



**Dental Board of California
Meeting Minutes
Thursday, August 11, 2011**
Department of Consumer Affairs
1625 North Market Blvd, 1st Floor Hearing Room, S-102
Sacramento, CA 95834

Members Present:

John Bettinger, DDS, President
Bruce Whitcher, DDS, Vice President
Luis Dominicis, DDS, Secretary
Steven Afriat, Public Member
Fran Burton, Public Member
Stephen Casagrande, DDS
Judith Forsythe, RDA
Huong Le, DDS
Steven Morrow, DDS
Thomas Olinger, DDS

Members Absent:

Rebecca Downing, Public Member
Suzanne McCormick, DDS

Staff Present:

Richard DeCuir, Executive Officer
Denise Johnson, Assistant Executive Officer
Kim Trefry, Enforcement Chief
Nancy Butler, Supervising Investigator
Lori Reis, Complaint and Compliance Unit Manager
Adrienne Mueller, Enforcement Coordinator
Donna Kantner, Licensing and Examination Unit Manager
Dawn Dill, Dental Assisting Program Manager
Sarah Wallace, Legislative and Regulatory Analyst
Karen Fischer, Associate Analyst
Linda Byers, Executive Assistant

President John Bettinger called the meeting to order at 8:15 a.m. Secretary Luis Dominicis called the roll and established a quorum. The full Board immediately went into closed session to discuss the Executive Officer's performance evaluation; and to deliberate and take action on disciplinary matters. At the conclusion of these discussions, the Licensing, Certification, and Permits (LCP) Committee met in closed session to review one application for issuance of a new license to replace a cancelled license.

The Board returned to open session at 11:39 a.m.

President Bettinger called the meeting to order and reported that the Board reviewed the Executive Officer's performance; and deliberated and took action on disciplinary

matters. He asked Dr. Bruce Witcher, Chair of the Licensing, Certification, and Permits (LCP) Committee to report on what the LCP Committee discussed in closed session. Dr. Witcher reported that the Committee considered one application for issuance of a new license to replace a cancelled license. The application was tabled until additional information related to malpractice actions by the applicant was received.

Agenda items were taken out of order to accommodate guest speakers.

AGENDA ITEM 8: Discussion and Possible Action Regarding Eligibility Requirements for Special Permits (*Business and Professions Code Section 1640*)

Dr. Steven Morrow, Board member and faculty member at Loma Linda University School of Dentistry reported that on May 14, 2011, the California dental school Deans and/or their representatives met during the California Dental Association meeting in Anaheim to discuss concerns they have regarding Special Permits issued by the Dental Board of California. Dr. Morrow met with the group on behalf of Loma Linda University and Dr. John Bettinger, Board President, participated in this meeting representing the Dental Board of California.

Dr. Morrow explained that Special Permits are a type of “restricted” dental license that are used by dental schools in California to recruit and retain non-California licensed dentists to fill faculty positions in their advanced dental education programs and their DDS programs. Through participation in the faculty practice, the school is able to increase the dentist faculty member’s financial compensation and provide the opportunity for the dentist to maintain and/or improve their clinical skills.

The ability to hire dental faculty to fill vacant positions in dental schools in the nation, and specifically in California has reached a near crisis point. This has occurred for a number of reasons: 1. The economic slow-down resulting in a decrease in the financial support of dental education, not only in State supported institutions, but in private universities as well; 2. The aging dental school faculty population and their rate of retirement; and 3. The student educational debt resulting in a limited number of recent graduates’ ability to pursue a career in dental education. As a result, dental schools have been forced to rely on hiring foreign trained dentists and dental specialists.

Dr. Morrow then outlined the two specific concerns expressed by the California dental school Deans regarding the issue of special permits:

1. Confusion and/or ambiguity regarding the eligibility requirements for the applicant outlined in Business & Professions Code Section 1640(b) and (c).
2. The limitation on the number of special permits available in the different categories as outlined in Business & Professions Code Sections 1640.2 and 1640.3

At this point in the discussion, President Bettinger introduced Dr. Ron Mito, former vice president of the Dental Board and Associate Dean of UCLA School of Dentistry. Dr. Mito re-emphasized that there is not an adequate pool of applicants to fill the over 400 full-time vacant faculty positions throughout the country. As a result, to recruit the best

candidates the pool must be expanded to include international dental graduates, of which there are two types: (1) those who have completed both dental school and advanced training in a foreign country, and (2) those who have completed dental school in a foreign country and received advanced training from a CODA accredited specialty program. The Deans feel that the applicant requirements for a special permit outlined in Business & Professions Code Sections 1640(b) and (c) are confusing and are asking for the Board's interpretation. Specifically, does a person who has completed a CODA approved specialty program meet the requirements of 1640(b)? Dr. Mito stated that the position of academic dentistry is that these individuals do meet the requirement and that all individuals who successfully complete a CODA approved program should be viewed as competent in their field. Additionally, their certificates of training should be considered equivalent to a degree.

Kristy Shellans, legal counsel discussed the eligibility requirements outlined in statute. She stated that by the schools interpretation, sections 1640 (b) and (c) are the same. However, she explained that statute should not be interpreted to have surplus (be duplicative). She stated that she was not prepared to give a final legal opinion on the questions discussed today. Further study is needed. Ms. Shellans responded to the question of increasing the number of special permits by saying that this statutory change would require legislation.

Dr. Mito asked that the Board consider seeking legislation to clarify the applicant eligibility requirements for a special permit. Additionally, he asked that the Board consider there also be legislation to increase the number of special permits granted to California Dental Schools.

