

State of California

State and Consumer Services Agency

## MEDICAL BOARD OF CALIFORNIA

April 25-26, 2013



<b>Executive Committee</b>	<b>April 25</b>	<b>8:00 am – 9:30 am</b>
<b>Panel A</b>	<b>April 25</b>	<b>9:30 am – 12:30 pm</b>
<b>Panel B</b>	<b>April 25</b>	<b>10:30 am – 12:30 am</b>
<b>Enforcement Committee</b>	<b>April 25</b>	<b>1:30 pm – 3:00 pm</b>
<b>Full Board</b>	<b>April 25</b>	<b>3:00 pm – 5:30 pm</b>
<b>Application Review Committee</b>	<b>April 26</b>	<b>8:30 am – 9:00 am</b>
<b>Full Board</b>	<b>April 26</b>	<b>9:00 am – 3:00 pm</b>



# MEDICAL BOARD OF CALIFORNIA

## ENFORCEMENT COMMITTEE MEETING AGENDA



### MEMBERS OF THE ENFORCEMENT COMMITTEE

*Reginald Low, M.D., Chair*  
*Dev GnanaDev, M.D.*  
*Sharon Levine, M.D.*  
*David Serrano Sewell, J.D.*  
*Gerrie Schipske, R.N.P., J.D.*  
*Barbara Yaroslavsky*

Hilton LAX  
Los Angeles Room  
5711 W. Century Boulevard,  
Los Angeles, CA 90045  
(310) 410-4000 (directions only)

**Thursday, April 25, 2013**

**Enforcement Committee**  
**1:30 pm – 3:00 pm**  
(or until the completion of business)

*Action may be taken  
on any item listed  
on the agenda.*

*While the Board intends to webcast  
this meeting, it may not be possible  
to webcast the entire open meeting  
due to limitations on resources.*

**ALL TIMES ARE APPROXIMATE AND SUBJECT TO CHANGE.**

**If a quorum of the Board is present, members of the Board who are not members  
of the Committee may attend only as observers.**

1. Call to Order / Roll Call
2. Public Comment of Items Not on the Agenda  
*Note: The Committee may not discuss or take action on any matter raised during this public comment section that is not included on this agenda, except to decide to place the matter on the agenda of a future meeting. [Government Code §§11125, 11125.7(a)]*
3. Approval of Minutes from January 31, 2013 Meeting
4. Update on Expert Reviewer Training – Ms. Sweet
5. Discussion and Consideration of Proposal to Increase Expert Reviewer Hourly Rate upon Completion of the Expert Reviewer Training Program – Ms. Sweet
6. Discussion on History of Efforts to Improve Retention by Enhancing the Investigator Classification and Consideration on Another Examination to Improve Retention – Ms. Threadgill
7. Discussion of Priorities Established in Business and Professions Code section 2220.05 – Ms. Cady
8. Discussion of Workers' Compensation Utilization Review Process; Investigation of Complaints – Ms. Cady and Mr. Heppler

9. Establishment of a Task Force to Develop and Address Best Practices Related to Prescribing Controlled Substances to Relieve Pain and Examine MBC Guidelines – Dr. Low
10. Discussion of MBC Efforts to Implement SB 1441 Uniform Standards – Ms. Cady
11. Agenda Items for July 2013 meeting
12. Adjournment

*The mission of the Medical Board of California is to protect healthcare consumers through the proper licensing and regulation of physicians and surgeons and certain allied healthcare professions and through the vigorous, objective enforcement of the Medical Practice Act, and to promote access to quality medical care through the Board's licensing and regulatory functions.*

*NOTICE: The meeting is accessible to the physically disabled. A person who needs a disability-related accommodation or modification in order to participate in the meeting may make a request by contacting Lisa Toof at (916) 263-2389 or email [lisa.toof@mbc.ca.gov](mailto:lisa.toof@mbc.ca.gov) or send a written request to Lisa Toof at the Medical Board of California, 2005 Evergreen Street, Ste. 1200, Sacramento, CA 95815. Providing your request at least five (5) business days before the meeting will help ensure availability of the requested accommodation.*

*Meetings of the Medical Board of California are open to the public except when specifically noticed otherwise in accordance with the Open Meeting Act. The audience will be given appropriate opportunities to comment on any issue presented in open session before the Board, but the President may apportion available time among those who wish to speak.*

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*For additional information, call (916) 263-2389.*



# MEDICAL BOARD OF CALIFORNIA



## ENFORCEMENT COMMITTEE

Embassy Suites San Francisco Airport  
Mendocino & Burlingame  
150 Anza Boulevard  
Burlingame, CA 94010

January 31, 2013

## MINUTES

*Due to timing for invited guests to provide their presentations, the agenda items below are listed in the order they were presented.*

### **Agenda Item 1      Call to Order / Roll Call**

Dr. Low called the Enforcement Committee meeting to order on January 31, 2013 at 1:15 p.m. A quorum was present and notice had been sent to interested parties.

### **Members Present:**

Reginald Low, M.D., Chairman  
Dev GnanaDev, M.D.  
Sharon Levine, M.D.  
Ms. Barbara Yaroslavsky

### **Members Absent:**

David Serrano Sewell, J.D.

### **Staff Present:**

Douglas Becker, Investigator  
Susan Cady, Enforcement Manager  
Dianne Dobbs, Department of Consumer Affairs, Legal Counsel  
Tim Einer, Administrative Assistant  
Kurt Heppler, Staff Counsel  
Todd Iriyama, Investigator  
Kimberly Kirchmeyer, Deputy Director  
Natalie Lowe, Licensing Manager  
Armando Melendez, Business Services Analyst  
Regina Rao, Business Services Analyst  
Kevin Schunke, Outreach Manager  
Jennifer Simoes, Chief of Legislation  
Melinda Sundt, Investigator  
Laura Sweet, Deputy Chief of Enforcement  
Renee Threadgill, Chief of Enforcement  
Lisa Toof, Administrative Assistant  
Tracy Tu, Investigator  
Linda Whitney, Executive Director  
Curt Worden, Chief of Licensing

**Members of the Audience:**

Teresa Anderson, California Academy of Physician Assistants  
G.V. Ayers, Consultant, Senate Business, Professions, and Economic Development Committee  
Steve Cattolica, California Society of Physical Medicine and Rehabilitation  
Yvonne Choong, California Medical Association (CMA)  
Zennie Coughlin, Kaiser Permanente  
Kristen Chambers, Kaiser Permanente  
Hank Dempsey, Chief Consultant, Assembly Business, Professions and Consumer Protection Committee  
Karen Ehrlich, L.M., Midwifery Advisory Council  
Julie D'Angelo Fellmeth, Center for Public Interest Law (CPIL)  
Jack French, Consumers Union CA Safe Patient Network  
Doreathea Johnson, Deputy Director for Legal Affairs, Department of Consumer Affairs  
Terry Jones, Supervising Deputy Attorney, Office of the Attorney General  
Tina Minasian, Consumers Union CA Safe Patient Network

**Agenda Item 2      Public Comments on Items Not on the Agenda**

Steve Cattolica, Director of Government Relations for the California Society of Physical Medicine and Rehabilitation, the California Neurology Society and the California Society for Industrial Medicine and Surgery stated that since 2008 their clients have introduced legislation that would establish that utilization review physicians must be licensed in California before providing such reviews. Utilization review decisions made in the vacuum of accountability present a problem of growing proportions. His organization requests that the Medical Board of California (Board) place the issue of utilization review as a practice of medicine and the Board's jurisdiction over licensed utilization review physicians on the agenda for the next meeting.

Yvonne Choong, CMA, requested that the issue of utilization review and the Board's jurisdiction be placed on the next agenda for the Enforcement Committee and the full Board meeting. The CMA agrees with the Board's previous position that a decision to delay, modify or deny medical treatment is the practice of medicine and that the Board has jurisdiction over this act. Ms. Choong indicated that the CMA would like know more about how the Board intends to enforce this position. CMA sees this as three issues that need clarification: 1) whether the Board believes it is the practice of medicine, 2) whether the Board has jurisdiction and 3) what policy or resource changes would need to be made in order to provide the resources that would allow the Board to fully investigate these types of violations.

**Agenda Item 3      Approval of Minutes from the July 19, 2012 Meeting**

*Dr. Gnanadev made a motion to approve the minutes from the July 2012 meeting; s/Dr. Salomonson; motion carried.*

**Agenda Item 4      Update on the Expert Reviewer Training**

Laura Sweet stated the second Expert Reviewer Training was scheduled to be held Saturday, February 9, 2013 at University of California – Irvine. She stated the response from this training has been overwhelming. The Board has made modifications to the training and have allocated two additional continuing medical education credits for a total of ten credits for each participant. At this training the expert reviewers are going to be preparing a sample expert opinion that will be graded. Teams that consist of a Supervising Deputy Attorney General, Supervising Investigator II, and a Medical Consultant will grade the actual opinions to make certain that the training is effective.

Ms. Yaroslavsky questioned the make-up of the experts who are attending. She questioned whether they are current experts, Board experts, or are they people that want to become experts.

Ms. Sweet responded that the attendees are current experts in the Board's Expert Reviewer program.

Ms. Yaroslavsky asked if the training might become a requirement in order to be an expert reviewer for the Medical Board.

Ms. Sweet stated that would be ideal.

#### **Agenda Item 5 Central Complaint Unit Progress Report**

Susan Cady stated that the Central Complaint Unit (CCU) had identified goals for improving case aging. She pointed out that previously it took on average 80 days to process a complaint; however, by focusing on shorter time frames to obtain an initial medical consultant review, the average number of days has been reduced by 20. In addition, consultants have been added which helps reduce the time in assigning a case and therefore, the number of days that a case is pending prior to assignment to a consultant has been reduced from 30 days to 7 days. Additionally, no more than two cases are assigned to each consultant which allows for a faster turnaround. The staff also does a follow-up to confirm that the consultants are on track to complete the case within the 30 day timeline. A medical transcription service has been contracted and the amount of time required for case initiation has been reduced from ten to five days. The managers in the CCU continue to monitor the status of ongoing cases to ensure that any obstacles are identified and addressed quickly which has allowed the Board to significantly reduce the average case aging time and meet the goals set in the strategic plan.

Dr. GnanaDev questioned the need for 30 days for the medical consultant to respond.

Ms. Cady responded that sometimes the Board has difficulty finding experts in particular practice specialties and that allowing up to 30 days allows the cases to keep moving. She pointed out that most consultants do not use the 30 days to conduct the review.

Dr. Low suggested that the time line be shortened to two weeks.

#### **Agenda Item 6 SB 1441 Uniform Standards Implementation**

Ms. Cady explained that SB 1441 required the Department of Consumer Affairs (DCA) to establish Uniform Standards regarding substance abusing licensees. She continued that within those uniform standards they focus mainly on two main areas, intake and how licensees are monitored as they come into probation and compliance. Ms. Cady directed the Committee Members to a chart in the Committee packet outlining the Uniform Standards and the Board's implementation.

