

**TITLE 16. DENTAL BOARD OF CALIFORNIA
DEPARTMENT of CONSUMER AFFAIRS**

INITIAL STATEMENT OF REASONS

HEARING DATE: September 26, 2016

SUBJECT MATTER OF PROPOSED REGULATIONS: Defining of “Discovery” and “Filing Date”

SECTION(S) AFFECTED: California Code of Regulations, Title 16, Division 10, Sections 1001.1 and 1001.2

INTRODUCTION

The Dental Board of California (Board) regulates approximately 102,000 licensees; consisting of 45,900 dentists (DDS), 54,500 registered dental assistants (RDA), and 1,700 registered dental assistants in extended functions (RDAEF). In addition, the Board has the responsibility for setting the duties and functions of approximately 50,000 unlicensed dental assistants. The Board’s highest priority is the protection of the public when exercising its licensing, regulatory, and disciplinary functions. The primary methods by which the Board achieves this goal are: issuing licenses to eligible applicants; investigating complaints against licensees and disciplining licensees for violations of the Dental Practice Act (Act); monitoring licensees whose licenses have been placed on probation; and managing the Diversion Program for licensees whose practice may be impaired due to abuse of dangerous drugs or alcohol.

The Board routinely receives complaints against licensees from consumers or the profession, and reports of settlements, insurers, etc pursuant to Business and Professions Code (Code) Sections 801, 802, 803, and 805. The Board investigates all complaints and reports. If grounds exist, the Board may pursue disciplinary action against the licensee by filing an accusation through the Office of the Attorney General.

It has been the practice of the Board that an accusation was considered filed on the same day it is signed by the Board’s Executive Officer. Upon receipt of the accusation with the appropriate signature and the date it was signed, staff would then post the accusation online which showed the date the document was considered filed by the Board and signed by the individual actually filing the document. Board staff then served the accusation on the respondent and relevant parties. The date the accusation was served was usually the same day it was filed.

While working through the Board’s administrative discipline process, the Attorney General’s Office advised that it would be beneficial to establish definitions for the terms “filing” and “discovery” in regulation.

The statute of limitations in Code Section 1670.2, which requires that accusations “shall be filed within three years after the board discovers the act or omission alleged as the

ground for disciplinary action...” The Board has not defined the terms “discovery” or “filing” as the Medical Board of California has done.

California Code of Regulations, Title 16, Section 1356.2(a)(1) defines the word “discovers” under the Medical Board’s statute of limitations set forth in Code Section 2230.5 to be “the date the board received the complaint or report describing the act or omission.”

California Code of Regulations, Title 16, Section 1356.5 defines the word “filed” under the Medical Board’s statute of limitations set forth in Code section 2230.5 as “an accusation or petition to revoke probation shall be deemed “filed” on the date it is signed by the Executive Director or other person described in section 1356.”

It was advised by the Attorney General’s Office that the Board consider promulgating a regulation to define the terms “discovery” and “filing” as found in Code Section 1670.2, as done by the Medical Board of California.

Since no regulations exist to implement this under Business and Professions Code, the Board must establish regulations to implement, interpret, and make specific Section 1670.2 to define the term “discovers” and to clarify when accusations are considered filed by the Board. This would provide a clearer understanding for both prosecutors, who have the duty to file accusations timely, and for respondents.

SPECIFIC PURPOSE OF EACH ADOPTION, AMENDMENT, OR REPEAL

The Board proposes to adopt California Code of Regulations, Title 16, Sections 1001.1 and 1001.2 relative to defining statute of limitations and filing. Specifically, the Board is proposing the following:

- Adopt Section 1001.1 to define the word “discovers”, for the purpose of implementing Code Section 1670.2 with respect to each act or omission alleged as the ground for disciplinary action, as (1) the date the Board received a complaint or report describing the act or omission, and (2) the date, subsequent to the original complaint or report, on which the Board became aware of any additional acts or omissions alleged as the ground for disciplinary action against the same individual.
- Adopt Section 1001.1(b) to define the following for the purpose of this section: (1) “Complaint” means a written complaint from the public or a written complaint generated by Board staff that names a particular licensee; and (2) “Report” means any written report required under the code to be filed with the Board, but does not include a notice filed under Code of Civil Procedure (CCP) Section 364.1.
- Adopt Section 1001.1(c) to specify that a notice filed under CCP Section 364.1 must be retained, in a potential investigation file and if a complaint or report on the same act or omission is subsequently received by the Board, the date the

Board discovers the act or omission alleged as the ground for disciplinary action is the date the Board receives that complaint or report.

- Adopt Section 1001.2 to specify that an accusation or petition to revoke probation shall be deemed “filed” on the date it is signed by the Executive Officer or other person described in Section 1001.

The statute of limitations for the Board is set forth in Business and Professions Code Section 1670.2, which requires that accusations “shall be filed within three years after the Board discovers the act or omission alleged as the ground for disciplinary action or within seven years after the act or omission alleged as the ground for disciplinary action occurs, whichever occurs first.” Since no regulations exist to implement this under Business and Professions Code, the Board must establish regulations to implement, interpret, and make specific Section 1670.2 to define the term “discovers” and to clarify when accusations are considered filed by the Board.