Ms. Fran Burton, Board member and Chair of the Legislative/Regulatory Committee responded that she feels a legal opinion is necessary before there is any discussion about legislative remedies.

M/S/C (Morrow/Burton) to request legal counsel provide the Board with a legal opinion regarding the interpretation of significant, pertinent portions of *Business and Professions Code Sections 1640 – 1640.3* relating to the discussion held during the meeting today. The motion passed unanimously. Dr. Morrow asked that staff review the Board's past interpretations of the statute for consistency.

Public Comment

Dr. Earl Johnson, UCSF staff member, stated that he concurred with everything Dr. Mito said and requested that if statutes are being changed, he would like to include a change so that graduates of CODA approved specialty training programs will be eligible to take the dental licensing examination.

The Committee meetings commenced at 12:15 p.m.

The full Board reconvened at 2:10 p.m.

AGENDA ITEM 1: Presentation on the use of Botox in Dentistry by Dr. Louis Malcmacher, President of the American Academy of Facial Aesthetics.

Louis Malcmacher, DDS is the President of the American Academy of Facial Aesthetics, an educational organization which offers approximately 50 training programs per year in the use of BOTOX and dermal fillers. In addition to lecturing, he has practiced as a general dentist for over thirty years and is licensed in the state of Ohio. Dr. Malcmacher requested that he be put on the Board agenda to give a presentation on the use of BOTOX and dermal fillers in dentistry.

He began his presentation with a broad overview and stated that BOTOX and dermal fillers have become an issue in dentistry. According to Dr. Malcmacher, thirty-five states allow general dentists to use BOTOX for cosmetic and therapeutic uses. He went on to say that BOTOX and dermal fillers are reversible, non-surgical procedures that, when appropriately trained, general dentists are legally, ethically, and morally obligated to offer their dental patients as available treatment options. He emphasized that these treatments are non-surgical and reversible.

BOTOX and dermal fillers are currently used throughout the country for therapeutic treatment of TMJ and retention of dentures. Dr. Malcmacher stated that since dentists are trained to give injections inside the mouth, they are highly qualified to administer injections outside the mouth as with BOTOX and dermal fillers. He showed a video of him administering BOTOX on a patient for treatment of facial pain. He also showed a video of him administering dermal fillers on a patient.

Dr. Malcmacher went on to say that the California Dental Practice Act is much like other dental practice acts throughout the country. Although he admitted he was not a lawyer, he feels that the Business & Professions Code Section 1625 reference to “associated structures” opens the door to treatment of the head and neck for facial pain by general dentists. He also mentioned that the UCLA School of Dentistry offers a Facial Pain residency; and that the FDA has approved BOTOX as the primary therapy for chronic migraines and facial pain. In closing, he referred to Business & Professions Code Section 1638 for the definition of oral and maxillofacial surgery.

AGENDA ITEM 2: Discussion and Possible Action Regarding Scope of Practice Issues and Board Policy Related to the Use of Botox and Dermal Fillers.

The discussion of Dr. Malcmacher’s presentation continued into Agenda Item #2. Dr. Huong Le, Board member, asked for confirmation that 35 states allow general dentists to use BOTOX for cosmetic and therapeutic treatment. Dr. Malcmacher responded yes. However California allows its use for therapeutic treatment only.

Fran Burton, Board member, asked how many of those 35 states had to enhance their legislation to allow the use of Botox. Dr. Malcmacher stated that none of the 35 states enhanced their legislation; however four months ago Arizona passed legislation to allow the use of BOTOX for “cosmetic/aesthetic” applications where formerly only “therapeutic” use was allowed. Ms. Burton stated that she does not think that the

California statute, as written, allows the use of BOTOX for cosmetic purposes by general dentists. She would like to see a legal opinion on this matter.

Kristy Shellans, Legal Counsel, clarified that *Business and Professions Code Section 1638* does not apply to general dentists. The section applies to physicians who were licensed to practice dentistry in another state. Ms. Shellans further clarified that the pertinent B & P code section in this matter is *1625*; and she does not feel that it is possible to come up with a “rule” because it is a case by case analysis, based on the scope of practice that is outlined in *section 1625*. Ms. Shellans suggested that the Board must look at what the purpose is for using any particular procedure. If it’s not for the “diagnosis or treatment, by surgery or other method, of diseases and lesions and correction of malpositions of the human teeth, alveolar process, gums, jaws, or associated structures.....” then it cannot be done.

With respect to the discussion about “associated structures”, Ms. Shellans stated that while it is true that the statute does not define this term, the dictionary does. “Associated” means connected. Therefore you must look at what is connected to those different structures and determine what the purpose is for using the procedure. If the purpose does not fall within the realm of what is outlined in statute, then the procedure cannot be performed by a general dentist.

Ms. Shellans pointed out that there is extensive history behind the enactment of the Elective Facial Cosmetic Surgery Permit (Business & Professions Code Section 1638.1). The argument for creation of the permit was that the current 1625 statute did not allow dentists to perform cosmetic procedures. EFCS Permits are now issued for procedures using BOTOX and dermal fillers.

Ms. Shellans pointed out that it would be difficult for her to give a legal opinion on this issue that would not be an underground regulation. The evaluation of the use of BOTOX and dermal filler by general dentists should be decided by expert opinion tied to the statute (B&P Code Section 1625). The decision should not be spurious, that is created to fit within 1625. Performing any specific procedure should be tied back to the purpose(s) outlined in statute. If the goal is to allow general dentists to use BOTOX and dermal fillers for aesthetic (cosmetic) purposes only, there will be problems defending that position.

