval may be issued by the Board for any act that would constitute grounds to suspend or revoke the license of a doctor of podiatric medicine. Letters of reprimand shall be purged from the file of the doctor of podiatric medicine five (5) years after they are issued.

(e) Infractions, citations or fines

A citation is issued by the Board for violations of specified provisions of law found in the Business and Professions Code. The citation may contain an order to stop performing some activity (order of abatement) and/or levy a fine. Any doctor of podiatric medicine served with a citation has a right to a hearing before an independent administrative law judge.

NOTE: Authority cited: Section 803.1 Business and Professions Code. Reference: Section 803.1, Business and Professions Code.

§ 1399.70~~0~~3. Requirements for Information Disclosure.

The Board of Podiatric Medicine will disclose the following information, if known, upon any request regarding any doctor of podiatric medicine licensed in California:

(a) Current status of a license, issuance and expiration date of a license, podiatric medical school of graduation, and date of graduation.

(b) Any public action or administrative decision against any doctor of podiatric medicine, and any disposition thereof, taken by the Board, another state or the Federal Government including, but not limited to~~,~~:

1) the filing of an accusation~~s,~~; ~~decisions,~~

2) licensure revocations;
3) denial of an application for licensure;
4) temporary restraining orders~~,~~;
5) interim suspension orders~~,~~;
6) citations, infractions, or fines imposed;
7) limitations on practice ordered by the board including those made part of a probationary order or stipulated agreement~~,~~; and
8) public letters of reprimand.

The following disclaimer shall be included with these disclosures:

> "Any adverse judgment or administrative order is subject to appeal or challenge by the doctor of podiatric medicine. For example, if an order revoking the license of a doctor of podiatric medicine is adopted by the Board, he or she can challenge that order by filing a petition for a writ of mandamus in superior court. If this court determines the order was issued contrary to law, it can vacate the Board's action and order that the doctor of podiatric medicine be reinstated."

(c) Accusations which have been filed and later withdrawn shall be retained in the board's files for a period of one year after the accusation is withdrawn.

~~(c) Medical malpractice judgments in excess of $30,000 reported to the board on or after January 1, 1993, including the amount of judgement, the date of the judgement, the court of jurisdiction, the case number, a brief summary of the circumstances as provided by the court, and an appropriate disclaimer including, but not limited to, the accuracy of the information provided.~~

~~(d) Discipline imposed by another state or the federal government reported to the Board on or after January 1, 1991, including the discipline imposed, the date of the discipline, the state where the discipline was imposed, and an appropriate disclaimer including, but not limited, to the accuracy of the information provided.~~

(d) Civil judgments in any amount of a claim or action for damages for death or personal injury caused by the negligence, error, or omission in practice by a doctor

of podiatric medicine, or by his or her rendering unauthorized professional services, whether or not vacated by a settlement after entry of the judgment and whether or not reversed on appeal, including the date and amount of judgment, the court and case number, a brief summary of the circumstances as provided by the court, plus any information the Board possesses pertaining to the disposition of the case following entry of judgment. The Board shall also include the following disclaimer with such disclosures:

> "Any civil judgment is subject to appeal by the losing party. For example, if a judgment is entered against a doctor of podiatric medicine, he or she can appeal to a higher court. If this court determines the judgment was entered in error, it can either vacate it or reduce the amount of any money damages awarded against the podiatrist."

(e) Arbitration awards in any amount of a claim or action for damages for death or personal injury caused by the negligence, error, or omission in practice of the doctor of podiatric medicine, or by his or her rendering unauthorized professional services.

~~(e)~~(f) California felony convictions reported to the board on or after January 1, 1991, including the nature of the conviction, the date of conviction, the sentence, if known, the court of jurisdiction, and an appropriate disclaimer including, but not limited to, the accuracy of the information provided.

(g) Summaries of any disciplinary actions taken at a hospital or any other type of health care facility that result in the termination or revocation of staff privileges of a doctor of podiatric medicine for medical disciplinary cause or reason.

(h) Matters that have been referred to the Attorney General for the filing of an accusation or statement of issues; provided that:

1) The matter has not been rejected by the Attorney General; and
2) The following disclaimer accompanies the disclosure:

> "Referral of a matter to the Attorney General for the filing of an accusation or statement of issues only occurs after an investigation has

been conducted by the Board and a determination has been made that the actions of the podiatrist are of a nature that should warrant disciplinary action. In some instances, however, the Attorney General may determine that disciplinary action is not warranted. Such cases will normally not result in the filing of a formal accusation. When an accusation is filed, the podiatrist will be given notice and the right to request a hearing before an independent administrative law judge. At such a hearing the Board has the burden of proving the allegations contained in the allegation. Unless a legal determination is made that the Board has sustained this burden, no disciplinary action may be taken against the doctor of podiatric medicine."

NOTE: Authority cited: Sections 803, 803.1 and 2470, Business and Professions Code; Section 6253, Government Code.
Reference: Sections 803 and 803.1, Business and Professions Code.

1399.704 Disclosure of Complaints.

The Board shall maintain records showing the complaints received against doctors of podiatric medicine and, with respect to such complaints, shall make available to inquiring members of the public the following information:

(a) The nature of all complaints on file which have been investigated by the Board and referred for legal action to the Attorney General, including:

1) The date of the complaint;
2) A brief summary of the nature of the complaint; and
3) Its disposition.

(b) Under no circumstances shall the name, identity, or information that might lead to the discovery of the identity of the complainant be disclosed.

(c) Information concerning the complaint shall be accompanied by the disclaimer set out in Section 1399.703(h)(2). If no action is taken by the Attorney General, records of the complaint shall be deleted from the Board's complaint disclosure system no later than one year after receipt of the decision by the Attorney

General to take no action.

(d) If a complaint results in legal action and is subsequently determined by the Board, the Attorney General, or a court of competent jurisdiction not to have merit, it shall be deleted from the complaint disclosure system.

NOTE: Authority cited: Sections 803.1 and 2470, Business and Professions Code; Section 6253, Government Code.
Reference: Sections 803 and 803.1, Business and Professions Code; Section 6250, Government Code; Section 1798.24, Civil Code.

1399.705 Disclosure of Civil Settlements.

Upon request, the Board will disclose information in its possession concerning settlement of civil actions seeking recovery of damages for death or personal injury caused by the professional negligence, errors, or omissions of a doctor of podiatric medicine or his or her unauthorized practice as described below.

(a) For settlements of $30,000 or more entered into prior to January 1, 2003, the Board will disclose the following information:

1) The date and amount of the settlement;
2) The case number, court and parties to the civil action; and
3) The following disclaimer:

"Settlement of a claim may occur for a variety of reasons that do not necessarily reflect negatively on the professional competence or conduct of the doctor of podiatric medicine. A payment in settlement of a medical malpractice action or claim should not be construed as creating a presumption that medical malpractice in fact occurred."

(b) For settlements entered into on or after January 1, 2003, the Board will disclose information pursuant to Business and Professions Code Section 803.1(b) & 803.1(c) and regulations promulgated by the Medical Board of California.

NOTE: Authority cited: Sections 803.1 and 2470, Business and Professions Code; Section 6253, Government Code.
Reference: Section 803.1, Business and Professions Code; Section .

1399.706 Disclosure of Information Concerning Licensed Doctors of Podiatric Medicine on the Board's Website.

For each licensed doctor of podiatric medicine, the Board will maintain on its website all of the information described in subdivision (a) of Section 1399.703 of these regulations as well as information on whether the doctor of podiatric medicine is in "good standing" as that term is used in Section 1399.701. If the doctor of podiatric medicine is not in good standing, the website shall indicate what restrictions, legal actions, orders, or discipline are currently pending.