Uniform standard number one states that the licensees must undergo a clinical diagnostic evaluation and must comply with any recommendations for treatment or restriction. Under the Board's current disciplinary guidelines, when a physician is placed on probation for a substance abuse issue, usually a psychiatric evaluation and a medical evaluation are ordered. These conditions can be ordered as a precedent condition, which means the physician will be suspended from practicing until these evaluations have been completed. This is consistent with the standard developed by the DCA.

The Probation Unit uses experts that have addiction medicine specialties or expertise to perform their initial assessments. The Board's standard language also allows the Board to order another evaluation whenever deemed necessary which is consistent with DCA's guidelines.

Ms. Cady pointed out that at least half of the standards in SB 1441 pertained to boards with an existing diversion program, which the Board does not have. The remaining standards are substantially covered in the Board's disciplinary guidelines for physicians who are placed on probation. Standards 2, 4, and 8 through 10 focus on monitoring for compliance and biological fluid testing. Biological fluid testing is started as soon as the physician is placed on probation and the probation unit uses the testing frequency recommended by DCA in Standard 4. If a physician tests positive for a "banned" substance, the Board has the authority to issue a cease practice order for 15 days which is consistent with Standard 8. DCA's Standards 9 and 10 address the penalty that should be contemplated for a positive test. The Board has opted to refer the matter for a formal investigation to determine if an Interim Suspension Order (ISO) or subsequent disciplinary action is warranted when this occurs.

Ms. Yaroslavsky asked for clarification of the process and the allotted timeframe.

Ms. Cady explained that one circumstance that could arise during probation might be that the physician is required to call in daily to the First Lab if they are required to have biological fluid testing. The Board is able to check daily to determine if the licensee has called in and can check on the reason for them not reporting which allows a quick response in terms of missed calls. She also pointed out that if there is a positive test result, the Board would need to check to see if it is related to the physician's lawful prescription. If there is no explanation for the positive test, the Board initiates a case and will send it out for investigation immediately.

Ms. Yaroslavsky asked for clarity regarding the disciplinary guidelines. She wanted to know the time frame for obtaining the medical and psychiatric evaluation and whether the Board designates the evaluator.

Ms. Cady stated that all the time frames for all of these conditions are in the disciplinary guidelines. Typically the evaluation has to be done within the first 30 days of probation.

Dr. GnanaDev questioned the guidelines from DCA that the licensee must cease practice and obtain another clinical evaluation and wanted to know how often does the Board use the cease practice order.

Ms. Cady stated the disciplinary guidelines allow the Board to issue a cease practice order and the time frames are identified in the disciplinary guidelines. A cease practice order can be issued for 15 days and after that it is similar to the timeframe for an ISO, in that there must be an investigation, and the Board must be prepared to file an Accusation within 15 days of the issuance and go to hearing within 30 days from a request for a hearing. If the Board does not file an Accusation within 15 days, then the cease practice order is dissolved and then the Board would need to file an ISO to keep the physician from practicing. The Board does try to rule out any false positives before it takes the steps necessary to remove a physician from practice.

Ms. Yaroslavsky asked for number of cease practice orders that have been issued and if any ISOs were also issued.

Ms. Cady replied that the disciplinary guidelines that authorize the cease practice just went into effect

January 1, 2012. Ms. Cady stated that to the best of her knowledge the Board has not issued any cease practice orders based solely on a positive test yet.

Public comment was received for this agenda item.

Tina Minasian, Consumers Union Safe Patient Project, stated that substance abusing physicians pose a significant risk to patients, who typically are unaware of the physician's problem. When these issues come before the Board, the matter should be addressed through a comprehensive and predictable process that is publicly transparent and has integrity. In 2008 the Legislature passed and the Governor signed SB 1441 establishing a Substance Abuse Coordination Committee (SACC) within the DCA. In April 2011 the committee finalized the SB 1441 uniform standards regarding substance abusing healing arts licensees. These uniform standards are to be used by all of DCA's healing arts boards in addressing substance abusing providers. The Legislative Counsel, the Office of the Attorney General, and the DCA each issued opinions unequivocally stating that the standards are mandatory. The standards must be used by the healing arts boards. Ms. Minasian stated that despite this the Board has not yet adopted all of the uniform standards.

Ms. Minasian stated SB 1441 was explicit that these are uniform standards and the lack of diversion programs is not an acceptable excuse for not implementing the standards. It is not within the discretion of the Board to fail to implement the uniform standards. The following are some examples of the requirements in the uniform standards that Ms. Minasian believed are important but do not find in the Board's adopted guidelines. Uniform Standard 2 states that while awaiting results of a diagnostic evaluation the licensee be randomly tested at least two times per week and that a licensee cannot return to practice until he or she has at least 30 days of negative drug testing. Uniform Standard 4 states that when the licensee is on probation, a minimum range of random testing is required of 52-104 times in the first year of probation and 36-104 in the second year and each year thereafter. In addition, this standard states that the licensee make daily contact to determine whether drug testing is required, requires specific training or certification for specimen collectors and that collectors adhere to US Department of Transportation Specimen Collection guidelines, and that laboratories be certified and accredited by the US Department of Health and Human Services.

Ms. Minasian urged the Board to comply with the requirements of SB 1441 and to implement the full uniform standards immediately.

Julie D'Angelo Fellmeth, CPIL, agreed with Ms. Minasian and stated despite what the chart appears to indicate the Board has not properly implemented the Uniform Standards. She explained that Business and Professions Code Section 315 required each healing arts board to use the Uniform Standards in dealing with substance abusing licensees, whether or not a board chooses to have a formal diversion program. She stated the Board's approval of the regulations for the Board's disciplinary guidelines occurred in January 2011 before the Uniform Standards were even finalized in April 2011. Therefore, the full and correct version of the Uniform Standards was not approved and section 1361 of Title 16 of the California Code of Regulations only refers to the Board's disciplinary guidelines that are discretionary. Ms. Fellmeth stated the language does not refer to the Uniform Standards and no Board regulation refers to or incorporates the full Uniform Standards. Section 1361 says that deviation from disciplinary guidelines is appropriate in the discretion of the Board, which is true for the disciplinary

guidelines, but it is not true for the Uniform Standards and three different legal opinions state they must be used.

Ms. Fellmeth added the DCA Director directed all boards to adopt a regulation that clearly requires each board to use the Uniform Standards in mandatory fashion when dealing with a substance abusing licensees. In addition, the regulations requiring use of the Uniform Standards in substance abuse cases should be separate from the Board's disciplinary guidelines regulations. Lastly, Ms. Fellmeth stated the Board has neither adopted such a regulation nor properly incorporated into its disciplinary guidelines all of the Uniform Standards required to use when dealing with substance abusing licensees. SB 1441 applies to all healing arts boards regardless of whether they have a formal diversion program for substance abusing licensees or not.

Ms. Fellmeth urged the Board to initiate a rule making process to adopt a new regulation, separate and apart from the discretionary disciplinary guidelines regulations requiring the SB1441 Uniform Standards in substance abuse cases.

Doreatha Johnson, Chief Counsel and Deputy Director for Legal Affairs at DCA stated she wanted to reiterate what was stated by the two previous speakers. The DCA agrees with respect to the fact that the implementation plan that has been proposed to the Enforcement Committee of the Board did not take into consideration the mandate that was placed on the DCA and on each of the healing arts boards. The SB 1441 standards apply to all of the boards and the implementation plan that has been proposed does not take that into consideration. Ms. Johnson stated there was a great deal of confusion at the inception of this implementation and the passage of SB 1441. In an effort to mitigate that confusion a request for a legal opinion was requested of both the Legislative Counsel and the Attorney General's Office. The opinions were consistent to the extent they said it was mandated that the Uniform Standards be applied across all boards uniformly. This uniform application has not been done by the Board. The DCA understands the Board took action with regards to the disciplinary guidelines prior to the completion of the process by the SACC, but there was an expectation that the Board would go back and amend its disciplinary guidelines and regulations to fully implemented the SB 1441 Uniform Standards. Ms. Johnson requested that this matter be referred back to the Enforcement Committee so that it can promulgate regulations that fully implement the standards set forth in SB 1441.

**Agenda Item 7      Update on Outreach Proposal to Medical Societies**

No discussion occurred on this agenda item and the matter was tabled.

**Agenda Item 8      Agenda Items for the April 2013 Meeting**

Dr. Low requested the utilization review issue and the Board's compliance with SB1441 be on the next agenda.

Ms. Yaroslavsky requested an explanation as to how experts are assigned to a case and how Board staff matches the specialty to the case.

Dr. Low requested not only a discussion on assigning expert reviewers, but also the medical consultant and the entire process.

Ms. Yaroslavsky requested that a discussion be held as identified in the Board's Strategic Plan on the current laws and their relevance to the practice of medicine in today's atmosphere. She believes that some laws may be outdated or need amending.

Dr. Low stated he believe this is beyond the scope of the Enforcement Committee.

Ms. Yaroslavsky wanted to know how the Board interprets the priority that is set up in legislation on the deployment of resources.

**Agenda Item 9          Adjournment**

There being no further business, the meeting was adjourned at 2:31 p.m.

The full meeting can be viewed at:

<http://www.youtube.com/watch?v=GN2PzUgpFMQ&list=PL6Up7Y6dOLoq7KBLYiat7q5d6uyhCVfob&index=1>

**MEDICAL BOARD ENFORCEMENT REPORT**

DATE REPORT ISSUED: April 4, 2013  
DEPARTMENT: Enforcement Program  
SUBJECT: Expert Reviewer Reimbursement Rate  
STAFF CONTACT: Laura Sweet

REQUESTED ACTION:

Direct staff to prepare a Budget Concept Proposal in order to increase compensation for expert reviewers.

STAFF RECOMMENDATION:

Recommend a Budget Concept Proposal be prepared in order to increase expert reviewer compensation to \$200.00 per hour for record review and report writing and \$250.00 per hour for testifying for all specialties except for neurosurgery. In neurosurgery cases, recommend compensation be increased to \$300.00 per hour for record review and report writing and \$400.00 per hour for testimony. This increased scale of pay will only be provided to experts who have attended the 8-hour training course for expert reviewers and who have successfully prepared a sample expert opinion.

EXECUTIVE SUMMARY:

The expert reviewer program is among the most critical aspects of the enforcement program. A poorly considered and articulated expert opinion can result in decreased public protection. Such an opinion can result in charges not being filed against a physician who has violated the Medical Practice Act; can result in charges being filed that ultimately cannot be supported; or can result in an accusation being dismissed if the expert cannot adequately testify in a manner to support the opinion rendered. To ameliorate these problems, 8 hours of formal, interactive training was instituted in May 2012. The objective of the course is to improve the quality of the opinions received, improve testifying skills, and improve statewide uniformity. Experts are compensated for their attendance at this training with CME credits (10 currently). Experts are also asked to prepare a sample expert opinion where specific feedback is then provided.