She further voiced her concern that the Board may be devaluing the EFCS Permit by going down this road. Dr. Dominicis pointed out that using BOTOX and/or dermal fillers is not surgery. Ms. Shellans responded that the discussion of whether or not it is considered surgery is not relevant. Dr. Dominicis stated that when his patients come in for bleaching he is not performing any therapeutic procedure, it is purely cosmetic. Ms. Shellans stated that the question that needs to be answered by the Board is whether or not a procedure is for cosmetic purposes only. If so, it is not legally defensible.

In the interest of time, President Bettinger tabled further discussion of this item until the November meeting. He appointed a two member subcommittee, Drs. Dominicis and

Olinger, and asked that they work with staff to look at all issues, including the legal aspect, of general dentists' use of BOTOX for cosmetic purposes. He also asked the subcommittee to work with staff and legal counsel to develop a statement to post on the Board's website relating to BOTOX and dermal filler use by general dentists.

Dr. Malcmacher commented that by having *B&P code 1638* in the Dental Practice Act, the Board has defined what oral and maxillofacial surgery is including aesthetics. Again, although he admitted that he is not a lawyer, he contends that this definition of oral and maxillofacial surgery, which dentists are allowed to perform, is what other Board's have used to allow veneers and other cosmetic procedures to be done. Dr. Malcmacher stated that dental schools like UCLA treat associated structures, including the whole head and neck and have been doing so for a long time.

There was no additional public comment.

AGENDA ITEM 3(A): Discussion and Possible Action Regarding Comments Received During the 45-day Public Comment Period for the Board's Proposed Rulemaking to Amend Title 16, CCR, Sections 1018 and 1020.5 Regarding Uniform Standards for Substance Abusing Licensees and Disciplinary Guidelines

Sarah Wallace, Legislative and Regulatory Analyst, provided background information leading up to the 45-day comment period which began on March 25, 2011 and ended on May 9, 2011 during which time the Board received oral testimony from the California Dental Association (CDA) and written comments from the Center for Public Interest Law. The regulatory hearing was held on May 10, 2011. The Substance Abuse Coordination Committee (SACC) met on April 11, 2011 and revised requirements contained in the *Uniform Standards Relating to Substance-Abusing Licensees*.

Lori Reis, Complaint and Compliance Unit Manager gave an overview of the proposed changes to the Dental Board's Diversion Contract with Maximus as they relate to SB 1441.

Kristy Shellans, Legal Counsel, clarified that the reason for giving this overview was to make everyone aware that the Department of Consumer Affairs is moving forward with changes to the Maximus contract to incorporate the uniform standards even though the Dental Board hasn't acted on the Substance Abuse Coordination Committee's (SACC's) guidelines yet. She noted that there is a dual movement both on the regulatory level and the contract level to incorporate these guidelines. There will be a need to come back to the contract issues once the Board has decided how it wants to proceed to be sure that the contract and the Board's guidelines are consistent.

Ms. Fran Burton, Board Member, stated that she raised her concern a year ago regarding the standards themselves and whether or not they are discretionary.

Ms. Wallace reported that Bill Lewis, CDA, delivered verbal testimony at the regulatory hearing indicating CDA's overall support of the proposed regulations. He thanked the Dental Board and staff for recognizing the distinction between the appropriate role of the

Board's Diversion Program and disciplinary action. Mr. Lewis also stated that it is important for the Board to maintain flexibility and discretion while treating individuals self-referred into the Diversion Program. Since this was not an adverse comment, there was no Board action.

Ms. Wallace stated that the second comment received was from the Center for Public Interest Law. Julianne D'Angelo Fellmeth, Administrative Director, submitted a letter stating that the proposed regulations do not incorporate the correct version of the Uniform Standards developed by the Department of Consumer Affairs' SACC. Furthermore, with the SACC finalizing its Uniform Standards in April 2011, the new version should be incorporated into the DBC's Disciplinary Guidelines. Ms. Fellmeth also stated that the view of the Center for Public Interest Law is that "the Dental Board of California does not have discretion to order individual conditions". She stated that Business and Professions Code Section 315 states: "...the committee shall formulate uniform and specific standards in each of the following areas that each healing arts Board shall use in dealing with substance-abusing licensees, whether or not a Board chooses to have a formal diversion program..." and that there is nothing discretionary in this language.

Staff recommended rejection of these comments because the Dental Board incorporated the original terms of the probationary standards recommended by the SACC into its originally noticed text, which was filed before the SACC amended its standards in April 2011. The Board intends to modify its proposed text to reflect these new amendments as of April 2011.

Ms. Wallace read the following excerpt from the proposed response to the comment:

"However, the Board staff disagreed with the commenter that the Board has no discretion. The Board believes that rulemaking is a discretionary act that has been specifically delegated to the Board by law, not the SACC. The SACC has been given no power to enact rules or regulations by *Section 315 of the Business and Professions Code* and the SACC's proposed standards are not exempt from the APA. As a result, any standards the SACC proposes do not have the force of law (statute or regulation) and do not set standards for the Board's licensees unless adopted by the Board through the rulemaking process. In addition, *Section 315 of the Business and Professions Code* does not restrict the Board's discretion to determine how and when to use the standards, or divest it of its rulemaking authority. The statute merely states that the Boards "shall use" the standards formulated by the SACC in dealing with substance-abusing licensees. The Board has done this by proposing to add the standards as written by the SACC to its guidelines. However, the Board has made it clear that it still has authority to determine how and whether to apply the standards."