NOTE: Authority cited: Sections 803, 803.1 and 2470, Business and Professions Code; Section 6253, Government Code.
Reference: Sections 803.1 and 2470, Business and Professions Code.

ARTICLE 10. CORRECTIVE SHOES

§1399.705~~7~~7. Sale of Corrective Shoes by Unlicensed Persons.

BOARD OF PODIATRIC MEDICINE
INFORMATION DISCLOSURE REGULATIONS
INITIAL STATEMENT OF REASONS

Background

The Public Records Act (Govt. Code § 6250 et seq.) provides that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." This Act also provides that the public has a right to inspect public records unless they are exempted from mandatory disclosure by express provisions of law. (Govt. Code § 6253(b).)

In addition to the Public Records Act, Business and Professions Code Sections 803 and 803.1 mandate that the Board of Podiatric Medicine ("the Board") either disclose or withhold certain categories of information pertaining to doctors of podiatric medicine. These sections were modified by SB 1950 in 2002. The new legislation also requires the Board to adopt regulations pertaining to the type of information it discloses.

Accordingly, the Board proposes to modify its existing regulations governing the disclosure of information pertaining to the professional status of doctors of podiatric medicine. In proposing these regulations, the goal of the Board is to provide maximum disclosure to the public consistent with governing statutory and constitutional law.

Relationship of the Public Records Act and Business & Professions Code Sections 803 and 803.1

The Public Records Act requires state agencies to disclose public records in their possession unless specifically exempted. Exempted records ***may*** , but need not be disclosed. By contrast, Business and Professions Code Sections 803 and 803.1identify categories of information concerning licensed health care professionals which must either be disclosed or withheld. Even though a particular item of information may not be covered by sections 803 or 803.1, the Board must still determine whether its disclosure is independently required by the Public

Records Act.

For example, Section 803.1 mandates the disclosure of malpractice judgments ***not reversed*** on appeal. The Board, however, may also be in possession of information or documents concerning judgments that ***were*** reversed. The reversal of the judgment does not suddenly make this information non-public. Therefore, disclosure would still be required under the Public Records Act.

Information pertaining to the professional status of doctors of podiatric medicine would normally be a matter of public nature and thus disclosure would be required under the Public Records Act. There are, however, exceptions. Matters of impacting the privacy rights of the licensed professional such as Social Security Numbers, home address and telephone numbers would not be disclosed to the public.

Using these statutory and constitutional principles, the Board proposes to adopt the following regulations which would govern information disclosures to the public.

Section 1399.650 - Manner of Citation.

The regulations of the Board are contained in Division 13.9 of Title 16 of the California Code of Regulations. Section 1399.650 currently refers to the body of these regulations as "This chapter." To be consistent with the organization of the regulations, this reference has been changed to "This division."

Section 1399.700 - Statement of Policy.

This new section expresses the overall goal of the Board to permit maximum information access for consumers and members of the public consistent with controlling statutory and constitutional law.

Section 1399.701 - Status of Licensees.

This new section was mandated by SB 1950. It requires the Board to adopt regulations defining the status of a licensee by January 1, 2004. It was drafted to include a licensee within the "good standing" category unless his or her practice is subject to some type of restriction or limitation as a result of a settlement, judicial or administrative order or because of a suspension following a conviction of certain crimes or an incarceration following conviction of a felony. In addition, if the doctor of podiatric medicine objects because of non-inclusion in the "good standing" category, he or she will have the right to challenge this designation at an administrative hearing.

Section 1399.702 - Standard Terminology Describing Different Types of Disciplinary Actions

This regulation is also mandated by SB 1950. It requires the Board to "develop standard terminology that accurately describes [certain] types of disciplinary filings and actions." In formulating this terminology, the Board gave a basic explanation of each type of action, the procedures involved, and when each can be utilized.

Section 1399.703 - Requirements for Information Disclosure.

This proposed regulation is a modified version of existing Section 1399.700. The changes made in subdivision (b) are primarily for purposes of clarification to fill in gaps in the types of disciplinary actions taken against a doctor of podiatric medicine that will be disclosed.

Existing subdivision (c) requiring the disclosure of medical malpractice judgments in excess of $30,000 was deleted because it has been replaced and expanded by new subdivision (d). Medical malpractice judgments in any amount will now be reported regardless of whether reversed on appeal. This information will be accompanied by a disclaimer which states any judgment is subject to appeal and reversal by a higher court. The Board believes this expanded disclosure

requirement is consistent with the policy of providing maximum amount of information permissible for purposes of consumer protection.

Old subdivision (d) was deleted because it is redundant with subdivision (b) as modified.

New subdivision (e) regarding disclosure of arbitration awards is consistent with new language added to Section 803.1 by SB 1950.

Old subdivision (e) was redesignated as subdivision (f).

New subdivision (g) regarding disciplinary actions taken at a hospital or other type of health care facility is consistent with language in Business and Professions Code Section 2027. It requires postings on the internet of disciplinary actions taken at hospitals against physicians and surgeons resulting in a loss of staff privileges.

1399.703(h) - Disclosure of Referrals to the Attorney General

Section 1399.703(h) adds a requirement regarding disclosure of referrals to the Attorney General for purposes of disciplinary action. It would permit the Board to disclose the referral of a matter to the Attorney General for the filing of a disciplinary action against a doctor of podiatric medicine. In the past, objections have been raised against disclosure of referrals to the Attorney General. They have centered on possible violation of the individual's privacy and due process rights. The Board believes these objections to be without merit for the following reasons.

1) Privacy

Information disclosed about a licensed professional normally does not concern his or her private life. Rather, it primarily relates to his or her professional competence and qualifications as a licensee of the State. Such information should not be shielded from public scrutiny, particularly on the ground that it impacts the individual's right to privacy.

In *Board of Medical Quality Assurance v. Andrews*, 211 Cal. App. 3d 1346, 1359, 260 Cal. Rptr. 113 (1989), the court observed that:

> " The right of an individual to privacy does not encompass any right to diagnose or treat other individuals."

Likewise, in *Cohen v. Marx*, 94 Cal. App. 2d 704, 705, 211 P.2d 320 (1949), the court noted that:

> "A person who by his accomplishments, fame or mode of life, or by adopting a profession or calling which gives the public a legitimate interest in his doings, affairs, or character, is said to become a public personage, and thereby relinquishes a part of his right of privacy."

Based on this authority, the Board does not believe that disclosure of referrals to the Attorney General for possible disciplinary action violates the right of privacy of any licensed doctor of podiatric medicine.

2) Procedural Due Process

Disclosure of a referral to the Attorney General's office could affect the reputation interest of the licensed professional. It would not, however, directly impact his or her property interest. Nor would it constitute action by the State which would foreclose the ability of the individual to practice his or her profession. That could only occur after a license revocation following an administrative or judicial hearing.

Earlier U.S. Supreme Court cases such as *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), if read in a vacuum, might support the argument that mere damage to reputation triggers a due process interest. But the Supreme Court limited these apparent holdings in the seminal case of *Paul v. Davis*, 424 U.S. 693 (1976). It noted that:

> "Two things appear from [this] line of cases . . . . The Court has recognized the serious damage that could be inflicted by branding a government employee as 'disloyal' and thereby stigmatizing his good name. But the Court has never held that the mere defamation of an individual whether by branding him disloyal or otherwise, was sufficient to invoke the guarantees of procedural due process absent an accompanying loss of government employment." (p. 705.)