FACTUAL BASIS/RATIONALE

Existing law, Business and Professions Code Section 1601.2, establishes the Board's highest priority, which is the protection of the public when the Board exercises its licensing, regulatory, and disciplinary functions.

Existing law, Business and Professions Code Section 1614, specifies that the Board is authorized to adopt, amend, or repeal such rules and regulations as may be reasonably necessary to enable the Board to carry into effect the provisions of the DPA.

Existing law, Business and Professions Code Section 1670, specifies that any licensee may have his license revoked or suspended or be reprimanded or be placed on probation by the Board for unprofessional conduct or incompetence or gross negligence or repeated acts of negligence in his or her profession, or for the issuance of a license by mistake, or for any other cause applicable to the licensee.

Existing law, Business and Professions Code Section 1670.2, specifies that accusations shall be filed within three years after the Board discovers the act or omission alleged as the ground for disciplinary action or within seven years after the act or omission alleged as the ground for disciplinary action occurs, whichever occurs first.

The proposed language, as required by law, provides a definition of when the Board discovers a violation of the DPA which is used as a basis for filing an accusation against a dentist or a dentist assistant auxiliary. This section is important, because when a complaint is first received; all violations are not immediately discovered at that initial stage. As the course of an investigation takes place and additional violations are found, then additional charges are filed against the same licensee. For example, if a patient alleges negligence against a dentist, the Board's investigator may question several other patients or dental assistant auxiliaries and may find that this particular dentist has established a pattern of negligence or incompetence. Or, additional complaints may be received against the same dentist for various violations. The “discovery” of acts or

omissions by a dentist can continue for some time after the initial complaint has been received by the Board. This is significant; because the three year period is counted from the time each complaint is received by the Board and not when the initial discovery was found, which gives the Board and its team of investigators and prosecutors a timeframe for each charge in which to establish their respective case regarding the disciplinary action. This is important because it helps solidify and further the Board's mission in consumer protection by disciplining those licensees who violate the DPA within the allotted time applicable by the statute of limitations.

In regards to the necessity in defining "filing", it is important, because it will eliminate any confusion between the Office of the Attorney General, the Office of Administrative Hearings, defense attorneys, and Board staff regarding the date a document is considered filed.

UNDERLYING DATA

1. Dental Board of California Meeting Minutes, March 3, 2016.
2. Dental Board of California Meeting Minutes May 12, 2016.

BUSINESS IMPACT

The Board has made the initial determination that the proposed regulation would not have a significant, statewide adverse economic impact directly affecting business, including the inability of California businesses to compete with businesses in other states, because the regulations pertain to the Board's internal enforcement procedures.

ECONOMIC IMPACT ASSESSMENT

This regulatory proposal will not have the following effects:

- It will not create nor eliminate jobs within the State of California because this proposal will not be sufficient to have the effect of creating or eliminating jobs. The Board has made this determination because this proposal pertains to the Board's internal business procedures.
- It will not create new business or eliminate existing businesses within the State of California because this proposal will not be sufficient to have the effect of creating or eliminating jobs. The Board has made this determination because this proposal pertains to the Board's internal business procedures.
- It will not affect the expansion of businesses currently doing business within the State of California because this proposal will not be sufficient to affect the limiting or furthering of the expansion of businesses. The Board has made this determination because this proposal pertains to the Board's internal business procedures.
- This regulatory proposal would benefit the health and welfare of California residents because this would result in improved disciplinary procedures and ultimately provide protection for consumers; and would provide improved disciplinary proceedings and procedures for licensees.

- This regulatory proposal does not affect worker safety because the regulations pertain to the Board's business processes as it pertains to disciplinary action against licensees and this proposal is not relative to worker safety.
- This regulatory proposal does not affect the state's environment because the regulations pertain to the Board's business processes as it pertains to disciplinary action against licensees and this proposal is not relevant to the State's environment.

BENEFITS

The benefit from these proposed regulations will aid the Board's ability to provide direction regarding internal enforcement procedures by defining the terms "discovers" and "filing". These would also clarify when accusations are considered filed by the Board. This rulemaking would provide a clearer understanding for all parties involved regarding a timely filing of an accusation against a licensee and ensure that the filing and discovery dates are not open for discussion, but can be explicitly interpreted.

SPECIFIC TECHNOLOGIES OR EQUIPMENT

This regulation does not mandate the use of specific technologies or equipment.

CONSIDERATION OF ALTERNATIVES

No reasonable alternative to the regulation 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 or would be more cost effective to affected private persons and equally effective in implementing the statutory requirement or other provision of law.

Set forth below is the alternative which was considered and the reason the alternative was rejected:

Alternative No. 1: Do not seek a regulatory change.

Rejected: The Board's highest priority is the protection of the public while exercising its licensing, regulatory, and disciplinary functions. These proposed regulatory changes provide the Board with the means to ensure that individuals who violate the laws relating to the DPA will be effectively disciplined within the reasonable amount of time allotted by the statute of limitations. Without some definition, the issue of when the violation was "discovered" or "filed" would be litigated in virtually every case, especially in cases where it would benefit the defendant, and the Board's resources would be diverted from consumer protection in order to address that issue. There would be no guidance to those most in need of it until the cases made their way through the court system. Litigation would be an inefficient, ineffective, and costly way to address this issue.