Richard DeCuir, Executive Officer, stated that he believes that the issue of discretion is still ambiguous. Fran Burton asked if the follow-up on this issue that was requested at the last Board meeting was done. Board Legal Counsel Kristy Shellans stated that the proposed response to the comment is her analysis as to why she believes the Board

has discretion. It's up to the Board whether or not they wish to agree with that argument and adopt the analysis as their comment in response to the argument that the Board has no discretion. Ms. Shellans stated that her analysis is her opinion and the Board is free to disregard it. However, her opinion is that it would be more legally defensible for the Board to retain its discretion because of the way the statute is written. This statute does not say that the Board has no discretion. There are plenty of statutes within the Dental Practice Act that state that the Board does have discretion and does set standards granting the Board sole discretion to determine what probationary conditions apply in every case. Ms. Shellans stated that it would be hard to ignore her opinion when the Board's laws say the Board must exercise its discretion. In her opinion, the Board cannot legally say that the law divests the Board of its discretion when it doesn't say that in Section 315 of the Business and Professions Code. Conversely, in other provisions of the Dental Practice Act, the law explicitly states that the board has discretion. Ms. Shellans pointed out that the proposed section of the Disciplinary Guidelines that Ms. Fellmeth took exception with was a statement that said the Board has discretion to decide when and how the terms are applied. Ms. Shellans further explained why not exercising the Board's discretion when imposing discipline on a substance-abusing licensee would be legally indefensible. She provided examples of two recent court cases where courts had found that boards in this Department had abused their discretion by either: (1) not exercising their discretion when required to by law; or, (2) acting arbitrarily by imposing terms and conditions of probation not rationally related to the alleged violations. She stressed that a court would probably find that failure to exercise discretion in using these standards would be an abuse of discretion.

Ms. Burton stated that she had previously asked for a legislative counsel opinion. Ms. Shellans explained that the Board does not have the power to ask for that opinion. Rosielyn Pulmano, staff person from the Senate Business, Professions and Economic Development Committee, stated that legislative counsel had spoken with the Department of Consumer Affairs chief legal counsel and had indicated verbally that in her opinion the standards are mandatory. Ms. Shellans asked if anyone from the legislative counsel was going to draft a written opinion for the Legislature. Ms. Pulmano stated yes. Ms. Pulmano stated that if you look at the legislative analysis of SB 1441, it was the intent of the Legislature that when they said "use" it meant to "apply" those standards for each licensee who is in diversion or who is on probation for substance abuse. She further stated that it is the verbal opinion of legislative counsel that Section 315.4, although included in authorization, cannot be read exclusively of the 315 requirements which are that the standards are mandatory.

Mr. Afriat, Board member, questioned Ms. Pulmano regarding her statement that the standards are mandatory when the legislation does not actually reference these standards as mandatory. He further explained that while it may have been the intent of the Legislature, no one can really know what the intent of all four Senators and the legislators who voted for this bill was. They may have all had different interpretations. Mr. Afriat also asked Ms. Pulmano, why those in the Legislature who thought it was important to make these guidelines mandatory, thought that was better public policy. Ms. Pulmano commented that some of the guidelines are indeed discretionary. There is

discretion built into the guidelines such as how many times a licensee must be tested and how often. There are exceptions to the requirements which allow discretion. Dr. Bettinger stated that he is troubled by the differences in the legal opinions. Ms. Pulmano stated that in closing, she would like to say that Section 3.5 of Article 3 in the California Constitution provides that:

“An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;.....”

Mr. Afriat asked Ms. Pulmano if it was her position, based on what she just stated, that if the Board follows the advice of their Legal Counsel they would be invalidating the ordinance or is it possible that the Board’s Legal Counsel is reading the ordinance and giving her best interpretation of it? He questioned if it was possible that the ordinance wasn’t written as well as it should have been. Ms. Pulmano stated that from their perspective, they believe that the discretion is inconsistent with the original intent of the statute. Dr. Witcher asked Ms. Pulmano if there was an outstanding legislative opinion that was still due. She replied that their Senator is contemplating that opinion and he will make that determination when they return from recess. Dr. Witcher stated that the Board may want to hold off until that opinion is rendered. Fran Burton stated that for purposes of full disclosure, because the Director was there, she asked if there was anything he wanted to lend to the conversation.

Brian Stiger, Acting Director of the Department of Consumer Affairs, commended the Dental Board for being so expedient in moving along with the new SB 1441 standards. He stated that there has been a lot of discussion regarding discretion. The Department’s position is that these standards are mandatory. There is built in discretion as to whether or not a particular standard applies to the individual situation but once an applicable standard is in place, there is no room for amending that standard or making it less restrictive. However, Mr. Stiger feels that the Board certainly has the discretion to make the standards more restrictive. Mr. Stiger confirmed that he and the Department’s Deputy Director of the Legal Affairs Division (Chief Legal Counsel) met with Senate Business, Professions & Economic Development Committee (Committee) representatives and their Legislative Counsel where the subject of discretion was discussed and they all agreed that the standards were mandatory.