Rather, the Court noted it was the ***altered legal status*** accompanying the defamatory statements which justified the invocation of procedural safeguards. (p. 707. In *Constantineau*, it was the inability to transact business in local liquor stores.)

The Court then concluded that:

> "In each of these cases [i.e. *Constantineau*, etc.] . . . a right or status previously recognized by state law was distinctly altered or extinguished. It was this alternation, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment. But the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the "liberty' or 'property' recognized in those decisions. . . . And any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of and 'liberty' or 'property' recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the State's laws. For these reasons we hold that the interest in reputation asserted in this case is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law." (424 U.S. at 711 - 13.)

California state courts are in accord with their federal counterparts. In *Haight v. City of San Diego*, 228 Cal. App. 3d 413, 418, 278 Cal. Rptr. 334 (1991), the court noted that:

> "It is well established '[a] person's protected interests are not infringed merely by defamatory statements, for an interest in reputation alone is not a constitutionally protected liberty interest. . . . Rather, the liberty interest is infringed only when the defamation is made in connection with the loss of a government benefit, such as employment.'" (Quoting *Murden v. County of Sacramento*, 160 Cal. App. 3d 302, 308, 206 Cal. Rptr. 699 (1984).)

In addition, even if the damage to reputation adversely impacted the individual's business, this would still not be sufficient to trigger procedural due process rights. (*WMX Technologies, Inc. v. Miller*, 197 F.3d 367, 375 (9th Cir. 1999) (en banc).)

Based on this federal and state case authority, the Board has determined that even if disclosure of a referral adversely impacted the reputation of a doctor of podiatric medicine, this would not constitute a violation of his or her due process rights. In addition, to minimize these risks in the first instance, a disclaimer will be required to accompany such disclosures. It notes that the matter has only been referred following a completed investigation, that the doctor of podiatric medicine will have the right to defend himself or herself against any charges at a hearing before an independent administrative law judge. Finally, if a hearing is conducted, the Board has the ultimate burden of establishing the truth of these charges before any disciplinary action can be taken.

1399.704 - Disclosure of Complaints.

Consistent with the Board's overall policy of maximizing disclosure to the public, this Section will require release of information concerning past or pending complaints against a doctor of podiatric medicine. Again, only complaints will be disclosed if they have resulted in a referral to the Attorney General or a formal legal action. Complaints found to be without merit or that result in no legal action being taken following a referral will be dropped from the Board's disclosure system. A disclaimer will accompany disclosure of complaints that have resulted in a referral. Finally, to protect the privacy rights of the complainant, information that would identify or lead to his or her identification will not be disclosed.

1399.705 - Disclosure of Civil Settlements.

Business and Professions Code Section 803.1 as modified by SB 1950 places restrictions on the type of information that can be disclosed with respect to settlement of civil cases involving professional malpractice of physicians and surgeons and doctors of podiatric and osteopathic medicine. The Medical Board is required by SB 1950 to develop "high or low risk" categories for these

professionals depending on the nature of their practice. The number of settlements which can be reported for a given time period is then made dependant on the risk category assigned. Certain types of settlements are excluded from these mandatory disclosure rules. Although the dollar amount of the settlement cannot be disclosed, SB 1950 mandates that these amounts be placed in three statistical categories based on the average number in the doctor's specialty. (I.e. Below or above average and average.) Further complicating the process is the rather lengthy mandatory disclaimer which must accompany such disclosures. Its general thrust is to suggest to the public that the existence of malpractice settlements should not by itself be interpreted to reflect adversely on the competence of the particular professional.

The Board has no discretion but to follow these statutory mandates. The Board does, however, have discretion on reporting information about malpractice settlements not covered by SB 1950. For example, settlements referred to in SB 1950 are those "entered into by the licensee on or after January 1, 2003." (B. & P. Code § 803.1(b)(2)(A).) The Board interprets this language to mean that the restrictions imposed by SB 1950 do not apply to any malpractice settlements entered into prior to this date.

For this reason, the Board has bifurcated its proposed regulation on disclosure of settlements depending on whether or not they were entered into before January 1, 2003. For those settlements entered into prior to this date, the Board proposes to make a straightforward disclosure including the amount of the settlement, the identity of the case, civil action and parties involved. In addition, the Board has developed a disclaimer utilizing a portion of the language found in SB 1950.

1399.706 - Disclosure of Information on Board's Website

This regulation would contain basic information describing the status and qualifications of each licensed doctor of podiatric medicine, including whether or not he or she is in "good standing."

BOARD OF PODIATRIC MEDICINE

FINAL STATEMENT OF REASONS

Hearing Date: June 6, 2003

Sections Affected: 1399.650; 1399.700; 1399.701; 1399.702; 1399.703; 1399.704; 1399.705; 1399.706; 1399.707

Updated Information

The Initial Statement of Reasons is included in the file. The proposed regulation regarding disclosure of civil settlements (Section 1399.705) has been amended as follows:

~~Upon request, the Board will disclose information in its possession concerning settlement of civil actions seeking recovery of damages for death or personal injury caused by the professional negligence, errors, or omissions of a doctor of podiatric medicine or his or her unauthorized practice as described below.~~

~~(a) For settlements of $30,000 or more entered into prior to January 1, 2003, the Board will disclose the following information:~~

~~1) The date and amount of the settlement;~~
~~2) The case number, court and parties to the civil action; and~~
~~3) The following disclaimer:~~

~~"Settlement of a claim may occur for a variety of reasons that do not necessarily reflect negatively on the professional competence or conduct of the doctor of podiatric medicine. A payment in settlement of a medical malpractice action or claim should not be construed as creating a presumption that medical malpractice in fact occurred."~~

~~(b) For settlements entered into on or after January 1, 2003, the Board will disclose information pursuant to Business and Professions Code Section 803.1(b) & 803.1(c) and regulations promulgated by the Medical Board of California.~~

Upon request, the Board will disclose information in its possession concerning settlements entered into on or after January 1, 2003 of civil actions seeking recovery of damages for death or personal injury caused by the professional negligence, errors, or omissions of a doctor of podiatric medicine or his or her unauthorized practice pursuant to Business and Professions Code Section 803.1(b) & 803.1(c) and regulations promulgated by the Medical Board of California.

Local Mandate

A mandate is not imposed on local agencies or school districts.

Small Business Impact

This action will not have a significant adverse economic impact on businesses.

Consideration of Alternatives

No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the board would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.

Objections or Recommendations/Responses

RESPONSE TO COMMENTS SUBMITTED BY THE CALIFORNIA MEDICAL ASSOCIATION REGARDING THE PROPOSED DISCLOSURE REGULATIONS OF THE BOARD OF PODIATRIC MEDICINE

Disclosure of Referrals to the Attorney General

The major portion of comments submitted by the California Medical Association ("CMA") address Section 1399.703(h) of the regulations proposed by the Board of Podiatric Medicine ("the Board"). This section would permit the Board to disclose to inquiring members of the public that a matter involving a licensed doctor of podiatric medicine has been referred to the Attorney General for the filing of an accusation or statement of issues.

A. Authority

The Board's primary source of authority for its disclosure regulations is the Public Records Act. CMA attacks this authority by relying on a 1993 ruling issued by Sacramento Superior Court Judge Ronald B. Robie. He granted a preliminary injunction against the use of similar disclosure regulations proposed by the Medical Board of California.

