

DENTAL BOARD OF CALIFORNIA
FINAL STATEMENT OF REASONS

Hearing Date: April 4, 2011

Subject Matter of Proposed Regulations: Consumer Protection Enforcement Initiative

Section(s) Affected: California Code of Regulations, Title 16, Division 10, Sections 1018.05 and 1020

Updated Information:

The Initial Statement of Reasons is included in the file. The information contained therein is updated as follows:

The Board currently regulates a total of 72,866 licensees; consisting of 37,508 dentists, 34,084 registered dental assistants, and 1,277 registered dental assistants in extended functions. 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 (DPA); monitoring licensees whose licenses has been placed on probation; and managing the Diversion Program for licensees, whose practice may be impaired due to abuse of dangerous drugs or alcohol.

Recommendations and comments received during the 45-day public comment period and at the April 4, 2011 regulatory hearing were considered by the Board at its May 19, 2011 meeting. A number of modifications were made to the Consumer Protection Enforcement Initiative regulations based upon comments received. The Board's responses to the comments received are detailed under "Summary of Comments Received During the 45-Day Comment Period".

The modified text was noticed on the Board's web site and mailed on May 25, 2011. The 15-day public comment period began on May 26, 2011 and ended on June 10, 2011. The Board did not receive comments in response to the modified text.

Since there were no adverse comments received in response to the modified text, the Board adopted the final text as noticed in the modified text at its May 19, 2011 meeting.

Local Mandate:

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

Updated Business Impact:

The proposed regulation will provide the Dental Board of California (Board) with the means to expedite the enforcement process by further defining unprofessional conduct. The proposed regulation also gives the Board the authority to require the examination

of an applicant who may be impaired by a physical or mental illness that may affect competency. These changes have been proposed to give the Board the tools to provide better public protection. The Board has estimated that this proposed regulation will not have a significant economic impact on the private sector.

Licensees may incur a nominal fee for the copying and mailing of records requested by the Board. However, current statute, California Business and Professions Code (Code) Section 1684.1, requires licensees to comply with the Board's records request or they risk being fined. Since current statute previously required the copying and submission of records, there should be no additional fiscal impact to the licensee or their business as a result of this regulation. Licensees will be considered to have committed unprofessional conduct if they fail to provide records requested by the Board. As a result, licensees may face disciplinary action against their license.

This regulation imposes a reporting requirement. Licensees may incur a nominal fee when reporting an indictment, felony charge, conviction, or disciplinary action by another professional licensing entity to the Board. This regulation does not specify the manner of how a licensee is to report to the Board. Licensees may choose from a variety of methods to notify the Board, including email, or mailing a letter. A licensee may incur nominal costs associated with mailing their notification to the Board. Licensees will be considered to have committed unprofessional conduct if they fail to report an indictment, felony charge, conviction, or disciplinary action by another professional licensing entity to the Board within 30 days. As a result, licensees may face disciplinary action against their license.

A license that has been revoked, suspended, reprimanded or placed on probation may cause a significant fiscal impact on the business where the licensee worked depending on the nature and severity of the violation. A business owned by a licensee who faces disciplinary action may incur a significant fiscal impact depending on the nature and severity of the violation. The Board does not maintain data relating to the number or percentage of licensees who own a business; therefore the number or percentage of businesses that may be impacted cannot be predicted. The Board only has authority to take administrative action against a licensee and not a business. Accordingly, the initial or ongoing costs for a business owned by a licensee who is the subject of disciplinary action cannot be projected. Businesses operated by licensees who are in compliance with the law will not incur any fiscal impact.

Businesses operated by licensees who are in compliance with the law will not incur any costs. Businesses operated by licensees who are found to be in violation of certain laws may incur the penalties imposed by these new regulations depending on the nature or severity of the crime. The Board only has authority to take administrative action against a licensee and not a business. Accordingly, the initial or ongoing costs for a business owned by a licensee who is the subject of disciplinary action cannot be projected.

Applicants required by the Board to be examined by a physician and surgeon or psychologists will not incur a fiscal impact. The Board is responsible for the full cost of

the examination. Existing law, Section 820 of the Code, authorizes the Board to examine licensees for mental illness or physical illness that may affect competency. Since licensees may already be subject to such an examination, the Board has determined that the proposed regulation will not have a significant statewide adverse economic impact on the businesses of the physicians and surgeons or psychologists designated to perform the examination. The physicians and surgeons or the psychologists designated to perform the examination have the necessary equipment to perform the examination and will not experience additional costs as a result of this regulation. However, the physician and surgeons, or psychologist may incur more revenue as a result of this regulation, depending on how many applicants the Board requires to be examined.

In the last five (5) years the Board has been compelled to examine seventeen (17) licensees as provided in Section 820 of the Code. Such an examination has cost the Board approximately \$2,500 each time. The Board receives approximately 1,100 applications for licensure as a dentist each year, approximately 2,300 applications for registered dental assistant licensure each year, and approximately 90 applications for registered dental assistant in extended functions licensure each year. The Board does not maintain data regarding the number of applicants who have demonstrated physical or mental illnesses affecting competency, therefore it is difficult to estimate the number of applicants the Board may examine. Based upon the number of licensees examined pursuant to existing authority, the fiscal impact of the proposed regulatory action on State government would be minor and any additional expenditure would be absorbable by the Board. This proposed regulation will not affect any federally funded State agency or program.