Doreathea Johnson, Chief Legal Counsel for the Department of Consumer Affairs, commented that there seems to be some confusion centered around the question as to whether or not this statute itself, *B & P Code Section 315*, is in fact discretionary or whether or not the language in that statute requires the Board to apply the uniform standards that have been adopted by the Committee that was charged by the Legislature to adopt those standards. Ms. Johnson stated that the language “...shall use” has been interpreted by the Department to mean “to employ” the standards that have been developed by the Substance Abuse Coordination Committee (SACC). She

further explained that if the Board is going to employ the terms, the question is whether or not the Board has discretion in terms of deviating from those standards. She further stated that it's evident from the action that the Board has taken in promulgating these regulations that by stating that the standards should be followed in all cases in which a licensee is placed in a Diversion program or where the license itself has been placed on probation due to substance abuse is indicative that the Board found that all of these standards should be applied where it is applicable. She stated that there is built in discretion within the language.

Ms. Johnson stated that in terms of the discretion, there are two issues at hand: (1) the discretion that this Board has in simply promulgating regulations; and, (2) then the discretion it has in applying the statute that is the law of the state with respect to the application of those standards that have been adopted by the SACC Committee. She explained that by virtue of the fact that the Board is adopting them via the regulatory process, the standards themselves, as indicated by Ms. Pulmano, had within them a certain level of discretion. She stated that she believes that if the Board was to look at standards 1, 2, 5 and 7, they clearly allow the Board discretion in terms of whether or not they are applicable in that situation, based on the facts that you have at that time. Ms. Johnson stated that the Board is not abdicating their discretion in determining ultimately what is applicable and what is not. Ms. Johnson stated that she agrees with Ms. Pulmano in the rendering of the oral opinion by Legislative Counsel and she also agrees with Dr. Witcher that it might be best to wait until they have that opinion before making such an important decision.

Mr. Afriat stated that he is troubled by the word "standards." He stated that using the word "standards" implies that there is no room for discretion whereas if the word "guidelines" was used it would convey a more discretionary approach. Mr. Stiger responded that when the SACC Committee was first formed the standards were initially called "guidelines". It wasn't until the final adoption that the wording was changed to convey the intent that they are to be used as written by every Board. He further stated that the development of the guidelines/standards was done by enforcement experts from every Board along with the Executive Officers. Mr. Stiger commented that the primary goal of the Department as well as every healing arts Board is public protection and he feels that these standards are designed to do just that.

Doreathea Johnson stated that the Board should be mindful of looking at the totality of the standards so that they preserve their defensibility on either side should that become necessary.

Dr. Olinger asked if he was correct in his assumption that under these new standards, if a licensee self-referred into the Diversion program, he/she would not be allowed to practice for 30 days. Ms. Shellans answered "yes; that is correct." Dr. Olinger commented that he feels that this will effectively eliminate self-referrals and force dentists to practice in an impaired state longer potentially causing more public harm because they can't afford to be out of business for 30 days not to mention their staff being unemployed.

Ms. Shellans pointed out that the SACC Committee was comprised of the Executive Officers of all the healing arts Boards. Those officers are not charged with setting standards for the Dental Practice Act, the Dental Board is. She stated that if the Board had no discretion the Board would not be having this discussion, the standards would already have been enacted. Mr. DeCuir stated that he wonders why the Executive Officers were excluded from the meeting between the Director, the Department's Chief Counsel, the Senate Business, Professions & Economic Development Committee and their Legislative Counsel. Mr. Stiger stated that they had that meeting to be sure that the Department had a firm understanding of what the intent of the legislation was. He also stated that they wanted to make sure that it was consistent at the Department level before they moved forward with the Boards.

Mr. Stiger commended the Dental Board on its expediency and thoroughness in incorporating all of the standards into the Board's rulemaking package. He noted that there are a couple of Boards that have concerns about discretion and the Department is working to clarify that issue. Mr. Stiger stated that even if a Board felt that they had the discretion to make changes to the standards, he stated that he would hope that they would choose not to make changes and implement them as they are. Mr. Stiger stated that if a Board decides that they cannot accept the standards as they are, and they want to keep the discretion in, the Board is ultimately the final decision maker. He further stated that he hoped that the Board would include language in the package that requires the Board to articulate the reasons for making changes to those standards for transparency purposes. Kristy Shellans, Legal Counsel to the Dental Board, explained that the reasoning would be set forth in her very lengthy response to comments as to why the Board feels it has discretion. She stated that that the explanation would be in the rulemaking file if the Board agrees with that response. She framed the issues for the Board as follows: Does the Board want to act to accept this response to comment or do they not want that response to comment in? Does the Board want to accept Julianne D'Angelo Fellmeth's position that they have no discretion, and remove the language that offends her?

Mr. Afriat stated that as a Certified Addictions Counselor, he will say with confidence that if the mandatory guidelines of a 30 day suspension from practice are imposed, it will have a seriously chilling effect on people voluntarily submitting themselves for Diversion. With regard to the Legislative Counsel opinion, he stated that he is fully prepared to wait and see what that says and give the Board's Counsel an opportunity to react to that. Mr. Afriat stated that he felt that it was important to say as a Board Member who wants to support the staff, that the Executive Officer and Board Counsel are here and even though their bosses are sitting in the audience, they are presenting differing views and he appreciates that they have the freedom to do that. M/S/C (Dominicis/Afriat) that the Board wait until they have all the information including Legislative Counsel's opinion before moving forward with this issue. The motion passed unanimously.