The Public Records Act was enacted in 1968. It is a bedrock of statutory law guaranteeing access to "the conduct of the people's business." (Govt. Code § 6250.) Any suggestion that this authority can somehow be diminished by the decision of a trial judge ruling on a preliminary injunction is legally unsound.
CMA acknowledges that Judge Robie's decision is "not precedential." But it appears

not to fully grasp why this is so. CMA believes the reason is because the decision involved a ruling on a preliminary injunction. It notes that:

> The injunction in CMA v. MBC was not made permanent due to a settlement between the parties, and disclosure of cases forwarded to the Attorney General was abandoned by the Medical Board. Thus, the decision in the preliminary injunction, while not precedential, remains the most recent opinion by the California Courts concerning disclosure of 'cases referred.'" (Comments at 2 - 3.)

This statement implies that had Judge Robie's decision become permanent, it would then be precedential. But any such implication is legally unsound. The decision has absolutely no precedential value even if it were permanent. It was issued by a ***trial court***. Trial courts cannot make binding legal precedents. (9 Witkin, *Appeal* § 922 at 960 (4th Ed. 1997).)

CMA chooses to ignore this principle throughout its comments. It begins on page two with a lengthy quotation from Judge Robie's ruling. It repeatedly refers to the case under the caption of "CMA v. MBC." It cites Judge Robie's remarks for the proposition that the Board's disclosure regulations violate the constitutional right to privacy. CMA is thus doing what the law forbids. It is citing Judge Robie's decision ***as if it had precedential value***.

For example, CMA uses Judge Robie's decision to suggest that the Board's reliance on the Public Records Act is legally questionable. CMA states that:

> In CMA v. MBC the Court [Judge Robie] indicated that the [Public Records] Act is the only possible basis for public disclosure of cases forwarded to the Attorney General and rejected that authority on the grounds that such disclosure is prohibited by the Constitutional right to privacy. (Comments at 3.)

CMA confuses the authority supporting a disclosure regulation with the regulation itself. This is apparent from the sloppy language used by CMA in the above quotation. Judge Robie "rejected that authority" - i.e. the Public Records Act - "on the grounds that ***such disclosure*** is prohibited by the Constitution." But the "disclosure" is not the same as the "authority." "'Authority' means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation." (Govt. Code § 11349(b).) Thus, the Board's primary authority is the Public Records Act. Whether the proposed regulation ***misuses*** that authority is a completely different issue. This obvious distinction was apparently lost on CMA.

Based on this confusion between authority and its application, CMA thus reaches the implicit and legally implausible conclusion that the Public Records Act cannot be utilized by the Board as a source of authority. CMA then apparently concludes that the ***only*** valid sources of authority for the Board's disclosure regulations are Sections 803 and

803.1 of the Business and Professions Code. These sections set forth specific mandatory reporting requirements for the Medical Board and Board of Podiatric Medicine. Section 803.1 begins with the following statement:

> Notwithstanding any other provision of law, the Medical Board . . ., the Osteopathic Medical Board . . ., and the California Board of Podiatric Medicine ***shall disclose*** to an inquiring member of the public information regarding any enforcement actions taken against a licensee by either board or by another state or jurisdiction . . . .

The fact that these requirements are mandatory is clearly not the same as saying they are ***exclusive***. Otherwise, one is left interpreting the statute as saying that any matters which are not mandatory are prohibited from being reported.

One of the fundamental cannons of statutory interpretation is that different statutory provisions should be harmonized. (2B Sutherland, *Statutory Construction* § 53:01 (2000).) With certain exceptions, the Public Records Act requires State agencies to disclose records in its possession. (Govt. Code § 6253(a).) There are two types of exceptions to this mandatory disclosure rule. Those categories of information which a board or agency ***may*** disclose and those which it is ***prohibited*** from disclosing. Categories of information which may, but need not be disclosed are primarily found in Section 6254 of the Government Code. Categories of information whose disclosure is prohibited are typically identified in areas of law such as the Information Practices Act or other specific statutes. (See, for example, Cal. Civ. Code § 1798 et seq.)

CMA has essentially turned this statutory structure on its head. It states that: "Nowhere does [Section 803] explicitly or implicitly permit or obligate the disclosure of 'cases referred.'" (Comments at 3.) In other words, unless a category of information is identified under the mandatory disclosure category, the Board has no authority to disclose it.

Just the opposite is the case. Unless there is some positive ***prohibition*** against disclosure of information, the Board has ample authority to disclose it under the Public Records Act. Thus, the issue of disclosure of referrals essentially turns on two points. Does it violate the privacy rights or procedural due process rights of individual doctors? The discussion below will demonstrate that as a matter of law neither right is adversely impacted by the Board's proposed disclosure regulations.

B. Necessity

CMA states:

> The Board does not and cannot articulate a public protection purpose that is served by disclosure of unreliable information. (Comments at 4.)

Nor can the Board articulate a "public protection purpose" for a policy promoting libel,

slander, premeditated murder, rape or mayhem. When framed this way, one can readily see the absurdity of CMA's statement.

CMA assumes that the Board is promoting a policy of disseminating "unreliable" information. (*Id*.) Yet CMA offers no evidence or statistics to substantiate this bald assertion. Had CMA bothered to look at the Board's prosecutorial procedures and track record, it might have come to a different conclusion.

Complaints involving doctors of podiatric medicine are reviewed by investigators as well as Board consultants and expert reviewers. After the investigation has been completed and a decision is made to go forward with disciplinary action, no referral is made until a Deputy Attorney General assigned to the field office reviews and approves the matter. Only then is it referred to the Attorney General for the filing of an accusation.

The track record of the Board's enforcement system demonstrates that it is incredibly reliable. For fiscal years 2000 - 2001, 2001 - 2002, and 2002 - 2003, the Board referred 56 cases to the Attorney General for disciplinary action. Accusations[1] were filed in 54 of them. In one of the two cases where an accusation was not filed, the licensee quickly came into compliance after the referral had been made. Thus, the filing of an accusation became unnecessary.

By any standard, a 54 out of 56 reliability rate or 96.4% is incredibly high. More realistically, the numbers should be viewed as 55 out of 56 or 98%.

CMA makes the unsubstantiated statement that information contained in the referral "by itself means nothing of value to the Attorney General." (*Id*. at 8.) CMA then ***assumes*** that the Attorney General will have to independently gather an "often-substantial amount of investigatory information." (*Id*.) These statements are all the more remarkable coming from an entity not privy to the internal process used by the Board and the Attorney General. In many instances, the Attorney General can draft the accusation relying heavily, if not exclusively, on the material submitted by the Board. In any case, CMA's assertion is not relevant to the legality of the Board's proposed disclosure regulations.

CMA confuses "unreliability" of the information disclosed with the merits of the underlying case. There is nothing "unreliable" in reporting a completed act. The disclosure of the referral indicates a bench mark has been reached in the process. The Board has officially determined that some form of disciplinary action against a licensee is warranted and has referred the matter to the Attorney General for prosecution.

CMA again cites Judge Robie's non-precedential decision as precedent. Judge Robie criticized the Medical Board for "telling" the public instead of "do[ing] something about it." (*Id.* at 4.) With all due respect, that was not Judge Robie's call to make. He

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[1]. Included within these statistics are petitions to revoke the probation of licensees who violate the terms of their probation.

essentially interjected his own subjective opinion on how the Medical Board should have exercised its discretion.