Ideally, an expert should have completed this training and provided a satisfactory sample expert opinion prior to being utilized in a “real” case to ensure public protection will not be compromised by an untrained individual rendering such an important product. This vetting process, to date, has not been feasible due to the notoriously below-market rate of payment the board issues to its experts.

During calendar year 2011, the expert reviewer program requested feedback from experts via questionnaires and received consistent responses regarding the low pay. The following are some of the comments taken, verbatim, regarding reimbursement:

- “Rate increase for time, as this is time spent away from family or other cases. My usual minimum rate is \$350/hr. to 500/hr. Understanding the importance of MBC review, a rate of \$250/hr. would be much more reasonable + allow for faster reviews.”
- “The reimbursement rate is quite low in comparison to the private market – since it is a service the value should likely come closer to the difference of these two extremes! i.e. \$350/hr.”
- “The pay is low compared with other professional activities, but I am willing to continue, as it is a necessary service.”
- “I think reimbursement should be higher --- comparable to medical-legal review reimbursement.”
- “Although I feel that my time and experience are worth much more than \$150/hr, and I am certainly more handsomely rewarded in my work on med-mal cases, I am willing to work for the MBC at far less than my med-mal. rate because I am aware of the limitations imposed by state budgetary constraints.”
- “Pay is significantly below average.”
- “The work is difficult and I think the hourly reimbursement is too low.”
- “Median rate for medico-legal evaluations for neurosurgeons is \$500-\$800/hr. While I understand MBC cannot pay this rate, there would be more willingness to participate if rate (sic) were a little higher.”

The Board has had significant difficulty procuring neurosurgery experts as evidenced by the few experts available in this specialty to review cases. Currently, after recruiting using articles in the *Newsletter*, the *American Board of Neurosurgeon’s Newsletter* and by corresponding with academic institutions, the Board has a total of 9 experts. It is also nearly impossible to get an expert review turnaround in 30 days for neurosurgery cases; typically it is closer to 60 days (and sometimes longer).

The Board cannot hope to amass a pool of qualified, vetted experts unless it is willing to pay more for its deservedly high expectations. A physician’s time is a precious resource and the rate of compensation must reflect this reality.

The Board has instituted a training program to ensure the experts know and understand the requirements. Those who have attended should have their pay scale increased as they have taken the time in addition to volunteering to spend an 8 hour day on the weekend obtaining extra training in the review process.

FISCAL CONSIDERATIONS:

Please see attached spreadsheet.

PREVIOUS MBC AND/OR COMMITTEE ACTION:

Expert reviewers for the Board were initially paid, in 1994, \$75.00 per hour to review materials and prepare a report and \$100.00 for testimony. In April 2001, the rate was increased to \$100.00 per hour to review materials and write a report and \$200.00 per hour for testimony. In October 2007, rates increased to \$150 per hour for record review/report writing and remained at \$200.00 per hour for testimony.

**MEDICAL BOARD EXPERT REVIEW RATES  
PROPOSED NEW RATES**

TYPE OF SERVICE	CURRENT RATES	CURRENT ANNUAL EXPERT EXPENSES FY 2011/2012 DATA	PROPOSED RATE INCREASE BY	PROPOSED NEW RATES	PROPOSED ANNUAL EXPERT EXPENSES	DIFFERENCE	% INCREASE OF EXPERT EXPENSES FROM PREVIOUS FY
<b>*REVIEW/REPORT CASE REVIEW NEUROSURGERY ONLY</b>	\$ 150/HR	\$ 33,000	\$ 150/HR	\$ 300/HR	\$ 66,000	\$ 33,000	100
<b>TESTIFYING NEUROSURGERY ONLY</b>	\$ 200/HR	\$ 1,600	\$ 200/HR	\$ 400/HR	\$ 3,200	\$ 1,600	100
<b>*REVIEW/REPORT CASE REVIEW ALL OTHER SPECIALTIES</b>	\$ 150/HR	\$ 1,276,000	\$ 50/HR	\$ 200/HR	\$ 1,702,000	\$ 426,000	33
<b>TESTIFYING ALL OTHER SPECIALTIES</b>	\$ 200/HR	\$ 60,750	\$ 50/HR	\$ 250/HR	\$ 76,000	\$ 15,250	25

\*INCLUDES THE FOLLOWING ACTIVITY CODES:

R-RECORD REVIEW/REPORT PREPARATION

RPC – CASE REVIEW/QUESTION DEVELOPMENT FOR PC EXAM

PC – PROFESSIONAL COMPETENCY EXAM

AG – CONFERENCE WITH DEPUTY ATTORNEY GENERAL

MC –PHONE/PERSONAL DISCUSSION WITH DISTRICT MEDICAL CONSULTANT OR INVESTIGATOR

**MEDICAL BOARD ENFORCEMENT REPORT**

DATE REPORT ISSUED: April 5, 2013  
DEPARTMENT: Enforcement Program  
SUBJECT: Investigator Recruitment and Retention Incentives  
STAFF CONTACT: A. Renee Threadgill

**REQUESTED ACTION:**

Direct Staff to pursue recommended incentives designed to attract and retain Medical Board Investigators.

**STAFF RECOMMENDATION:**

Staff recommends the following:

- Seek Training Officer differential for staff when engaged in training activities such as, Field Training Officer, Rangemaster, Defensive Tactic Instructor, and other formal training assignments.
- Seek Geographic pay differentials for staff living in Los Angeles.
- Work with the Department of Consumer Affairs to amend the specifications for the investigator classification series to expand the subject areas of the degrees accepted for admission to the examination.

**EXECUTIVE SUMMARY:**

The Chairman of the Enforcement Committee asked for a report detailing efforts the Board has undertaken to address the recruitment and retention of Medical Board investigative staff. As previously reported, the turnover of investigative personnel is a chronic problem and one that is not easily remedied. Many reasons for investigator turnover can be cited including:

- Medical Board investigators receive extensive specialty training from the Medical Board and as a result are constantly being recruited by other state law enforcement agencies, especially in the competitive Southern California area.
- The Medical Board is unable to compete with other state agencies that offer as much as \$200 extra per month to offset cost of living in high cost areas.
- The attraction of less complicated cases offered by other state agencies.
- Entry level requirements include a degree in Criminal Justice. This is extremely narrow and should be broadened to include other degrees.

**FISCAL CONSIDERATIONS:**

To be determined.

**PREVIOUS MBC AND/OR COMMITTEE ACTION:**

The following attachment provides chronology of efforts to address the recruitment and retention of Medical Board investigative staff.

# MEDICAL BOARD OF CALIFORNIA ENFORCEMENT PROGRAM

## CHRONOLOGY OF EFFORTS TO ENHANCE INVESTIGATOR CLASSIFICATION

**December 1975** – the Medical Injury Compensation Reform Act passed, Board of Medical Quality Assurance (later renamed the Medical Board of California) authorized to employ investigative staff.

**February 1977** – investigators in the Department of Consumer Affairs (DCA) Division of Investigation whose principal caseload included cases for the Board of Medical Quality Assurance were transferred to the Board of Medical Quality Assurance.

**1989 – 1990 Legislative Session** – Senator Robert Presley introduced and the Legislature enacted Senate Bill 2375 (the Medical Judicial Procedure Improvement Act). The Legislation included the following intent language regarding investigator pay: “It is also the intent of the Legislature that the pay scales for investigators of the Medical Board of California be equivalent to the pay scales for special investigative agents of the Department of Justice, in order to attract and retain experienced investigators.”

**June 1990** – DCA analyzed the duties and responsibilities of employees in the Special Investigator Series with the Department of Alcoholic Beverage Control, Department of Insurance, Department of Motor Vehicles (DMV), and the Department of Justice (DOJ); found that DCA investigator’s duties most closely compared to those of the DOJ Attorney General Investigator.

**March 22, 1991** – DCA signed a Budget Change Proposal (BCP) for Fiscal Year 1991-92 for the Medical Board, to facilitate implementation of SB 2357 (Presley).

**April 9, 1991** – the State Personnel Board (SPB) established the new series for Investigator, DCA, which provided for a 10% increase over the Special Investigator Series.

**May 1, 1994** – DPA granted recruitment and retention pay to employees within the Special Investigator Series at the DMV (Los Angeles County) and the Employment Development Department (Los Angeles County).

**April 1, 1995** – DPA granted recruitment and retention pay to employees within the Department of Health Services.

**July 1995** – MBC submitted a request to the DCA for a \$200 retention pay in Los Angeles County.

**September 7, 1995** – DCA, on behalf of the MBC, submitted a request for recruitment and retention pay to the DPA.

**October 6, 1995** – The September 7, 1995 request was retracted and modified, then resubmitted to the DPA as a request for recruitment and retention pay differential for the Investigator, DCA Series, which included DOI and Dental Board of California investigators.

**January 16, 1996** – DPA denied the October 6, 1995 request.

**April 2, 1996** – Letter from Ron Joseph to DPA requesting approval of a \$200 recruitment and retention differential for MBC offices located in Los Angeles Glendale, Torrance, Woodland Hills, and Diamond Bar), as a necessary interim measure to maintain MBC's business operations.

**October 7, 1996** – DPA denied the April 2, 1996 request.

**December 1996** – DPA granted recruitment and retention pay to employees within the Special Investigator Series at the Department of Social Services.

**December 1998** – DPA granted recruitment and retention pay to employees within the Special Investigator Series at the DMV (Orange and San Francisco Counties) in December 1998.

**March 17, 1999** – Letter from Ron Joseph, MBC Executive Director, to Kathleen Hamilton, DCA Director, requesting that the DCA submit a request to the DPA to pursue including, in any negotiations with Bargaining Unit 7, (1) the establishing a lump sum (cost of living) incentive for MBC Investigators and Senior Investigators for positions in Los Angeles County, or establishing uniform statewide geographic pay differential for all peace officers, available to all state departments, for all locations with recruitment and/or retention difficulties, and (2) establishing a Field Training Officer pay differential for Senior Investigators at MBC.

**June 1, 1999** – DCA, on behalf of MBC, submitted MBC's March 17, 1999, request to DPA.

**July 1, 1999** – the Bargaining Unit 7 (BU7) Contract was ratified with a provision that the State and BU7 agreed to coordinate their efforts to develop a classification proposal for the Special Investigator class series.

**October 2, 2000** – Ana Facio, MBC Deputy Chief Enforcement Field Operations, submitted a Request for Approval of Proposed Legislation, to amend B&P section 2220 to include the original Legislative mandate outlined in SB 2375 to realign the pay for MBC investigators to that of DOJ Special Agent series.

**2000** – Request to *Rectify Salary Disparity as a Result of the Bargaining Unit Agreement* document written, presumably as a request for negotiations for the 2001 – 2003 BU7 contract. Document includes request to establish recruitment and retention pay differential for Investigator Assistant, Investigator, Senior Investigator, Supervising Investigator I, or Supervising Investigator II, and training officer pay differentials for specified investigator positions.