Public comments included Rosielyn Pulmano stating that in response to the Board member's comments that were made that there was concern that some of the standards proposed might deter substance abusing licensees from self-referral or voluntarily going into the Diversion program. She noted that there was only one self referral to the Dental Board's Diversion Program last year. She added that she wanted to resonate Director Stiger's statement that it is a confidential program and no disciplinary action is taken against the licensee. However, she stated that it is the Board's responsibility to not only look out for the interests of the licensee but also protect the public.

Fran Burton asked Sarah Wallace what consequences a delay would cause. Ms. Wallace informed the Board that the rulemaking was noticed in March so the one year rulemaking deadline would be March 24, 2012. Ms. Wallace continued that if this item were tabled until November, there should still be ample time to complete the rulemaking by the March deadline. Dr. Witcher asked if the changes would be minor such as just taking out the line about discretion or more major language changes. Ms. Wallace stated that there is no proposed language at this time. Such language would have to come from the Board. Kristy Shellans stated that if the Board chooses to remove all references to discretion the language would need to be re-written and the language that says the Board has sole discretion in determining which terms and conditions shall apply would also need to be removed. Ms. Shellans stated that staff cannot come up with language without a recommendation from the Board. Mr. Stiger offered that the Department's Chief Counsel has come up with some suggested language if the Board would like to utilize it. Mr. Stiger read the Chief Legal Counsel's recommendations, as follows: ... the current language for 'Uniform Standards Related to Substance Abuse and Disciplinary Guidelines states that ...'in reaching a decision on a disciplinary action under the administrative procedures act, the Dental Board of California shall consider the Dental Board of California Uniform Standards'... one change would be; rather than saying the Dental Board of California shall 'consider", the Chief Counsel would recommend saying the Dental Board of California shall 'apply'. Additionally, the sentence beginning with ...'deviation from these guidelines and orders'... the Chief Counsel would recommend that language be stricken. Ms. Shellans stated that she would have a concern about striking that language as the Disciplinary Guidelines apply to non-substance abusing cases as well as substance abusing cases. Mr. Stiger suggested crafting some language to cover the non-substance abusing cases.

There was no further public comment.

AGENDA ITEM 3(B): Discussion and Possible Action Regarding Adoption of Proposed Amendments to Title 16, CCR, Sections 1018 and 1020.5 Regarding Uniform Standards for Substance Abusing Licensees and Disciplinary Guidelines

The Board did not take action on this agenda item because agenda item 3(A) relating to the Board's response to comments received was tabled until further clarification regarding the authorizing statute was received from Legislative Counsel. M/S/C (Afriat/Olinger) to table Agenda Item 3(B). The motion passed unanimously.

The Board returned to Committee Meetings

The full Board reconvened at 5:30 p.m.

AGENDA ITEM 4: Renewal Application for Universidad De La Salle. Discussion Regarding:

Dr. Dominicus immediately recused himself from any discussion and voting of this agenda item.

(1) Current Status and Review of the School's Application:

Dr. Le provided the report of the subcommittee for the renewal of approval of the University De La Salle Dental Program. Dr. Le reported that, on April 20, 2011, Dr. Bettinger appointed Dr. Morrow and herself to serve as the subcommittee to manage the application process for renewal of the Board's approval for the dental education program at University De La Salle. The subcommittee was charged with the following tasks: (1) reviewing current Board statutes and regulations relating to the renewal of foreign dental schools, (2) establish and implement the application process for the renewal of Board approval, (3) review the renewal application and identify any deficiencies, (4) notify the applicant in writing of any deficiencies and identify information needed to deem the application complete, and (5) review the completed application and determine the necessary steps needed to evaluate the re-approval of the school and provide a written report with recommendations to the Board upon completion of the review process.

Dr. Le reported that the subcommittee received the renewal application and supporting documentation from the University De La Salle School of Dentistry on May 3, 2011. The renewal application had been written mostly in Spanish and the subcommittee requested an English version. On June 17, 2011, the subcommittee received an English translation of the application; however it was not an exact translation of the first application but was complimentary. In reviewing the application, the subcommittee decided to combine both versions to obtain the necessary information. Dr. Le stated that the subcommittee met at the Board office on July 13, 2011 and deemed the application deficient and additional documents were needed for the application to be considered complete. The subcommittee sent a list of required additional documents to the school the first week in August and the school was advised to submit the needed documentation as soon as possible.

Dr. Le reported that the Board sent a preliminary budget to the University De La Salle School of Dentistry in May and the school sent a check for the estimated expenses. Board staff did not want to process the check without a completed application. Board staff is working on a new budget which will be sent to the school. Dr. Le reported that once the subcommittee receives the additional information that was requested and the application is deemed complete, the subcommittee will review the complete application and conduct a site visit of the school. Dr. Le stated that the California Code of Regulations, Title 16, Section 1024.6(a)(2) specifies the requirements for the site team. She reported that the subcommittee has assembled a preliminary list of potential

individuals who meet the specified criteria who could assist in the site team visit and will contact those people once the review of the complete application is finished.

The subcommittee thanked the Board for giving them the authority to act as its designee to move forward in the renewal process.

(2) the Board's Authority to Approve a Specified Curriculum within a School of Dentistry or Only a Dental School;

Kristy Shellans, DCA Senior Staff Counsel, explained that the Board had requested a legal opinion regarding whether the Board has authority to approve a specified curriculum within a foreign dental school or if the Board has the authority to approve the foreign dental school as an institution. Ms. Shellans reported that she reviewed the Board's statutes and regulations and it is her legal opinion that the Board has the authority to grant dental school approvals and does not have authority to grant an approval for a dental school to offer only a specified curriculum in the dental school. She stated that it is clear in the statutes and regulations that the Board's approval authority of the foreign dental school is institutional.