The discretion on how to deal with problems of public safety and consumer awareness has been delegated by the Legislature to various Boards and Bureaus operating within the Department of Consumer Affairs, not the judiciary. "The courts have nothing to do with the wisdom or expediency of the measures adopted by an administrative agency to which the formulation and execution of state policy have been entrusted, and will not substitute their judgment or notions of expediency, reasonableness, or wisdom for those which have guided the agency." (*Faulkner v. California Toll Bridge Authority*, 40 Cal. 2d 317, 253 P.2d 659, 667 (1953), quoting 2 Cal. Jur. 2d 361, § 219. See also *Hunt v. State Bd. of Chiropractic Examiners*, 87 Cal. App. 2d 98, 196 P.2d 77, 78 (1948) ("It is settled law that when a statute imposes upon an administrative body discretion to act under certain circumstances[,] mandate will not lie to compel the exercise of such discretion in a particular manner."))

Moreover, the distinction between "doing" and "telling" is precisely why the Board of Podiatric Medicine has adopted its proposed disclosure regulations. Not every violation by a health care professional will rise to the level of an imminent public danger sufficient to justify an emergency suspension. The time lapse between a referral and the point at which an accusation is served and filed can be significant. CMA fails to understand that the Board can protect the public by ***both*** taking disciplinary action ***and*** informing interested persons about it.

CMA attempts to put its own regulatory comments in the Board's mouth when it states that the "[Board] acknowledges the unreliable character of the information it wishes to disclose by proposing the addition of a 'disclaimer.'" (Comments at 4.) Presumably, under CMA's logic the ***absence*** of a disclaimer would mean the information is more reliable. The point CMA appears to miss is that the presence of a disclaimer has nothing to do with the accuracy of the information. Rather, the Board is providing additional information to better promote public understanding.

CMA states: "[T]he 'public' is not protected by the availability of incomplete information that reaches ***only those random individuals*** who think to inquire about a podiatrist with the Board." (*Id.* [Emphasis added]) Presumably, unless ***all*** members of the public inquire, ***none*** of them should receive the information. Further, the fact that not ***every member*** of the public is protected by a particular disclosure is hardly a reason why ***no one*** should ever receive it.

CMA objects to disclosure of "incomplete" information. Presumably, all information remains in a state of "incompleteness" until the entire administrative process has run its course. If this logic were correct, then there could be no disclosure until a final decision on the merits of the case has been reached.

CMA's "necessity" arguments thus essentially rest on a string of unsubstantiated assumptions. CMA is also questioning the wisdom of an open disclosure policy which

has long since been established by the California Legislature. The Public Records Act declares that:

> [T]he Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. (Govt. Code § 6250.)

The Legislature has thus given State administrative agencies ample "necessity" to justify disclosures of public information which are not prohibited by some other provision of law.

C. Privacy

CMA states that:

> Information such as complaints against a podiatrist, investigational information and information regarding an agency's *ex parte* and unproven allegations against a podiatrist ***constitutes information of such a personal nature*** about the podiatrist that it must be considered protected by the state constitutional right of privacy. (Comments at 6 [Emphasis added].)

Starting with "ex parte" and "unproven" CMA leaps into the realm of personal information. "Ex parte" and "unproven" equal "information of such a personal nature." Any "unproven" statements made by a public official on an "ex parte" basis ***regardless of their subject matter or content*** become matters of a "personal" nature protected by the right of privacy.

CMA also uses the term "ex parte" and "unproven" as pejoratives. It fails to explain that most communications made in the ordinary course of state business are "ex parte." The term primarily has significance in the context of litigation where ex parte communications between one party and the judge are normally prohibited. Likewise, there is no legal prohibition about disclosing "unproven" allegations. If there were, then not even an accusation or a civil complaint could be released to the public.

CMA also takes liberties with its interpretation of the Information Practice Act. It states that this Act:

> [P]rohibits agencies from disclosing inaccurate or untimely information that may unfairly and adversely influence any determination relating to the qualifications, character, rights, opportunities of or benefits to the individual. (*Id*. at 5.)

No legal authority is given for this novel proposition. Rather, it appears to reflect CMA's somewhat utopian version of how it would like to see disclosures by public agencies regulated. Under its version of the Act, there can be no communication of "untimely"

information that might "unfairly adversely influence any determination." Conceivably even information that is the least bit controversial would have to be censored. This theoretically could include negative information about candidates for public office because CMA's "any determination" language is broad enough to include voting.

No such restrictions are built into the Information Practices Act. Its purpose is to protect the privacy of individuals by regulating "the maintenance and dissemination of personal information." (Civ. Code § 1798.1(c).)

The fundamental misconception being advanced by CMA is that disclosure of professional and disciplinary information concerning a licensed doctor of podiatric medicine constitutes a violation of his or her right of privacy. CMA claims the Board must demonstrate a "compelling state interest" before it can disclose referral information. Alternately, it states that personal information cannot be misused. But the need for meeting a "compelling state interest" and the prohibition against "misusing" information only arises if the disclosure violates the right of privacy in the first instance. As the discussion below will demonstrate, the Board's proposed disclosure policy does not do this.

D. The Central Valley Decision

Principal reliance by CMA is placed on *Central Valley Chapter v. Younger*, 214 Cal. App. 3d 145, 262 Cal. Rptr. 496 (1989). There, certain employers classified by the court as "nonexempt" were prohibited from utilizing records of arrests which did not result in a conviction. (214 Cal. App. 3d at 157.) By contrast, "exempt" employers which primarily hired Peace Officers could review such records. (*Id*. at 152 n. 3.) The court held that dissemination of these records by the Attorney General to nonexempt employers and public agencies for employment, licensing or certification purposes violated the individuals' privacy rights. (*Id*. at 151, 165.)

CMA argues that disclosures of referrals of disciplinary matters to the Attorney General are analogous to those made in *Central Valley* and therefore violate the privacy rights of doctors of podiatric medicine. There are, however, fundamental distinctions between the two situations. The most obvious has to do with the nature of the information being disclosed. In *Central Valley*, non-exempt employers were prohibited by statutory law from using records of arrest which did not result in a conviction. (See Labor Code § 432.7.) This statutory prohibition was apparently significant in the eyes of the appellate court. It noted that:

> The [trial court] impliedly found that entities requesting arrest records for non-exempt employment and licensing purposes did not require nonconviction information. This finding, which defendants do not substantively contest, ***is fully consistent with the statutory prohibition on nonexempt employers . . . considering nonconviction information***. (214 Cal. App. 3d at 164.)

There is no comparable public policy prohibiting the use or dissemination of information concerning referrals to the Attorney General. On the contrary, this type of disclosure ***has already been recognized in statute by the California Legislature***. The ***statutory*** disclosure policy for the Contractors' State Licensing Board provides that:

> (a) The registrar shall make available to members of the public the date, nature, and status of all complaints on file against a licensee that do either of the following:
>
> (1) ***Have been referred for accusation***.
>
> (2) Have been referred for investigation after a determination by board enforcement staff that a probable violation has occurred, and have been reviewed by a supervisor, and regard allegations that if proven would present a risk of harm to the public and would be appropriate for suspension or revocation of the contractor's license or criminal prosecution.
>
> (b) The Board shall create a disclaimer that shall accompany the disclosure of a complaint that shall state that the complaint is an allegation. The disclaimer may also contain any other information the board determines would be relevant to a person evaluating the complaint. (B. & P. Code §7124.6(a) - (b) [Emphasis added].)