**July 1, 2001** – the Bargaining Unit 7 (BU7) Contract was ratified without establishing recruitment and retention or training officer pay differentials.

**December 1, 2001** – In an email from Tonya Blood (DCA's Labor Relations Manager) to Ana Facio, Ms. Blood wrote "Regarding your request to continue to pursue the FTO pay, unfortunately it cannot be done at this time. DPA has put a moratorium on all items that have a cost. According to DPA, FTO pay is a cost item and although small it cannot be approved at this time."

**November 6, 2002** – Board President sent letter to Governor Gray Davis seeking his support to overcome salary and differential inequities. The correspondence noted that it is troublesome and contrary to good management practices when a single employer, the State of California, allows some of its agencies to offer benefits in the same geographic area in which it is denied to other agencies.

**January 1, 2006** – The Legislature enacted Senate Bill 231 (Figueroa). Under SB 231 the MBC and the Health Quality Enforcement Section (HQES) of the Department of Justice (DOJ) were required to implement a vertical prosecution (VP) model to conduct its investigations and prosecutions. Under this legislatively defined VP model, each complaint referred to a MBC district office for investigation is simultaneously and jointly assigned to a MBC investigator and an HQES deputy. Throughout much of the legislative process, SB 231 contained a provision which specified that MBC investigators would be transferred to the DOJ, thus creating a more streamlined and centralized enforcement system to achieve the public protection goal. However, shortly before it was enacted, SB 231 was amended and this proposed transfer of investigators was deleted.

**April 12, 2007** – Memorandum from Dave Thornton to MBC Board Members, detailing the efforts the Board has taken to address the recruitment and retention of Medical Board investigative staff.

1. Working with the DCA to seek a reclassification of investigators including a salary increase, and to revise the minimum qualifications for entry level investigators,
2. Seeking full implementation of Vertical Enforcement to include the transfer of investigative staff to the DOJ, HQES,
3. Working with the Senate budget subcommittee to explore ways the Legislature can assist the Board in addressing the issue of investigator pay differentials,
4. Exploring the possibility of a pay differential for investigators through the Budget Change Proposal process.

**April 2009** – Susan Lorenz, CPS Human Resource Services, provides the MBC with recommendations after conducting an Investigator Classification review for the MBC.

1. Complete the drafting and review of the MBC Investigator duty statements and submit them to DCA for final approval (completed),
2. Formalize the Investigator training program by ensuring all Investigators complete a specified number of POST-certified courses, in addition to any on-the-job training, by a specified time after their original appointment (on-going),
3. Craft a an official request for a two stage pay differential (suggested 5% and 10%) focusing on additional training, and
4. Submit the request to the DCA Human Resources Office for review and future inclusion in bargaining or other compensation review requests (completed).

**August 26, 2009** – Memorandum to Mike Navarro, Project Consultant, CPS Human Resource Services, from Pete Strom, outlining comments on the Investigator Study conducted by Susan Lorenz. Mr. Navarro agreed with Ms. Lorenz's basic conclusion that a pay differential, rather than establishment of a new classification, provided the most promise as a possible solution.

**March 1, 2010** – Letter to Brian Stiger, DCA Director, from Renee Threadgill requesting that the DCA submit a request to the DPA to pursue including, in any negotiations with Bargaining Unit 7, the Investigator, DCA, and Senior Investigator classifications under Bargaining Unit 7 Contract Agreement, Section 19.24 Differential – Training Officer, for the purposes of Field Training Officer (FTO), Rangemaster, Defensive Tactics Instructor, and other formal training assignments.

**May 4, 2010** – Memorandum from Brian Stiger responding (in part) that DCA's Office of Human Resources (OHR) "is currently working on establishing pay differentials, revising existing pay differentials and reviewing salary. The Investigator class and the respective pay differential requests will be reviewed in mid-July. At that time, the OHR will contact Programs that use the Investigator class series and meet with them to obtain insight on the existing challenges, and provide information that will assist in the approval of pay differentials."

**November 2, 2010** – The Investigator deep class series was established by the State Personnel Board. A deep class series provides for three ranges of salaries based on an investigator's education, experience, skills, and competencies. The establishment of the Investigator deep class series eliminated the need for an examination for promotion to a senior level position within the Investigator series.

**April 1, 2011** – the Bargaining Unit 7 (BU7) Contract was ratified with no provisions addressing Ms. Threadgill's March 1, 2010 request to DCA.

## Agenda Item #7



### Priorities Established in Business and Professions Code Section 2220.05

In 2003, Section 2220.05 was added to the Business and Professions Code which established priorities for the Medical Board's investigative and prosecutorial resources as follows:



- Gross negligence, incompetence, or repeated negligent acts that involve death or serious bodily injury to one or more patients;
- Drug or alcohol abuse by a physician involving death or serious bodily injury to a patient;
- Repeated acts of clearly excessive prescribing of controlled substances, or repeated acts of prescribing or dispensing of controlled substances without a good faith prior exam or a medical reason;
- Sexual misconduct with one or more patients during a course of treatment or an examination;
- Practicing medicine while under the influence of drugs or alcohol.

The Board also considers complaints with the following allegations as “urgent”, receiving the next highest priority:



- Physician impairment (mental/physical illness)
- Self-use of drugs or alcohol
- Hospital Discipline or 805 reports
- Unlicensed practice of medicine
- Aiding and abetting unlicensed practice
- Felony/Criminal convictions
- Complaints involving physicians on board-ordered probation

## Complaint allegations that do not meet the criteria of urgent/highest priority



- Advertising Issues/FNP (Fictitious Name Permit) Issues
- CII Reports—(arrests and misdemeanor convictions)
- Conditions of office and staff issues
- Failure to provide medical records to patient
- Failure to sign death certificate
- Fraud/Billing Issues; alteration of medical records
- Non accreditation of Outpatient Surgery Center
- Patient abandonment
- Patient complaints that do not involve patient injury
- Physician demeanor/breach of confidentiality
- Workers Compensation/Independent Evaluation Issues

# MEMORANDUM

<b>DATE</b>	April 10, 2013
<b>TO</b>	Enforcement Committee Members Medical Board of California
<b>FROM</b>	Kurt Heppler, Senior Staff Counsel Division of Legal Affairs
<b>SUBJECT</b>	<b>Workers' Compensation Complaints</b>

The issue before the Enforcement Committee (Committee) involves the Medical Board of California (Board) and its obligation to investigate complaints against physicians who participate in utilization review activities. Recently, several entities have asked that the Board investigate complaints filed against these physicians, and historically, the Board has declined to do, finding that it did not have jurisdiction over the matter. Please note that this memo is not to be considered a primer on workers compensation; rather, it attempts to explain the policy question of whether complaints regarding workers' compensation should be investigated.

## **Background**

The Board is the state agency that licenses and disciplines physicians and its paramount mission is public protection. The Board shall investigate complaints filed by the public or other licensees that a physician and surgeon may be guilty of unprofessional conduct. (See Bus. & Prof. Code, § 2220, subd.(a).) Inputs into the complaint process also include section 801 and section 805 reports as well as reports submitted pursuant to other statutes.

The Workers Compensation (WC) system, which is not administered by the Board, essentially serves four purposes, as follows: (1) to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society, (2) to guarantee prompt, limited compensation for an employee's work injuries, regardless of fault, as an inevitable cost of production, (3) to spur increased industrial safety, and (4) in return, to insulate the employer from tort liability for his employees' injuries." (*Metea v. Workers Comp Appeals Board* (2006) 51 Cal.Rptr 3d 314.)

One of the fundamental principles of the Workers Compensation Act is that it is the *employer's* responsibility to provide all medical treatment reasonably required to effect the proper care and speedy recovery of injured employees. (*PM & R Associates v. Workers' Comp. Appeals Bd.* (2000) 94 CalRptr.2d 887.)(Emphasis added.)

Please note that medical treatment provided to an injured worker must be consistent with established guidelines. In most cases, the medical treatment must be consistent with an adopted medical treatment utilization schedule (MTUS) or the American College of Occupational and Environmental Medicine Practice Guidelines. It is reasonable to presume that these guiding documents set the standard of care for most industrial injuries.

Another important concept of WC is the utilization review process, which is required by law. (See Lab. Code, § 4610.) The purpose of the UR process is to review, modify, approve, deny, or delay treatment to the injured worker. It is important to note that the Board has stated on its Internet site that UR review cannot be performed with a physician who holds a retired license. Please note that a UR physician need not be licensed in California. \*

Some illustrations may prove helpful. In the UR process, we have essentially three participants: 1) the injured worker or claimant; 2) the worker's treating physician (in this case, physician means certain licensed health care providers and not just allopathic physicians); and 3) the UR physician. It works like this: after injury, the employee files a notice of work injury and the employer is obligated to provide medical treatment initially. The treating physician then recommends a treatment plan, which is then subject to the UR process.

The following is an excerpt taken from the Department of Industrial Relations' (DIR) Internet site regarding UR:

**“Q. What is utilization review (UR) and why is it used for workers' compensation?”**

**A.** UR is the process used by employers or claims administrators to review medical treatment requested for the injured worker, to determine if the proposed treatment is **medically necessary**. All employers or their workers' compensation claims administrators are required by law to have a UR program. This program is used to decide whether or not to approve medical treatment recommended by a treating physician.”

([http://www.dir.ca.gov/dwc/UtilizationReview/UR\\_FAQ.htm#1](http://www.dir.ca.gov/dwc/UtilizationReview/UR_FAQ.htm#1))(Emphasis added.)

As members might surmise, the UR process leads to disputes. The dispute resolution process does not include the Medical Board; it does include lawyers and judges. It is important to note that the UR dispute resolution process has been revised by recent legislation to utilize an Independent Medical Review (IMR) process that would bring more medical and less legal resources to bear on disputes. (See Lab. Code, § 4610.5.) However, even under the new IMR process, there is no explicit role for the Board.

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- This issue is somewhat congruous. The Board has states that UR review cannot be performed by the holder of an inactive license. The Board has also supported Legislation requiring UR physicians to hold a California license.

As the Board understands the issue, sometimes a treating physician will file a complaint against UR physician because the treating physician believes that the UR physician is not following the established standards or guidelines. In other words, the complaint is not based upon an attempt to leverage the outcome of a UR treatment decision or compensation claim but rather to ascertain whether the standard of care is being followed.

To date, the Board, after a preliminary analysis of this type of complaint, has often opted not to proceed as it classifies these matters as non-jurisdictional. Part of this determination may have been based upon the provisions of section 4610, which provided that a dispute arising out of UR decision had to be resolved pursuant to section 4062 of the Labor Code. Section 4062 does not include the Board. Additionally, case law suggests that the Workers Compensation Appeals Board has exclusive jurisdiction over any controversy relating to or arising out of the medical treatment of an injured employee. (See *PM & R Associates, supra*, 94 Cal.Rptr.2d at p. 891.)