(3) the Board's Authority to Extend the School's Approval Pending Completion of its Review.

Ms. Shellans explained that the Board had requested a legal opinion regarding the Board's authority to extend the schools current approval for a reasonable period of time to complete its review and assessment if the Board is unable to complete the review of Universidad De La Salle's renewal application before the school's current approval expires on November 4, 2011. Ms. Shellans reported that upon review of the statutes and regulations governing the approval of foreign dental schools, the Board may interpret its authorizing statutes in a manner that allows the Board to extend the Universidad De La Salle's current approval for a reasonable period of time to complete its review and assessment of the school and its application so that the school's current approval does not expire before the Board acts on the application. The Board's regulation (CCR, Title 16, Section 1024.4) provides a time period of 225 days for the Board's review of a completed application prior to issuing a notification of approval or disapproval. Ms. Shellans recommended, in order to maintain consistency with the Board's mandate to ensure foreign dental schools are equivalent, that the Board extend the current approval for 225 days from the date of receipt of the completed application so that the Board may have enough time to conduct the site visit and make the decision to approve or disapprove the renewal application. Dr. Bettinger requested clarification if the application would have to be completed prior to the November expiration date of the current approval; Ms. Shellans clarified that if the completed application is not submitted prior to the expiration date, then the current approval would expire. The subcommittee expressed confidence that the Universidad De La Salle School of Dentistry would be able to submit a completed application with the additional information the subcommittee had requested prior to the expiration date.

Dr. Morrow stated that an application shall be considered to be complete if it appears that the institution has submitted all of the information, documents, and fees required by

this article, including any additional documents the Board may request to determine if the institution meets the minimum standards. Once the Board determines that the application is complete and meets the minimum standards the Board will notify the institution of its application approval or disapproval within two hundred twenty five (225) days. Dr. Morrow clarified that if the completed application is not received prior to the expiration date, then the current approval will expire.

Dr. Earl Johnson, member of the public, commented that the Board should request the Legislature to accept the findings of the American Dental Association International Commission on Dental Accreditation rather than require the Board to conduct the review of foreign dental schools.

M/S/C (Morrow/Olinger) to approve an extension of the currently existing approval of the Universidad De La Salle School of Dentistry for a period of time not to exceed 225 after the receipt of a completed application for renewal provided that the completed application is received prior to the November 4, 2011 expiration date of the current approval. The motion passed unanimously. Dr. Dominicis had recused himself from the discussion and vote of this agenda item.

Ms. Shellans asked the Board if it wanted to make her legal opinion regarding the Universidad De La Salle's Foreign Dental School renewal application available to the public. M/S/C (Olinger/Afriat) to make the legal opinion available to the public. The motion passed unanimously. Dr. Dominicis had recused himself from the discussion and vote of this agenda item.

There was no further public comment.

AGENDA ITEM 5: Future Dates for Board Meetings:

The Board decided upon the following meeting dates for 2012:

- Thursday, February 23, 2012 and Friday, February 24, 2012 in San Diego, California.
- Thursday, May 17, 2012 and Friday, May 18, 2012 in San Francisco, California.
- Thursday, August 16, 2012 and Friday, August 17, 2012 in Sacramento, California.
- Thursday, November 8, 2012 and Friday, November 9, 2012 in Los Angeles, California.

The Board discussed the possibility of holding a meeting in Orange Country rather than San Diego, but took no action.

There was no public comment.

AGENDA ITEM 6: Discussion and Possible Action Regarding SB 540 (Price) – Legislative Proposal for the Dental Board of California's Sunset Review:

Karen Fischer, Associate Analyst, reported that, at its May 2011 meeting, the Board directed staff to submit a letter to Senator Price indicating the Board's support of SB 540 while at the same time outlining the Board's concerns; a letter was sent to Senator Price

as directed. The bill was heard in the Assembly Business and Professions Committee on July 5, 2011 and Drs. Bettinger, Whitcher, and Ms. Fran Burton, along with staff, attended the hearing. The bill was amended on July 12th and specified that the Board be comprised of eight (8) practicing dentists, one (1) registered dental hygienist, one (1) registered dental assistant, and five (5) public members.

The bill also contained amendments relating to the five-member Dental Assisting Council. Ms. Fischer reported that staff had been notified that amendments relating to the Dental Assisting Council had been submitted to Legislative Counsel and would be made in the Assembly Appropriations Committee meeting scheduled for August 17th. Board staff expects additional amendments relating to the Dental Assisting Council's membership qualifications will be made prior to the Appropriations Committee hearing.

Ms. Fischer reported that in response to the Board's concerns relative to collecting dental assisting licensing fees, the Senate Business, Professions, and Economic Development Committee staff inserted legislative intent language into the bill stating: "It is the intent of the Legislature that any fees established by the Dental Board of California under Section 1725 of the Business and Professions Code that are in effect on December 31, 2011, continue to apply on and after January 1, 2012, until the board changes those fees by regulation, as set forth in Section 12 of this act." The Board's legal counsel maintained that the "legislative intent" language regarding the dental assisting fees may be insufficient and not legally defensible. The Senate Business, Professions, and Economic Development Committee staff maintain the language is sufficient.

Ms. Fischer reported that the bill does not contain the requested enforcement tools such as time limitations on public disclosure for citation issued for less egregious violations, Notice of Correction, and Letter of Admonishment. The language regarding sunset dates in previous versions of the bill had been taken out, and the amended language contained a sunset date of January 1, 2016.