In *Central Valley*, the court focused on the problem of collecting arrest information for one use (law enforcement) and disclosing it for others (employment and licensing). (214 Cal. App. 3d at 161 - 62.) That "mischief," as it was characterized by the court, is not present in the Board's disclosure regulations. One of the primary responsibilities of the Board is to protect the public from unprofessional or substandard doctors of podiatric medicine. Dissemination of information which assists the public in this regard is clearly not a "mischief" as CMA contends. It has a ***direct bearing*** on the public's right to be informed about the qualifications and standing of licensed professionals. In this way, the disclosure policy further's the Board's goal of protecting the public.

One might infer from CMA's argument that dissemination of preliminary law enforcement data of an adverse nature violates the individual's right to privacy. This is not the case. In *Alarcon v. Murphy*, 201 Cal. App. 3d 1, 248 Cal. Rptr. 26 (1988), a teenage male prostitute was brutally murdered in San Francisco's Golden Gate Park. Alarcon was identified by witnesses and his arrest was sought, but only on the charges of engaging in the lewd sexual conduct and illegal use of marijuana. He was subsequently implicitly identified by the police to the press as the chief suspect in the ***murder*** of the victim. No charges, however, were filed against him. He continued to remain a suspect until another individual confessed to the murder. (201 Cal. App. 3d at 3 - 4.)

Alarcon claimed in his ensuing lawsuit that under his constitutional right to privacy, city officials should not have identified him to the press as a suspect in the ***murder*** until ***it had probable cause to arrest him***. (*Id*. at 4 - 5.) This would be equivalent to CMA's argument that no disclosures could be made prior to the filing of an accusation. The

arrest warrant and the administrative accusation serve analogous functions. Both signal the beginning of formal legal proceedings against the suspect or the respondent.

The court found no violation of Alarcon's privacy rights had occurred. Citing the Public Records Act, it observed that "[i]n most cases, the facts and circumstances surrounding an arrest must be made public." (*Id*. at 6.) In addition, it noted that:

> The logical inference to be drawn from the affidavit [supporting the arrest warrant] was that the police ***suspected*** that Alarcon was the murderer [even though he wasn't being arrested for this crime]. That Alarcon might not want this fact disclosed is understandable. ***However, the disclosure is not a revelation of confidential information, but a disclosure of facts that were a part of a public record. As such, Alarcon had no objectively reasonable expectation that this information would not be disclosed by police***." (*Id*. at 6 - 7 [Emphasis added].)

When the Board refers a case to the attorney general for the filing of an accusation, it has much more than a "suspicion" that disciplinary action is warranted. It is taking active steps to issue the administrative equivalent of an arrest warrant, something law enforcement never did in *Alarcon*. Nonetheless, the *Alarcon* court correctly held that even dissemination of information based on the reasonable suspicion of the police did not violate the privacy rights of the defendant. The obvious reason was because the information involved was of a public nature.

Alarcon demonstrates why CMA's heavy reliance on the *Central Valley* case is misplaced. *Central Valley* involved a situation where a statute prohibited use of information by employers. It was gathered for one purpose and then used for another. None of these factors were controlling in *Alarcon.* Neither do they apply to the Board's disclosure regulations.

E. The Interest of the Public in Status of Licensed Professionals

By choosing to seek the status as a licensed medical professional, the doctor of podiatric medicine puts himself or herself in the public light. As one California appellate court stated:

> A person who by his accomplishments, fame or mode of life, or by adopting a profession or calling which gives the public a legitimate interest in his doings, affairs, or character, is said to become a public personage, and thereby relinquishes a part of his right of privacy. (*Cohen v. Marx*, 94 Cal. App. 2d 704, 705, 211 P.2d 320 (1949).)

Numerous legal authorities have emphasized this characteristic of licensed professionals. In discussing the disclosure of information pertaining to licensed bar pilots, the Attorney General stated that:

> Inasmuch as a bar pilot is entrusted with great responsibilities for the safety of lives and property [and licensed by the State], it is fair to say that a pilot is 'a person who . . . [adopts] a profession or calling which gives the public a legitimate interest in his doings, affairs or character . . . .' (53 Ops. A.G. 136, 146 (1970), citing in part a 1955 report of a State Senate Committee.)

In a footnote, the Attorney General made the following observation:

> Two California cases . . . speak of pilots as public officers. The status of [a] public officer, however, is not necessarily inconsistent with that of [an] occupational licensee. (*Id*. at 144 n. 6.)

In *Board of Medical Quality Assurance v. Andrews*, 211 Cal. App. 3d 1346, 260 Cal. Rptr. 113 (1989), the trial court issued a permanent injunction against a group known as the Religious School of Natural Hygiene because of its unlawful practice of medicine without a license. On appeal, the School contended the actions of the Board of Medical Quality Assurance violated its right of privacy. The appellate court disagreed noting that:

> Nor does any authority give a right of privacy to activities such as those engaged in on this record. The right of an individual to privacy does not encompass any right to diagnose or treat other individuals. (211 Cal. App. 3d at 1359.)

That is essentially what the issue comes down to. Disclosures by the Board regarding a disciplinary matter may have an impact on the practice of the doctor of podiatric medicine and his or her ability to diagnose and treat other individuals. According to *Board of Medical Quality Assurance v. Andrews*, the right to diagnose and treat others is not included with the individual's zone of privacy. Therefore, information relevant to the licensed individual's qualifications to treat and diagnose others would also fall outside of this zone of privacy.

The fact that the referral information is public in nature is pointedly ignored in CMA's comments. It cites a number of legal authorities which discuss the right of privacy. It attempts to shoehorn the Board's disclosure policies under the distinguishable holding of *Central Valley.* But it basically fails to analyze the substance of the information proposed for disclosure by the Board. This omission is telling. Information concerning the performance of a professional licensed by a governmental agency does not fall within the zone of privacy.

Because CMA cannot make a case on this point, it relies on *Central Valley* to attempt to make one based on "inaccuracies" and "incompleteness" of the Board's disclosure information. (Comments at 8 - 10.) But the two situations are fundamentally different. In *Central Valley*, the Attorney General was reporting ***incomplete data regarding the prior criminal histories*** of potential employees. By contrast, the Board's proposed disclosures would accurately report the happening of a ***completed current event*** – i.e. a referral to the Attorney General. This information is ***neither inaccurate nor incomplete***. Rather the "inaccuracies" and "incompleteness" CMA complains about have to do with ***future events*** which have yet to unfold.
Thus, CMA would create an entirely new concept of "completeness" which would stifle dissemination of information to the public. Preliminary agency actions could not be revealed because more is to follow. Events could change. The doctor of podiatric medicine the Board charged with unprofessional conduct *could* be exonerated. Because this possibility exists, nothing could be disclosed – not even the accusation or any ***proposed*** decisions adverse to the licensee. This information would not represent finality and completeness in the process.

Nor could the public be trusted to handle this type of information. As CNA cynically observes in its comments:

> These records are nonetheless inconclusive as to whether the person actually committed the wrongdoing. Because they are inconclusive, ***their use by those not sophisticated enough to understand their import and degree of reliability*** . . . may harm the reputation and other interests of the person involved.
> * * * *
> Otherwise, as with arrest records, the information could be inappropriately used against that pdiatrist by individuals ***who do not have the special expertise necessary to place this information in proper context and perspective.***
>
> * * * *
> ***The general public is vested with no authority, and has not the expertise or sophistication***, to perform an 'informed and intelligent determination of the fitness' of a podiatrist by simply learning that a case has been 'referred' to the Attorney General. (Comments at 8, 10 [Emphasis added].)