However, it may be that a complaint may be filed against a physician not to challenge the treatment decision but rather over a concern of public policy. It is important to note that a complaint process already exists for UR, as indicated by the attachments. The imposition of a monetary fine by the administrative director within DIR may follow a complaint investigation.

### **Recommendation**

Staff suggests that the Board continue its established policy of performing a preliminary analysis of a complaint. If the complaint involves UR issue, then Board staff should inform the complainant of the DIR's complaint process.

**Utilization Review (UR) Complaint Form**  
State of California  
Division of Workers' Compensation Medical Unit

**Utilization review complaint form**

**What it is and how to use it**

Utilization review (UR) is the process used by employers or insurance companies to review treatment to determine if it is medically necessary. All employers or the insurance companies handling workers' compensation claims are required by law to have a UR program. This program will be used to decide whether or not to approve medical treatment recommended by a physician.

The UR process is governed by Labor Code section 4610 and regulations written by the CA Division of Workers' Compensation (DWC). The DWC regulations are contained in Title 8, California Code of Regulations, sections 9792.6 et seq.

Medical providers, injured workers or others who find that UR is not being done according to the regulations can file a complaint with the DWC. The attached form may be used to register a complaint regarding UR services connected with workers' compensation injuries and treatment.

Injured workers may also benefit from reading the UR fact sheet (A) at <http://www.dir.ca.gov/dwc/iwguides.html>.

Please fill out the form as completely as possible, checking all complaint boxes that apply. Please include any additional information or documentation required to clarify the details of your complaint.

Completed complaint forms can be sent by U.S. mail, fax or e-mail to the address provided at the bottom of the form.

**Glossary of terms:**

**Supporting documentation:** All written material related to the complaint(s), including letters or faxes regarding modification, delay or denial of specific treatment request(s).

**ACOEM:** The American College of Occupational and Environmental Medicine. The state of California is currently using the ACOEM Practice Guidelines, Second Edition, as its medical treatment guidelines.



# SB 1441 IMPLEMENTATION

Medical Board of California

April 2013

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## **BACKGROUND/HISTORY OF THE PROCESS TO AMEND DISCIPLINARY GUIDELINES**

2009	Rulemaking file opened and hearings held to update Model Disciplinary Guidelines
04/2010	DCA formed committee to develop Uniform Standards
08/2010	OAL found technical problems with rulemaking file and package withdrawn
11/2010	Public Hearing held by MBC to move forward with revising disciplinary guidelines
01/2011	Interested Parties meeting held to gather public comment/input on revised disciplinary guidelines
01/28/2011	Board voted to adopt regulations
04/2011	DCA finalized Uniform Standard #4 regarding biological fluid testing frequency
09/2011	Rulemaking file referred to DCA for review/approval
12/2011	Rulemaking file approved by Office of Administrative Law

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## DCA UNIFORM STANDARDS FOR SUBSTANCE ABUSING HEALING ARTS LICENSEES

1	If license on probation due to substance abuse problem, licensee must undergo a clinical diagnosis evaluation. The report should contain recommendations for treatment, practice restrictions, etc.
2	Requires Board to order cease practice pending results of clinical diagnostic evaluation and review by Board staff. Licensee must be drug tested at least two times per week during evaluation period and must have 30 days of negative tests before resuming practice
3	Requires probationer who has an employer to provide the board with names, addresses, phone numbers of all employers/supervisors and sign a consent authorizing the board to communicate with the employer regarding work status, performance and monitoring.
4	Contains drug testing standards which includes frequency (recommends 104 for the first year), random scheduling, lab standards, observed collections, etc.
5	Provides guidelines for group support meetings
6	Provides guidelines for treatment programs (inpatient, outpatient, etc.)
7	Provides guidelines for qualifications, methods of monitoring and reporting for worksite monitors
8	Requires that licensee be ordered to cease practice immediately when a test for a banned substance is positive. Requires board to notify licensee and employer and worksite monitor, if any, that the licensee may not work.
9	Identifies that when a licensee tests positive for a prohibited substance, he/she has committed a major violation and subject to penalties from #10
10	Identifies consequences for a major violation to be that licensee must cease practice, obtain another clinical evaluation and test negative for 1 month before returning to work; and the matter should be referred for disciplinary action
11	Identifies criteria licensee must meet in order to return to practice full-time
12	Identifies criteria licensee must meet in order to reinstate to a full/unrestricted license
13	Identifies standards for vendors providing diversion services
14	Identifies public information to be provided when licensees are in a diversion program
15	Identifies an audit schedule for diversion programs
16	Identifies reporting information that must be provided to DCA regarding physicians on probation for substance abuse issues

## SUNSETTING OF THE DIVERSION PROGRAM effective July 2008

**History:** The Diversion Program was a monitoring program that allowed physicians impaired due to substance abuse who were violating the Medical Practice Act a pathway to “divert away from” appropriate disciplinary action. The Program was meant to provide public protection by including monitoring controls on impaired physicians to prevent them from working while under the influence.

**The Program required participants to sign contracts which required them to adhere to conditions including, but not limited to, an evaluation by an evaluation committee, random biological fluid testing, in-patient treatment, psychiatric care, group therapy sessions, AA meetings, worksite monitors, etc. The Program’s responsibility was to monitor impaired physicians to ensure they were complying with the contract.**

With the Diversion Program	Without the Diversion Program
Impaired physicians with substance abuse issues can: Contact/enroll in a treatment facility of their choosing to find assistance with their problem. (Even with the Diversion Program impaired physicians had the option of seeking assistance at other treatment facilities.)	Impaired physicians with substance abuse issues can contact/enroll in a treatment facility of their choosing to find assistance.

The policy decision made by the Board with the sunseting of the Diversion Program was that physicians would be responsible **for their own treatment and recovery**. The Board’s role was limited to ensuring that physicians were safe to practice and randomly tested to ensuring they were abstaining from the use of drugs and alcohol.

## COMPARISON OF CONDITIONS REQUIRED UNDER THE DIVERSION PROGRAM AND ADDRESSED IN THE UNIFORM STANDARDS

<b>MEDICAL BOARD'S DIVERSION PROGRAM</b>
<p>The Diversion Program required participants to sign contracts and adhere to conditions which included:</p> <ul style="list-style-type: none"> <li>• An evaluation by an intake evaluation committee</li> <li>• Clinical evaluation</li> <li>• random biological fluid testing</li> <li>• in-patient treatment</li> <li>• psychiatric care</li> <li>• group therapy sessions and AA meetings</li> <li>• worksite monitors</li> </ul>

<b>UNIFORM STANDARDS</b>	
Standard #1	Clinical Diagnostic Evaluation
Standard #2	Removal from practice pending results of evaluation
Standard #5	Guidelines for Group Support Meetings
Standard #6	Guidelines for treatment programs (inpatient/outpatient)
Standard #7	Guidelines for Worksite Monitors
Standard #11	Criteria for returning the licensee to full-time practice
Standard #12	Criteria for reinstating the license to full/unrestricted
Standard #13	Standards for vendors providing diversion services
Standard #14	Information to be made public regarding diversion participants
Standard #15	Criteria for scheduling audits of diversion programs
Standard #16	Reporting information to be provided to DCA

MBC's Current Disciplinary Guidelines  
Excerpt from Recommended Range of Penalties for Violations

**EXCESSIVE USE OF CONTROLLED SUBSTANCES or  
PRACTICE UNDER THE INFLUENCE OF NARCOTICS**

**Minimum penalty:** Stayed revocation, 5 years probation

**Maximum penalty:** Revocation

- 1. Suspension of 60 days or more**
2. Controlled Substances – Restriction/Surrender DEA permit
3. Maintain Drug Records/Access to Records and Inventories
- 4. Controlled Substances - Abstain From Use**
- 5. Alcohol-Abstain from Use**
- 6. Biological Fluid Testing**
7. Education Course
8. Prescribing Practices Course
9. Medical Record Keeping Course
10. Professionalism Program (Ethics Course)
- 11. Psychiatric Evaluation**
- 12. Psychotherapy**
- 13. Medical Evaluation and Treatment**
14. Monitoring-Practice/Billing
15. Prohibited Practice

**EXCESSIVE USE OF ALCOHOL or  
PRACTICE UNDER THE INFLUENCE OF ALCOHOL**

**Minimum penalty:** Stayed revocation, 5 years probation

**Maximum penalty:** Revocation

- 1. Suspension of 60 days or more**
- 2. Controlled Substances-Abstain From Use**
- 3. Alcohol-Abstain from Use**
- 4. Biological Fluid Testing**
5. Professionalism Program (Ethics Course)
- 6. Psychiatric Evaluation**
- 7. Psychotherapy**
- 8. Medical Evaluation and Treatment**
9. Monitoring-Practice/Billing

**#3 SB 1441 REQUIREMENT:** Specific requirements that govern the ability of the licensing board to communicate with the licensee's employer about the licensee's status or condition.

**#3 Uniform Standard**

If the licensee who is either in a board diversion program or whose license is on probation has an employer, the licensee shall provide to the board the names, physical addresses, mailing addresses, and telephone numbers of all employers and supervisors and shall give specific, written consent that the licensee authorizes the board and the employers and supervisors to communicate regarding the licensee's work status, performance, and monitoring.

**MBC Condition #30 - Quarterly Declaration**

Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Board, stating whether there has been compliance with all the conditions of probation.

Respondent shall submit quarterly declarations not later than 10 calendar days after the end of the preceding quarter

The Quarterly Declaration identifies the name, address and work schedule of any locations the probationer practices in. The Medical Director or Chief of Staff contact information must also be provided. Employer information is also confirmed verbally during the quarterly interview.

Disciplinary Guidelines

Probation Policy

**#4 SB 1441 REQUIREMENT:** Standards governing all aspects of required testing, including, but not limited to, frequency of testing, randomness, method of notice to the licensee, number of hours between the provision of notice and the test, standards for specimen collectors, procedures used by specimen collectors, the permissible locations of testing, whether the collection process must be observed by the collector, backup testing requirements when the licensee is on vacation or otherwise unavailable for local testing, requirements for the laboratory that analyzes the specimens, and the required maximum timeframe from the test to the receipt of the result of the test.

#### #4 Uniform Standard

The following standards shall govern all aspects of testing required to determine abstention from alcohol and drugs for any person whose license is placed on probation due to substance use:

##### TESTING FREQUENCY SCHEDULE

A board may order a licensee to drug test at any time. Additionally, each licensee shall be tested RANDOMLY in accordance with the schedule below:

Level	Segments	No. of Tests
I	Year 1	52-104
II	Year 2	36-104

\*The minimum range tests identified in level II, is for the 2nd year of probation and each year thereafter, up to five (5) years. Thereafter, administration of one (1) time per month if there have been no positive drug tests in the previous five (5) consecutive years of probation or diversion. Nothing precludes a board from increasing the number of random tests for any reason.