M/S/C (Burton/Afriat) to direct staff to send a letter to the author indicating support of SB 540 as amended on July 12, 2011. The motion passed unanimously.

There was no public comment.

AGENDA ITEM 7: Discussion and Possible Action Regarding SB 544 (Price), Professions and Vocations: Regulatory Boards Relating to the Consumer Health Protection Enforcement Act:

Sarah Wallace, Legislative and Regulatory Analyst, reported that Senate Bill 544 (Price) Professions and vocations: regulatory boards was last amended on April 14, 2011 and contains enforcement changes similar to that of Senate Bill 1111 (Negrete McLeod, 2009-2010 Legislative Session) and is a two-year bill. Ms. Wallace reported that the bill contains a total of one-hundred-and-ninety-one (191) sections containing various amendment and additions to the Business and Professions Code and the Government Code. Of the one-hundred-and-ninety-one sections, there are forty (40) sections that

contain proposed amendments and additions that will directly affect the Board. These proposed amendments and additions are included in the general provisions of the Business and Professions Code applicable to the Department of Consumer Affairs and all healing arts boards, and provisions contained in the Dental Practice Act. Ms. Wallace stated that the purpose of this agenda item is to seek the Board's position on the provisions contained in SB 544 as currently amended.

Ms. Burton stated that because this is a two-year bill and amendments will most likely be made at the beginning of the 2012 Legislative year, it would be premature and inefficient for the Board to spend time taking positions on this bill at this meeting. M/S/C (Afriat/Burton) to table this agenda item until the February 2012 Board meeting. The motion passed unanimously.

There was no public comment.

AGENDA ITEM 9: Update on Pending Regulatory Packages:

A. Dental Assisting Educational Programs and Courses (*California Code of Regulations, Title 16, Sections 1070, 1070.1, 1070.2, 1070.6, 1070.7, 1070.8 and 1071*)

Sarah Wallace, Legislative and Regulatory Analyst, reported that the final rulemaking file was submitted to the Director of the Department of Consumer Affairs (Department) on May 26, 2011. A 90-day extension was granted as authorized in Business and Professions Code Section 313.1. She reported that the final rulemaking file is required to be approved by the Director of the Department, the Secretary of the State and Consumer Services Agency (Agency), and the Director of the Department of Finance (Finance). Staff has requested an expedited review and anticipates this process may take 30 to 60 days. Once the approval signatures are obtained, the rulemaking will be submitted to the Office of Administrative Law. The Office of Administrative Law will have 30 working days to review the file. Once approved, the rulemaking will be filed with the Secretary of State and will become effective 30 days later. The deadline to submit the final rulemaking to the Office of Administrative Law is August 30, 2011.

B. Minimum Standards for Infection Control (*California Code of Regulations, Title 16, Section 1005*)

Ms. Wallace reported that the final rulemaking file was submitted to the Office of Administrative Law on June 10, 2011. The regulatory file was approved by the Office of Administrative Law and filed with the Secretary of State on July 21, 2011 and the regulation is effective on August 20, 2011.

C. Consumer Protection Enforcement Initiative (*California Code of Regulations, Title 16, Sections 1018.05 and 1020*)

Ms. Wallace reported that the final rulemaking file was submitted to the Director of the Department on June 13, 2011. The final rulemaking file is required to be approved by the Director of the Department, the Secretary of Agency, and the Director of Finance. Once the approval signatures are obtained, the rulemaking will be submitted to the

Office of Administrative Law. The Office of Administrative Law will have 30 working days to review the file. Once approved, the rulemaking will be filed with the Secretary of State and will become effective 30 days later. The deadline to submit the final rulemaking to the Office of Administrative Law is February 17, 2012.

D. Uniform Standards Relating to Substance Abusing Licensees and Disciplinary Guidelines (*California Code of Regulations, Title 16, Sections 1018 and 1020.5*)

Ms. Wallace reported that the Board, at its February 25, 2011 meeting, discussed and approved proposed regulatory language relative to the uniform standards relating to substance abusing licensees and Disciplinary Guidelines. The Board directed staff to initiate a rulemaking. Ms. Wallace stated that the initial rulemaking file was submitted to the Office of Administrative Law on March 11, 2011. The proposed action was published on March 25, 2011 and was noticed on the Board's web site and mailed to interested parties. The 45-day public comment period began on March 25, 2011 and ended on May 9, 2011. The regulatory hearing was held on May 10, 2011. The Board received oral testimony from the California Dental Association and written comments from the Center for Public Interest Law. The Substance Abuse Coordination Committee (SACC) met on April 11, 2011 and revised requirements contained in the *Uniform Standards Relating to Substance-Abusing Healing Arts Licensees*. Ms. Wallace reported that the Board voted to table the response to comments received during the 45-day public comment period until a legal opinion is received from Legislative Counsel regarding the Board's discretion relative to mandatory probation conditions.

E. Sponsored Free Health Care Events (*California Code of Regulations, Title 16, Sections 1023.15, 1023.16, 1023.17, and 1023.18*)

Ms. Wallace reported that the Board, at its February 25, 2011 meeting, discussed and approved proposed regulatory language relative to sponsored free health care events. The Board directed staff to initiate a rulemaking. Staff is currently drafting the initial rulemaking documents and will be filing the proposed regulation with the Office of Administrative Law in the near future.

Public Comment:

There was no public comment.

Recess:

The Board recessed at 6:27 p.m.