That in a nutshell sums up CMA's opposition to public disclosure. In its eyes, the public is "not sophisticated enough" to digest the information. It is "vested with no authority" even though in our republican form of government all power basically resides with the people. (Cal. Const. Art. II § 1.)

More appropriate is the philosophy expressed in the preamble to the Brown Act.

> The people of this State do not yield their sovereignty to the agencies

> which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist in remaining informed so that they may retain control over the instruments they have created. (Govt. Code § 54950.)

Under CMA's view, the people presumably must be dependent on their "rulers" to predigest and censor information in the best traditions of a paternalistic state. Nothing could be disclosed by an agency until the entire panoply of hearings, writs and appeals has been exhausted. Only then, according to CMA would the public be entitled to evaluate the merits. Not only does CMA's philosophy fly directly in the face of the underlying premise of the Public Records Act but the basic underpinnings of democratic and representative government in the State of California.

Because there is no violation of a privacy right in the disclosure of public information concerning a referral to the Attorney General, the Board is not required to justify these disclosure as fulfilling a compelling state interest as claimed by CMA. But even if it did, the Board clearly meets this burden. The compelling state interest is protecting the health and welfare of the people of the State of California.

F. Procedural Due Process

In attempting to establish a case against the Board's proposed disclosure policy based on procedural due process grounds, CMA cites the correct legal standard and then proceeds to ignore it.

Government cannot deprive a person of a liberty or property interest without affording the person "due process of law." (Cal. Const. Art. I § 7(a).) Due process of law at a minimum requires notice and an opportunity to be heard. (*Bell v. Burson*, 402 U.S. 535, 542 (1971).) In other words, the person must be given some form of a hearing before the state can take action. (*Id*.)

But before there can be any due process protection, there must be a deprivation of something. Not just any deprivation will do. It must involve a "liberty" or "property" interest. (*Board of Regents v. Roth*, 408 U.S. 564, 569 (1972).)

Does disclosure of a referral to the Attorney General qualify? CMA thinks it does. It comments that:

> The damning information disclosed will be made by the one state agency vested with authority to license and suspend or revoke the licenses of the affected podiatrists. . . . The disclosure constitutes state action by the licensing agency of the Podiatric profession to vitiate, without due process, the affected podiatrists' fundamental vested right to practice the profession. The disclosure of case referrals and Podiatric Board allegations contained therein will severely injure the property and liberty

> interests of podiatrists, as discussed above. (Comments at 13.)

CMA thus appears to be saying that the mere disclosure of negative information by the state would trigger due process protection. Earlier U.S. Supreme Court cases such as *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), if read in a vacuum, might support this notion. But the Supreme Court limited these apparent holdings in the seminal case of *Paul v. Davis*, 424 U.S. 693 (1976). It observed that:

> "Two things appear from [this] line of cases . . . . The Court has recognized the serious damage that could be inflicted by branding a government employee as 'disloyal' and thereby stigmatizing his good name. But the Court has never held that the mere defamation of an individual whether by branding him disloyal or otherwise, was sufficient to invoke the guarantees of procedural due process absent an accompanying loss of government employment." (p. 705.)

The Court went on to note that language in *Constantineau* could be read to suggest that damage to reputation alone is sufficient. (In that case, the label the person was a drunkard.) But the Court found such an interpretation to "significantly broadening" those holdings. Rather, the Court noted it was the ***altered legal status*** accompanying the defamatory statements which justified the invocation of procedural safeguards. (p. 707. In *Constantineau*, it was the inability to transact business in local liquor stores.)

The Court then concluded in *Paul v. Davis* that:

> In each of these cases [i.e. *Constantineau*, etc.] . . . a right or status previously recognized by state law was distinctly altered or extinguished. It was this laternation, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment. But the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the "liberty' or 'property' recognized in those decisions. . . . And any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of and 'liberty' or 'property' recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the State's laws. For these reasons we hold that the interest in reputation asserted in this case is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law.
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> * * * *
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> Respondent . . . . claims constitutional protection against the disclosure of

> the fact of his arrest on a shoplifting charge. ***His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be 'private,' but instead on a claim that the State may not publicize a record of an official act such as an arrest***. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner. (424 U.S. at 711 - 13.)

CMA did cite *Paul v. Davis*, 424 U.S. 693 (1976) in its brief. But then CMA misapplied it. This case holds that a mere stigma to the person's reputation is not enough to trigger procedural due process protection. There must be "stigma-plus." CMA then went on to fabricate "the plus" out of thin air. It stated that:

> Procedural due process guarantees apply to prohibit the Podiatric Board from imposing what is in essence a "***public sanction***" against a podiatrist where no violation of law has been formally alleged. (Comments at 13 [Emphasis added].)

But the "public sanction" CMA refers to is nothing more that damage to the reputation of the doctor of podiatric medicine in the eyes of the public. CMA essentially admits this in the following passage.

> ***Publication and re-publication of the disclosed information will impose a profound stigma on a podiatrist as one who simply should not be trusted as a care provider***. In many cases, by the time the Attorney General's office decides to file an accusation, if it does, the podiatrists adversely affected by the unlawful disclosures will be damaged to the point at which they will be unlikely to recover. (*Id*. [Emphasis added])

This is nothing more than an elaborate way of saying that a disclosures of a referral would damage the reputation of the doctor of podiatric medicine. The only action taken by the Board is a disclosure. The disclosure by itself is not an infringement on the ability of the doctor of podiatric medicine to practice his or her profession. There has been no order from the Board revoking or restricting the individual's scope of practice. There cannot be until after the doctor of podiatric medicine has been afforded an opportunity to be heard before an administrative law judge.

A "profound" stigma isn't "stigma-plus." It's still only a stigma. Thus, the only conceivable impact of the disclosure of the referral is on the reputation of the doctor of podiatric medicine. There is clearly no other state action at that juncture. Thus, contrary to CMA's assertions there is no "plus" which would bring the case within the protection of the Due Process Clause.

Moreover, the referral to the Attorney General is not the only thing which impacts the reputation interest of the individual. ***The filing of an accusation does as well***.

Therefore, attempting to differentiate between the referral and the filing of the accusation is the equivalent of a distinction without a difference. Both events involve State action potentially adversely impacting the individual's reputation ***prior to any type of hearing***. Thus, if disclosure of referral information violates a person's right to procedural due process, so does disclosure of an accusation. The damage to the reputation occurs at the point of disclosure – not later. The fact that the person always has an opportunity for a hearing when an accusation is filed, but may not after a referral disclosure is made is immaterial. If disclosure of potentially damaging information affects a protected constitutional interest, then some form of "name-clearing" hearing is necessary before even an accusation can be released to the public. The result is a process shrouded in secrecy until a final adjudication on the merits is reached.

CMA concludes by citing three cases for the proposition that the standard established by *Paul v. Davis* may no longer be necessary. Presumably, the inference one is supposed to draw is that a "stigma" by itself might be sufficient to trigger due process protection.

None of these cases comes close to even questioning, let alone limiting the "stigma-plus" rule of *Paul v. Davis*. In *Vitek v. Jones*, 445 U.S. 480 (1980), the United States Supreme Court held that a prisoner from a prison to a mental hospital "must be accompanied by appropriate procedural protections." (*Id*. at 491.) This followed because "commitment to a mental hospital produces 'a massive curtailment of liberty . . . . and in consequence 'requires due process protection.'" (*Id*. at 491 - 92.) In other words, a major "plus" was involved in this case.
Likewise, in *Ingraham v. Wright*, 430 U.S. 651 (1977), the Court held that school children who were subjected to paddling had a right to due process protections. The Court reasoned that:

> It is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law.
>
> This constitutionally protected liberty interest is at stake in this case. . . . [A]t least where school authorities, acting under color state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated. (*Id*. at 674.)