#### MBC Condition #11- Biological Fluid Testing

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

## #4 Uniform Standard continued

### OTHER DRUG STANDARDS

- Drug testing may be required on any day, including weekends and holidays.
- The scheduling of drug tests shall be done on a random basis, preferably by a computer program, so that a licensee can make no reasonable assumption of when he/she will be tested again. Boards should be prepared to report data to support back-to-back testing as well as, numerous different intervals of testing.
- Licensees shall be required to make daily contact to determine if drug testing is required.
- Licensees shall be drug tested on the date of notification as directed by the board.
- Specimen collectors must either be certified by the Drug and Alcohol Testing Industry Association or have completed the training required to serve as a collector for the U.S. Department of Transportation.
- Specimen collectors shall adhere to the current U.S. Department of Transportation Specimen Collection Guidelines.
- Testing locations shall comply with the Urine Specimen Collection Guidelines published by the U.S. Department of Transportation, regardless of the type of test administered.
- Collection of specimens shall be observed.
- Prior to vacation or absence, alternative drug testing location(s) must be approved by the board.
- Laboratories shall be certified and accredited by the U.S. Department of Health and Human Services.
- A collection site must submit a specimen to the laboratory within one business day of receipt. A chain of custody shall be used on all specimens. The laboratory shall process results and provide legally defensible test results within 7 days of receipt of the specimen. The board will be notified of non-negative test results within one business day and will be notified of negative test results within 7 business days.
- A board may use other testing methods in place of, or to supplement biological fluid testing, if the alternate testing method is appropriate.

### **MBC Condition #11- Biological Fluid Testing**

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

### **Board-Approved Laboratory and Services**

The Board presently contracts with FirstLab to provide services to implement and administer a program for drug and alcohol testing. FirstLab provides and maintains an automated 24-hour toll free telephone system informing the probationers whether or not they have been selected to provide a specimen (i.e., urine, blood, and/or hair follicle) for testing and analysis.

**#8 SB 1441 REQUIREMENT: Procedures to be followed when a licensee tests positive for a banned substance.**

**#8 Uniform Standard**

When a licensee tests positive for a banned substance:

- The board shall order the licensee to cease practice;
- The board shall contact the licensee and instruct the licensee to leave work; and
- The board shall notify the licensee's employer, if any, and worksite monitor, if any, that the licensee may not work.

Thereafter, the board should determine whether the positive drug test is in fact evidence of prohibited use. If so, proceed to Standard #9. If not, the board shall immediately lift the cease practice order. In determining whether the positive test is evidence of prohibited use, the board should, as applicable:

- Consult the specimen collector and the laboratory;
- Communicate with the licensee and/or any physician who is treating the licensee; and
- Communicate with any treatment provider, including group facilitator/s

**MBC Condition 9, 10-Abstain from use of controlled substances/alcohol**

If respondent has a confirmed positive biological fluid test for any substance (whether or not legally prescribed) and has not reported the use to the Board or its designee, **respondent shall receive a notification from the Board or its designee to immediately cease the practice of medicine. The respondent shall not resume the practice of medicine until final decision on an accusation and/or a petition to revoke probation.**

An accusation and/or petition to revoke probation shall be filed by the Board within 15 days of the notification to cease practice. If the respondent requests a hearing on the accusation and/or petition to revoke probation, the Board shall provide the respondent with a hearing within 30 days of the request, unless the respondent stipulates to a later hearing. A decision shall be received from the Administrative Law Judge or the Board within 15 days unless good cause can be shown for the delay. The cessation of practice shall not apply to the reduction of the probationary time period

**#9 SB 1441 REQUIREMENT: Procedures to be followed when a licensee is confirmed to have ingested a banned substance.**

**#9 Uniform Standard**

When a board confirms that a positive drug test is evidence of use of a prohibited substance, the licensee has committed a major violation, as defined in Uniform Standard #10 and the board shall impose the consequences set forth in Uniform Standard #10

**MBC Condition 9, 10-Abstain from use of controlled substances/alcohol**

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

**#10 SB 1441 REQUIREMENT:** Specific consequences for major and minor violations. In particular, the committee shall consider the use of a “deferred prosecution” stipulation described in Section 1000 of the Penal Code, in which the licensee admits to self-abuse of drugs or alcohol and surrenders his or her license. That agreement is deferred by the agency until or unless licensee commits a major violation, in which case it is revived and license is surrendered.

**#10 Uniform Standard**

Major Violations Include, but are not limited to:

- Failure to complete a board-ordered program;
- Failure to undergo a required clinical diagnostic evaluation;
- Multiple minor violations;
- Treating patients while under the influence of drugs/alcohol;
- Any drug/alcohol related act which would constitute a violation of the practice act or state/federal laws;
- Failure to obtain biological testing for substance abuse;
- Testing positive and confirmation for substance abuse pursuant to Uniform Standard #9;
- Knowingly using, making, altering or possessing any object or product in such a way as to defraud a drug test designed to detect the presence of alcohol or a controlled substance.

Consequences for a major violation include, but are not limited to:

1. Licensee will be ordered to cease practice.
  - a) the licensee must undergo a new clinical diagnostic evaluation,
  - b) the licensee must test negative for at least a month of continuous drug testing before being allowed to go back to work.
2. Termination of a contract/agreement.
3. Referral for disciplinary action, such as suspension, revocation, or other action as determined by the board.

**VIOLATION OF PROBATION**

Minimum penalty: 30 day suspension

Maximum penalty: Revocation

The maximum penalty should be given for repeated similar offenses or for probation violations revealing a cavalier or recalcitrant attitude. A violation of any of the following conditions of probation should result in, at minimum, a 60 day suspension:

1. Controlled Substances -Maintain Records /Access to Records and Inventories [8]
2. Biological Fluid Testing [11]
3. Professional Boundaries Program [17]
4. Psychiatric Evaluation [20]
5. Psychotherapy [21]
6. Medical Evaluation and Treatment [22]
7. Third Party Chaperone [25]

The Board’s current policy is to proceed with administrative action for any violation of the terms and conditions of probation that relate to “fitness for practice” such as failure to comply with an order for a medical/psychiatric evaluation, testing positive for a banned substance or failing to cooperate with testing.

**#10 SB 1441 REQUIREMENT:** Specific consequences for major and minor violations. In particular, the committee shall consider the use of a “deferred prosecution” stipulation described in Section 1000 of the Penal Code, in which the licensee admits to self-abuse of drugs or alcohol and surrenders his or her license. That agreement is deferred by the agency until or unless licensee commits a major violation, in which case it is revived and license is surrendered.

**#10 Uniform Standard cont.**

Minor Violations include, but are not limited to:

- Untimely receipt of required documentation;
- Unexcused non-attendance at group meetings;
- Failure to contact a monitor when required;
- Any other violations that do not present an immediate threat to the violator or the public.

Consequences for minor violations include, but are not limited to:

- Removal from practice;
- Practice limitations;
- Required supervision;
- Increased documentation;
- Issuance of citation and fine or a warning notice;
- Required re-evaluation/testing;
- Other action as determined by the board.



LEGISLATIVE COUNSEL BUREAU

LEGISLATIVE COUNSEL BUREAU

October 27, 2011

Honorable Curren D. Price Jr.  
Room 2053, State Capitol

HEALING ARTS BOARDS: ADOPTION OF UNIFORM STANDARDS - #1124437

Dear Senator Price:

You have asked two questions with regard to the adoption of uniform standards by the Substance Abuse Coordination Committee pursuant to Section 315 of the Business and Professions Code. You have asked whether the Substance Abuse Coordination Committee is required to adopt the uniform standards pursuant to the rulemaking procedures under the Administrative Procedure Act (Ch. 3.5 (commencing with Sec. 10340), Pt. 1, Div. 3, Title 2, Gov. C.). You have also asked, if the uniform standards are properly adopted by the Substance Abuse Coordination Committee, whether the healing arts boards are required to implement them.

By way of background, Section 315 of the Business and Professions Code provides as follows:

"315. (a) For the purpose of determining uniform standards that will be used by healing arts boards in dealing with substance-abusing licensees, there is established in the Department of Consumer Affairs the Substance Abuse Coordination Committee. The committee shall be comprised of the executive officers of the department's healing arts boards established pursuant to Division 2 (commencing with Section 500), the State Board of Chiropractic Examiners, the Osteopathic Medical Board of California, and a designee of the State Department of Alcohol and Drug Programs. The Director of Consumer Affairs shall chair the committee and may invite individuals or stakeholders who have particular expertise in the area of substance abuse to advise the committee.

All further section references are to the Business and Professions Code, unless otherwise referenced.

"(b) The committee shall be subject to the Bagley-Keene Open Meeting Act (Article 9 (commencing with Section 11120) of Division 3 of Title 2 of the Government Code).

"(c) By January 1, 2010, the committee shall formulate uniform and specific standards in each of the following areas that each healing arts board shall use in dealing with substance-abusing licensees, whether or not a board chooses to have a formal diversion program:

"(1) Specific requirements for a clinical diagnostic evaluation of the licensee, including, but not limited to, required qualifications for the providers evaluating the licensee.

"(2) Specific requirements for the temporary removal of the licensee from practice, in order to enable the licensee to undergo the clinical diagnostic evaluation described in paragraph (1) and any treatment recommended by the evaluator described in paragraph (1) and approved by the board, and specific criteria that the licensee must meet before being permitted to return to practice on a full-time or part-time basis.

"(3) Specific requirements that govern the ability of the licensing board to communicate with the licensee's employer about the licensee's status and condition.

"(4) Standards governing all aspects of required testing, including, but not limited to, frequency of testing, randomness, method of notice to the licensee, number of hours between the provision of notice and the test, standards for specimen collectors, procedures used by specimen collectors, the permissible locations of testing, whether the collection process must be observed by the collector, backup testing requirements when the licensee is on vacation or otherwise unavailable for local testing, requirements for the laboratory that analyzes the specimens, and the required maximum timeframe from the test to the receipt of the result of the test.

"(5) Standards governing all aspects of group meeting attendance requirements, including, but not limited to, required qualifications for group meeting facilitators, frequency of required meeting attendance, and methods of documenting and reporting attendance or nonattendance by licensees.

"(6) Standards used in determining whether inpatient, outpatient, or other type of treatment is necessary.

"(7) Worksite monitoring requirements and standards, including, but not limited to, required qualifications of worksite monitors, required methods of monitoring by worksite monitors, and required reporting by worksite monitors.

"(8) Procedures to be followed when a licensee tests positive for a banned substance.

"(9) Procedures to be followed when a licensee is confirmed to have ingested a banned substance.

"(10) Specific consequences for major violations and minor violations. In particular, the committee shall consider the use of a deferred prosecution stipulation similar to the stipulation described in Section 1000 of the Penal Code, in which the licensee admits to self-abuse of drugs or alcohol and surrenders his or her license. That agreement is deferred by the agency unless or until the licensee commits a major violation, in which case it is revived and the license is surrendered.