Businesses owned by the physicians and surgeons or psychologists designated by the Board to perform an examination of mental or physical illness affecting competency should not incur any additional costs. These businesses are equipped to perform examinations on a daily basis and the addition of a patient will not significantly impact the costs of running their business. However, the physician and surgeons, or psychologist may incur more revenue as a result of this regulation, depending on how many applicants the Board requires to be examined.

Benefits

The benefit from these proposed regulations will be to provide maximum protection to the California consumers against licensees who are found to be in violation of the law or who do not demonstrate the competency necessary to perform their duties due to a mental or physical illness.

These benefits are a direct result of the Board's statutorily mandated priority (B&P Code Section 1601.2). The protection of the public is the highest priority of the Board in exercising licensing, regulatory, and disciplinary functions.

Consideration of Alternatives

There are no alternatives to the regulation. 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 expedite the enforcement process and provide better public protection.

Without this regulatory change, the Board would not be able to receive records or reports in a more expedited manner. Waiting for a licensee to renew their license to obtain conviction information would be less effective and could endanger patient safety.

Licensing an applicant who demonstrates mental or physical illness that may affect competency, but who successfully completes an examination and is subsequently licensed, has the potential to cause detrimental patient harm and would be less effective. This regulation gives the Board the ability to further examine applicants that demonstrate mental or physical illness that may affect competency, but who otherwise successfully complete an examination. With this new authority, the Board would be able to deny the application, and provide better patient protection if the applicant is found to be unable to safely practice.

Objections or Recommendations/Responses:

The following recommendations were made regarding the proposed action:

Summary of Comments Received During the 45-Day Comment Period:

The California Dental Association (CDA) submitted comments in response to the proposed text.

CDA expressed concern regarding the subjective nature of the examination of an applicant for a mental or physical illness whenever the applicant "appears" to be unable to safely practice. Staff recommended rejection of this comment. The Board voted unanimously to reject this comment because the commonly understood meaning of "appears" is sufficiently clear. Appears means "to have the appearance of being; seem; look" (Random House Dictionary, © Random House, Inc. 2011.) Therefore, if the Board has factual evidence in a specific case that a person seems like they may have a physical or mental condition affecting competency, the Board may refer for an examination. The applicant's rights are protected by the confidentiality of the process and double-checked by an independent expert evaluating the facts presented to him or her. At the same time, the Board ensures that the public is protected by the Board's further investigation into competency before a license is issued. The applicant bears the burden of proof of their fitness for competency to practice. The proposed regulatory language is derived from existing law, Business and Professions Code Section 820, and licensing agencies within the Department of Consumer Affairs have used this provision without issue. Additionally, the examination would be performed on a case by case basis by a professional expert trained to perform examinations for mental or physical competency.

Additionally, CDA was concerned that the proposed regulatory language appeared to only allow the Board the option of outright denial of the application for licensure if the requested examination leads to concerns. The Board voted unanimously to modify the text to address CDA's concerns, maintain consistency with the "Dental Board of California Disciplinary Guidelines With Model Language", revised 8/30/2010, and provide a higher level of due process for the applicant, while still maintaining protection of the public. The Board voted to modify the last sentence of section 1020(a) to read as follows: "If after receiving the report of evaluation, the Board determines that the applicant is unable to safely practice, the Board may deny the application, or may issue the applicant a license that is placed on probation with terms and conditions. If the Board issues a license on probation, the probationary order shall include an order that the license be revoked, stayed and placed on probation for the entire term of probation. In issuing a license on probation, the Board may consider any or all of the following terms and conditions: (i) Requiring the licensee to obtain additional training or pass an examination upon completion of training, or both. The examination may be written, oral, or both, and may be a practical or clinical examination or both, at the option of the Board; (ii) Requiring the licensee to submit to a mental or physical examination, or psychotherapy during the term of probation under the terms and conditions provided for in the "Dental Board of California Disciplinary Guidelines With Model Language" revised 08/30/2010, incorporated by reference at Section 1018; or, (iii) Restricting or limiting the extent, scope or type of practice of the licensee."

In addition to the proposed modifications to address CDA's concerns, staff recommended adding language to Section 1020(a) to provide for the confidentiality of examination records if there is insufficient evidence to bring an action against the applicant. Staff recommended maintaining the records for a period of five years from the date of determination. If no further proceedings are conducted to determine the licensee's fitness to practice within the five years, staff recommended the records be purged and destroyed. However, if new proceedings are conducted during the five year period, staff recommends authorizing the Board to utilize the records of the examination in the proceedings. These provisions regarding confidentiality of the examination and the destruction of insufficient evidence are consistent with those privacy protections provided to licensees in Section 828 of the Business and Professions Code. Staff recommended the addition of Section 1020(a)(2) as follows: "If the Board determines, pursuant to proceedings conducted under this subdivision, that there is insufficient evidence to bring an action against the applicant, then all Board records of the proceedings, including the order for the examination, investigative reports, if any, and the report of the physicians and surgeons or psychologists, shall be kept confidential. If no further proceedings are conducted to determine the applicant's fitness to practice during a period of five years from the date of the determination by the Board of the proceeding pursuant to this subdivision, then the Board shall purge and destroy all records pertaining to the proceedings. If new proceedings are instituted during the five-year period against the applicant by the Board, the records, including the report of the physicians and surgeons or psychologists, may be used in the proceedings and shall be available to the Respondent pursuant to the provisions of Section 11507.6 of the

Government Code.” The Board voted unanimously to accept staff’s recommendation and modified the text.

Summary of Comments Received During the 15-Day Comment Period:

The Board did not receive comments in response to the modified text.