Finally, in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), Illinois fair employment law required that the appropriate oversight commission convene a fact-finding conference within 120 days after a claim was filed. The commission failed to do this and Logan's claim was dismissed. On appeal to the U.S. Supreme Court, Logan argued that he was entitled to due process protection. The Court agreed finding that Logan had a ***property interest*** in his fair employment claim and thus he could not be deprived of it without due process of law. (*Id*. at 428 - 29.)

None of these cases even addressed the issue which was the subject of *Paul v. Davis*.

All of them involved deprivation of a liberty or property interest. None involved damage to a person's reputation or whether such an interest would constitute a liberty or property interest sufficient to invoke due process protection. Therefore, CMA's reliance on these cases appears to be misplaced.

In addition, the standard enunciated by the U.S. Supreme Court in *Paul v. Davis* appears to be alive and well in both state and federal courts. In *Haight v. City of San Diego*, 228 Cal. App. 3d 413, 418, 278 Cal. Rptr. 334 (1991), the court noted that:

> "It is well established '[a] person's protected interests are not infringed merely by defamatory statements, for an interest in reputation alone is not a constitutionally protected liberty interest. . . . Rather, the liberty interest is infringed only when the defamation is made in connection with the loss of a government benefit, such as employment.'" (Quoting *Murden v. County of Sacramento*, 160 Cal. App. 3d 302, 308, 206 Cal. Rptr. 699 (1984).)

Binkley v. City of Long Beach, 16 Cal. App. 4th 1795, 1808, 20 Cal. Rptr. 2d 903 (1993) held that a mere referral without further action by the State does not constitute sufficient action to trigger procedural due process interests. Specifically, the Court noted that:

> Even were we to assume respondent was entitled to 'some kind of a hearing' before being deprived of a 'protected interest' [citing *Bd of Regents v. Roth*], no deprivation of a constitutionally protected 'liberty' interest occurred until the stigmatizing allegations of mismanagement and misconduct led to the decision to terminate his employment. . . . . Respondent continued to receive full pay and benefits of the office of chief of police during the pendency of the city manager's investigation.

This point was also emphasized in *Caloca v. County of San Diego*, 72 Cal. App. 4 th1209, 85 Cal. Rptr. 2d 660 (1999).) The court held that:

> Although it is clear [the Citizens Law Enforcement Review Board's] findings on serious misconduct stigmatize Deputies and may well impact their law enforcement careers in the future [i.e. analogous to physician losing future business], we must focus on the absence of evidence in the record showing [the Board's] allegedly false findings of misconduct were *made in connection with or have resulted in the loss of* a government benefit. The law requires there not only be government action but also the loss of a government benefit. (72 Cal. App. 4th at 1219 [Emphasis in original].)

The same principles were applied in the case of a "prominent eye surgeon" arrested for cultivating marijuana in the San Luis Obispo area. In *Higginbotham v. King*, 54 Cal. App. 4th 1040, 63 Cal. Rptr. 2d 114 (1997), the physician alleged a statement made by the narcotics task force officer to a local newspaper concerning the arrest damaged his

"professional reputation and medical practice." Relying principally on *Paul v. Davis*, the appellate court noted that:

> '[D]amage to reputation standing alone, cannot state a claim for relief under section 1983 because reputation is neither "liberty" nor "property" guaranteed against state deprivation without due process of law. In order to attain protected status under the Due Process Clause, the state action complained of must also alter or extinguish a right or status previous recognized by state law.' (54 Cal. App. 4th at 1046, quoting *Johnson v. Barker*, 799 F.2d 1396, 1399 (9th Cir. 1986).)

In *WMX Technologies, Inc. v. Miller*, 197 F.3d 367, 375 (9th Cir. 1999) (en banc), the Ninth Circuit held that damage to ***the reputation of a business*** resulting in a loss of goodwill and patronage does not constitute a deprivation sufficient to trigger procedural due process protection. In reaching this decision, the Ninth

Circuit distinguished a case where government officials directly interfered with the business in question by suspending bulk permits and by sending letters to customers informing them of this fact. The Ninth Circuit further held that because damage to reputation does not amount to a deprivation of a protected property interest, there was no "plus" to satisfy the "stigma-plus" standard of *Paul v. Davis*. (197 F.3d at 376.)

When analyzed under the weight of this case law, CMA's position collapses. The "deprivation" or "plus" is not the result of action taken by the State. Rather, it would only occur because independent third parties choose not to be treated by the doctor of podiatric medicine subject to the disciplinary proceeding. This is not the type of deprivation of a government liberty or property interest that warrants protection under the Due Process Clause.

Disclosure of Complaints

CMA raises essentially the same objections to the Board's proposed regulation governing disclosure of complaints. CMA states that:

> '[C]omplaint' information is even more unreliable, inaccurate and incomplete than 'cases referred' because complaints, particularly from lay members of the public, are unanalyzed with respect to relevant law and other facts that can be gathered during an investigation. It would be highly inflammatory and injurious to a podiatrist for the Board to summarize such information that may contain allegations, which, even if true, are not violations of the law, but by virtue of disclosure will carry the implicit assertion by the Board that they are an accurate reflection of wrongdoing by the podiatrist in question. (Comments at 14.)

The regulation in question provides that the Board will disclose to inquiring members of

the public:

> The nature of all complaints on file [pertaining to a particular licensee] which have been investigated by the Board and referred for legal action to the Attorney General, including:
>
> F. The date of the complaint;
> G. A brief summary of the nature of the complaint; and
> H. Its disposition. (16 C.C.R. § 1399.704.)

CMA misconstrues the scope of this regulation. Complaints will not be disclosed unless they have resulted in a referral to the Attorney General for a formal legal or administrative action. Complaints determined to be without merit or that result in no legal action will be dropped from the Board's disclosure system.

CMA again confuses the underlying merits of the complaint with accuracy of its disclosure. A disclosure would be accurate as long as it did not erroneously report or distort the nature of the complaint. In addition, only those complaints which have been investigated and which the Board has determined to have sufficient merit to warrant disciplinary action would be disclosed. Finally, inquiring members of the public would be given the same disclaimer that accompanies referrals of matters to the Attorney General.

If anything, the Board's proposed complaint disclosure policy appears to be more conservative that what is permitted under current statutory law. Education Code Section 94779 ***requires*** the Bureau for Private Postsecondary and Vocational Education to "make available to members of the public, upon request, the nature and disposition of ***all*** complaints on file . . . against an institution."

Disclosure of Settlements Entered Into Prior to January 1, 2003

At its regular meeting held on June 6, 2003, the Board approved modifying its proposed regulation regarding disclosure of settlements to read as follows:

> Upon request, the Board will disclose information in its possession concerning settlements entered into on or after January 1, 2003 of civil actions seeking recovery of damages for death or personal injury caused by the professional negligence, errors, or omissions of a doctor of podiatric medicine or his or her unauthorized practice pursuant to business and Professions Code Section 803.1(b) & 803.1(c) and regulations promulgated by the Medical Board of California.

Given this modification, the issues raised by CMA in its comments regarding settlements entered into prior to January 1, 2003 appear to now be moot.