"(11) Criteria that a licensee must meet in order to petition for return to practice on a full-time basis.

"(12) Criteria that a licensee must meet in order to petition for reinstatement of a full and unrestricted license.

"(13) If a board uses a private-sector vendor that provides diversion services, standards for immediate reporting by the vendor to the board of any and all noncompliance with any term of the diversion contract or probation standards for the vendor's approval process for providers or contractors that provide diversion services, including, but not limited to, specimen collectors, group meeting facilitators, and worksite monitors, standards requiring the vendor to disapprove and discontinue the use of providers or contractors that fail to provide effective or timely diversion services, and standards for a licensee's termination from the program and referral to enforcement.

"(14) If a board uses a private-sector vendor that provides diversion services, the extent to which licensee participation in that program shall be kept confidential from the public.

"(15) If a board uses a private-sector vendor that provides diversion services, a schedule for external independent audits of the vendor's performance in adhering to the standards adopted by the committee.

"(16) Measurable criteria and standards to determine whether each board's method of dealing with substance-abusing licensees protects patients from harm and is effective in assisting its licensees in recovering from substance abuse in the long term." (Emphasis added.)

Thus, the Legislature has established in the Department of Consumer Affairs (hereafter department) the Substance Abuse Coordination Committee (subd. (2), Sec. 315; hereafter committee). The committee is comprised of the executive officers of each healing arts board within the department,<sup>2</sup> the State Board of Chiropractic Examiners, and the

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<sup>2</sup> The department's healing arts boards are those boards established under Division 2 (commencing with Section 500) to license and regulate practitioners of the healing arts. Those boards include, among others, the Dental Board of California, the Medical Board of California, the Veterinary Medical Board, and the Board of Registered Nursing.

Osteopathic Medical Board of California (hereafter, collectively, healing arts boards), and a designee of the State Department of Alcohol and Drug Programs (Ibid.). The Director of Consumer Affairs chairs the committee and is authorized to invite individuals or stakeholders who have particular expertise in the area of substance abuse to advise the committee (Ibid.).

The committee is required to formulate uniform and specific standards in each of 16 areas provided by the Legislature, but otherwise has discretion to adopt the uniform standards each healing arts board shall use in dealing with substance-abusing licensees (subd. (c), Sec. 315). The committee adopted its initial set of uniform standards in April 2010, and revised those initial standards as recently as April 2011.<sup>1</sup> Although the committee has adopted the uniform standards pursuant to its own procedures, it has yet to adopt those standards pursuant to the rulemaking procedures of the Administrative Procedure Act (Ch. 3.5 (commencing with Sec. 11340), Pt. 1, Div. 3, Title 2, Gov. C.; hereafter APA).

You have asked whether the committee is required to adopt the uniform standards pursuant to the rulemaking procedures of the APA.

The APA establishes basic minimum procedural requirements for the adoption, amendment, or repeal of administrative regulations by state agencies (subd. (a), Sec. 11346, Gov. C.). The APA is applicable to the exercise of any quasi-legislative power conferred by any statute (Ibid.). Quasi-legislative powers consist of the authority to make rules and regulations having the force and effect of law (*California Advocates for Nursing Home Reform v. Bonta* (2003) 106 Cal.App.4th 498, 517; hereafter *California Advocates*). The APA may not be superseded or modified by any subsequent legislation except to the extent that the legislation does so expressly (subd. (a), Sec. 11346, Gov. C.).

The term "regulation" is defined for purposes of the APA to mean every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure (Sec. 11342.600, Gov. C.; emphasis added). The APA provides that a state agency shall not issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation under the APA, unless properly adopted under the procedures set forth in the APA, and the Office of Administrative Law is empowered to determine whether any such guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule is a regulation under the APA (Sec. 11340.5, Gov. C.).

In *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571 (hereafter *Tidewater*), the California Supreme Court found as follows:

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<sup>1</sup> See [http://www.dea.ca.gov/about\\_dea/sacc/index.shtml](http://www.dea.ca.gov/about_dea/sacc/index.shtml) (as of September 20, 2011).

"A regulation subject to the APA thus has two principal identifying characteristics. (See *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, [272 Cal.Rptr. 886] [describing two-part test of the Office of Administrative Law].) First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. (*Roth v. Department of Veterans Affairs* (1980) 110 Cal.App.3d 622, 630 [167 Cal.Rptr. 552].) Second, the rule must implement, interpret, or make specific the law enforced or administered by [the agency], or ... govern [the agency's] procedure. (Gov. Code, § 11342, subd. (g)."

If a policy or procedure falls within the definition of a "regulation" within the meaning of the APA, the adopting agency must comply with the procedures for formalizing the regulation, which include public notice and approval by the Office of Administrative Law (*County of Butte v. Emergency Medical Services Authority* (2010) 187 Cal.App.4th 1175, 1200). The Office of Administrative Law is required to review all regulations adopted pursuant to the APA and to make its determinations according to specified standards that include, among other things, assessing the necessity for the regulation and the regulation's consistency with the agency's statutory obligation to implement a statute (subd. (a), Sec. 11349.1, Gov. C.).

Applying these principles to the question presented, the uniform standards are subject to the rulemaking procedures of the APA if the following criteria are met: (1) Section 315 does not expressly preclude application of the APA; (2) the committee is a state agency under the APA; (3) the uniform standards are regulations subject to the APA; and (4) no exemption applies under the APA.

With respect to the first criterion, Section 315 is silent on the application of the APA. Thus, Section 315 does not expressly preclude application of the APA, and the APA will apply to any regulation adopted under Section 315.

We turn next to the second criterion, and whether the committee is an "agency" for purposes of the APA. The word "agency" is defined, for purposes of the APA, by several separate provisions of law. For purposes of the rulemaking procedures of the APA, "agency" is defined to mean a state agency (Sec. 11342.520, Gov. C.). That reference to state agency is defined elsewhere in the Government Code to include every state office, officer, department, division, bureau, board, and commission (subd. (a), Sec. 11000, Gov. C.). The APA does not apply to an agency in the judicial or legislative branch of the state government (subd. (a), Sec. 11340.9, Gov. C.).

Along those lines, the APA is applicable to the exercise of any quasi-legislative power conferred by any statute (subd. (a), Sec. 11346, Gov. C.). Quasi-legislative powers consist of the authority to make rules and regulations having the force and effect of law (*California Advocates*, *supra*, at p. 517). Thus, for purposes of our analysis, we think that an "agency" means any state office, officer, department, division, bureau, board, or commission that exercises quasi-legislative powers.

Here, the committee is a state office comprised of executive officers of the healing arts boards and the Director of Consumer Affairs. Although the Legislature has set forth 16 areas in which the committee is required to adopt standards, the committee itself is required to exercise quasi-legislative powers and adopt uniform standards within those areas. Those standards shall have the force and effect of law, since the healing arts boards, as discussed more extensively below, are required to use the standards in dealing with substance-abusing licensees and the standards are required to govern matters such as when a licensee is temporarily removed from practice or subject to drug testing or work monitoring (paras. (2), (4), and (7), subd. (c), Sec. 315). Accordingly, we think the committee is an agency to which the APA applies.

As to the third criterion, two elements must be met for the uniform standards at issue to be a regulation: they must apply generally and they must implement, interpret, or make specific a law enforced or administered by the agency or that governs its procedures (Idewater, supra, at p. 571; Sec. 11342.600, Gov. C.). Section 315 requires the committee to formulate uniform and specific standards in specified areas that each healing arts board within the department shall use when dealing with substance-abusing licensees, whether or not the board chooses to have a formal diversion program. The uniform standards will not be limited in application to particular instances or individuals but instead, will apply generally to those licensees. Further, under this statutory scheme, the uniform standards will implement Section 315 and will be enforced and administered by, and will govern the procedures of, each healing arts board that is a member of the committee. Thus, the uniform standards are, in our view, a regulation under the APA.

Lastly, we turn to the fourth criterion, and whether the regulation is exempt from the APA. Certain policies and procedures are expressly exempted by statute from the requirement that they be adopted as regulations pursuant to the APA. In that regard, Section 11340.9 of the Government Code provides as follows:

"11340.9. This chapter does not apply to any of the following:

"(a) An agency in the judicial or legislative branch of the state government.

"(b) A legal ruling of counsel issued by the Franchise Tax Board or State Board of Equalization.

"(c) A form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation on any requirement that a regulation be adopted pursuant to this chapter when one is needed to implement the law under which the form is issued.

"(d) A regulation that relates only to the internal management of the state agency.

"(e) A regulation that establishes criteria or guidelines to be used by the staff of an agency in performing an audit, investigation, examination, or inspection, settling a commercial dispute, negotiating a commercial

arrangement, or in the defense, prosecution, or settlement of a case, if disclosure of the criteria or guidelines would do any of the following:

- "(1) Enable a law violator to avoid detection.
  - "(2) Facilitate disregard of requirements imposed by law.
  - "(3) Give clearly improper advantage to a person who is in an adverse position to the state.
- (f) A regulation that embodies the only legally tenable interpretation of a provision of law.
  - (g) A regulation that establishes or fixes rates, prices, or tariffs.
  - (h) A regulation that relates to the use of public works, including streets and highways, when the effect of the regulation is indicated to the public by means of signs or signals or when the regulation determines uniform standards and specifications for official traffic control devices pursuant to Section 21400 of the Vehicle Code.
  - (i) A regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state.

None of the exemptions contained in the APA can be reasonably construed to apply to the committee or the uniform standards to be used by the healing arts boards. In addition, we are aware of no other applicable exemption.

Thus, because all four of the criteria are met, it is our opinion that the Substance Abuse Coordination Committee is required to adopt the uniform standards pursuant to the rulemaking procedures under the Administrative Procedure Act (Ch. 3.5 (commencing with Sec. 11340), Pt. 1, Div. 5, Title 2, Gov. C.).

Having reached this conclusion, we next turn to whether the healing arts boards are required to use the uniform standards if those standards are properly adopted. In addressing that question, we apply certain established rules of statutory construction. To ascertain the meaning of a statute, we begin with the language in which the statute is framed (*Leroy T. v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 434, 438; *Visalia School Dist. v. Workers' Comp. Appeals Bd.* (1995) 40 Cal.App.4th 1211, 1220). Significance should be given to every word, and construction making some words surplusage is to be avoided (*Lambert Steel Co. v. Heller Financial, Inc.* (1993) 16 Cal.App.4th 1034, 1040). In addition, effect should be given to statutes according to the usual, ordinary import of the language employed in framing them (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388).

As set forth above, subdivision (c) of Section 315 provides that "the committee shall formulate uniform and specific standards in each of the following areas that each healing arts board shall use in dealing with substance-abusing licensees, whether or not a board chooses to have a formal diversion program" (emphasis added). Section 19 provides that "shall" is mandatory and "may" is permissive. The word "may" is ordinarily construed as permissive, whereas the word "shall" is ordinarily construed as mandatory (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443).

Here, in Section 315, the Legislature uses the term "shall" rather than "may" in providing that each healing arts board "shall use" the specific and uniform standards adopted by the committee when dealing with substance-abusing licensees. The Legislature uses the term "shall use" as compared to "shall consider," "may consider," or "may use." The Legislature's use of the term "shall" indicates that the healing arts boards are required to use the standards adopted by the committee rather than being provided the discretion to do so. Moreover, as employed in this context, the word "use" implies that the healing arts boards must implement and apply those standards rather than merely considering them. Finally, the use of the term "uniform" suggests that the Legislature intended each board to apply the same standards. If the healing arts boards were not required to use the standards as adopted by the committee, the standards employed by these boards would vary rather than being "uniform."

Notwithstanding the plain meaning of Section 315, one could argue that the enactment of Section 315.4 indicates that the Legislature intended that implementation of the uniform standards by the boards be discretionary. Section 315.4, which was added by Senate Bill No. 1172 of the 2009-10 Regular Session (Ch. 517, Stats. 2010, hereafter S.B. 1172), provides that a healing arts board "may adopt regulations authorizing the board to order a licensee on probation or in a diversion program to cease practice for major violations and when the board orders a licensee to undergo a clinical diagnostic evaluation pursuant to the uniform and specific standards adopted and authorized under Section 315." Section 315.4 could be read to imply that a healing arts board is not required to implement those uniform standards because the board was given discretion to adopt the regulations that would allow that board to implement the standards, if necessary.

It is a maxim of statutory construction that a statute is to be construed so as to harmonize its various parts within the legislative purpose of the statute as a whole (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 788). As discussed above, we believe that the plain meaning of Section 315 requires the healing arts boards to implement the uniform standards adopted by the committee. Thus, whether Section 315.4 indicates, to the contrary, that the Legislature intended the boards to have discretion in that regard depends upon whether there is a rational basis for harmonizing the two statutes.

In harmonizing Sections 315 and 315.4, we note that S.B. 1172 did not make any changes to Section 315, such as changing the term "shall" to "may" in subdivision (c) of Section 315 or deleting any subdivisions of Section 315. S.B. 1172 did not diminish the scope of the authority provided to the committee to adopt the uniform standards. In fact, the analysis of the Senate Committee on Business, Professions and Economic Development for S.B. 1172, dated April 19, 2010 (hereafter committee analysis), describes the purpose of S.B. 1172 and the enactment of Section 315.4, as follows:

"The Author points out that pursuant to SB 1441 (Ridley-Thomas, Chapter 548, Statutes of 2008), the DCA was required to adopt uniform guidelines on sixteen specific standards that would apply to substance-abusing health care licensees, regardless of whether a board has a diversion program. Although most of the adopted guidelines do not need additional statutes for

implementation, there are a couple of changes that must be statutorily adopted to fully implement these standards. This bill seeks to provide the statutory authority to allow boards to order a licensee to cease practice if the licensee tests positive for any substance that is prohibited under the terms of the licensee's probation or diversion program, if a major violation is committed and while undergoing clinical diagnostic evaluation" (Committee analysis, at p. 4.)

The committee analysis further provides that the purpose of S.B. 1172 was to grant specific authority to implement those standards and "provide for the full implementation of the Uniform Standards" (committee analysis, at p. 11). The committee analysis at no time implies that the Legislature intended the Section 315 uniform standards to be revised or repealed by S.B. 1172 or that, in enacting Section 315.4, the Legislature intended that the implementation of the uniform standards be subject to the discretion of each healing arts board.

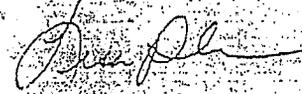
Thus, in our view, Section 315.4 may be reasonably construed in a manner that harmonizes it with Section 315. Specifically, we think that the intent of the Legislature in enacting Section 315.4 was not to make the uniform standards discretionary but to provide for the full implementation of the Uniform Standards" by providing the authority to adopt regulations where the Legislature believed that further statutory authority was needed. Accordingly, we think implementation by the various healing arts boards of the uniform standards adopted under Section 315 is mandatory.<sup>4</sup>

<sup>4</sup> Although Section 108 and Division 2 (commencing with Section 500) authorize the healing arts boards to set standards and adopt regulations (see, for example, Secs. 1224, 1614, 2018, 2531.95, 2615, 2715, 2854, 2930, 3025, 3510, and 3546) it is an axiom of statutory construction that a particular or specific provision takes precedence over a conflicting general provision (Sec. 1859; *C.C.P., Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 420, app. dism. *Kubo v. Agricultural Relations Bd.* (1976) 429 U.S. 802, see also Sec. 3534, Civ. C.). Thus, in our view, the specific requirement under Section 315 that the uniform standards be adopted supersedes any general provision authorizing the boards to set standards and adopt regulations.

Thus, it is our opinion that, if the uniform standards are properly adopted by the Substance Abuse Coordination Committee, the healing arts boards are required to implement them.

Very truly yours,

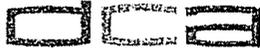
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By  
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# MEMORANDUM

DATE	April 5, 2012
TO	ALL HEALING ARTS BOARDS
FROM	 <b>DOREATHEA JOHNSON</b> Deputy Director, Legal Affairs Department of Consumer Affairs
SUBJECT	Opinion Regarding Uniform Standards for Substance-Abusing Licensees (SB 1441)

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

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

Questions Presented

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

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

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

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

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

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

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

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

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

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

Attachments

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

**M e m o r a n d u m**

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

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

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

**Executive Summary**

Issues

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

(1) SACC was required to formally promulgate the uniform standards as regulations pursuant to the Administrative Procedures Act (APA), and

(2) the healing arts boards are required to use such standards under Business and Professions Code sections 315.

Summary of Responses

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

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

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

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

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

### Statutory Background

In 2008, SACC was legislatively established within the Department of Consumer Affairs to create uniform standards to be used by the healing arts boards when addressing licensees with substance abuse problems. (Bus. & Prof. Code, § 315, subd. (a); Stats. 2008, ch. 548 (SB 1441).) By January 1, 2010, SACC was required to "formulate uniform and specific standards" in 16 identified areas "that each healing arts board shall use in dealing with substance-abusing licensees, whether or not a board chooses to have a formal diversion program." (*Id.* at § 315, subd. (c).) These 16 standards include requirements for: clinical diagnostic evaluation of licensees; the temporary removal of the licensee from practice for clinical diagnostic evaluation and any treatment, and criteria before being permitted to return to practice on a full-time or part-time basis; aspects of drug testing; whether inpatient, outpatient, or other type of treatment is necessary; worksite monitoring requirements and standards; consequences for major and minor violations; and criteria for a licensee to return to practice and petition for reinstatement of a full and unrestricted license. (*Ibid.*) SACC meetings to create these standards are subject to Bagley-Keene Act open meeting requirements. (*Id.* at subd. (b).)

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

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

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

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

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

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

In 2010, additional legislation was enacted to further implement section 315. Specifically, it provided that the healing arts boards, as described in section 315 and with the exception of the Board of Registered Nursing, "may adopt regulations authorizing the board to order a licensee on probation or in a diversion program to cease practice for major violations and when the board orders a licensee to undergo a clinical diagnostic evaluation pursuant to the uniform and specific standards adopted and authorized under Section 315." (Bus. & Prof. Code, § 315.4, subd. (a); Stats. 2010, ch. 517 (SB 1172).) An order to cease practice does not require a formal hearing and does not constitute a disciplinary action. (*Id.* § 315.4 subds. (b), (c).)

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

Although most of the adopted guidelines do not need additional statutes for implementation, there are a few changes that must be statutorily adopted to fully implement these standards. [¶] This bill seeks to provide the statutory authority to allow boards to order a licensee to cease practice if the licensee tests positive for any substance that is prohibited under the terms of the licensee's probation or diversion program, if a major violation is committed and while undergoing clinical diagnostic evaluation. [¶] The ability of a board to order a licensee to cease practice under these circumstances provides a delicate balance to the inherent confidentiality of diversion programs. The protection of the public remains the top priority of boards when dealing with substance abusing licensees.

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

### Legal Analysis

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

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

Under the APA, a regulation is defined as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." (Gov. Code, § 11342.600.) "No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless [it has been adopted in compliance with the APA]." (*Id.* § 11340.5, subd. (a).) This requirement cannot be superseded or modified by subsequent legislation, unless the statute does so expressly. (*Id.* § 11346, subd. (a).)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Although most of the adopted guidelines do not need additional statutes for implementation, there are a few changes that must be statutorily adopted to fully implement these standards. [¶] This bill seeks to provide the statutory authority to allow boards to order a licensee to cease practice if the licensee tests positive for any substance that is prohibited under the terms of the licensee's probation or diversion program, if a major violation is committed and while undergoing clinical diagnostic evaluation.

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

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

### Conclusion

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

Doreatha Johnson  
February 29, 2012  
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believe that the healing arts boards must use the uniform standards where an agency undertakes an action covered by the standards.

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

:KAL

cc: Peter K. Southworth, Supervising Deputy Attorney General

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March 28, 2013

RE: Opinion No. 13-202

To Whom It May Concern:

We have received a request from Virginia Herold, California Board of Pharmacy for an opinion of the Attorney General on the following questions:

1. Is the statutory scheme created by Senate Bill 1441 (Bus. & Prof. Code §§ 315-315.4) and prescribing the promulgation and implementation of uniform standards for healing arts boards to utilize in dealing with their "substance-abusing licensees" invalid either (a) for vagueness or (b) as an improper delegation of legislative authority to the entity charged with promulgating the standards (the Substance Abuse Coordination Committee or SACC)?

2. Must the uniform standards be adopted as regulations under the Administrative Procedure Act and, if so, by what entities?

3. Are individual healing arts boards permitted to define the term "substance-abusing licensees" for purposes of determining which of their licensees are subject to the uniform standards in the first instance?

4. Must individual healing arts boards utilize the uniform standards verbatim in all cases in which they are found to apply, and, if so, do the boards nonetheless retain discretion over how to utilize the uniform standards and decide individual cases?

It is the policy of our office to solicit the views of all interested parties prior to issuing an opinion. If you would like to submit comments, a response by May 28, 2013, would be most helpful; materials received after such date will nonetheless be considered. Views submitted will be treated by our office as public records under the Public Records Act. Please address your views to:

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March 28, 2013

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Information regarding the status of this opinion request and a copy of the opinion when it is issued, as well as opinion research materials and a description of our opinion writing policies, are available on the Opinion Unit's Internet website, [www.ag.ca.gov/opinions](http://www.ag.ca.gov/opinions).

Sincerely,



SUSAN DUNCAN LEE  
Supervising Deputy Attorney General  
Opinion Unit

For KAMALA D. HARRIS  
Attorney General

SDL:mjn:al

cc: Diane Eisenberg

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