

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

INITIAL STATEMENT OF REASONS

HEARING DATE: April 4, 2011

SUBJECT MATTER OF PROPOSED REGULATIONS: Consumer Protection
Enforcement Initiative

SECTION(S) AFFECTED: Title 16, Division 10, California Code of Regulation,
Sections 1018.05, 1020

INTRODUCTION:

In July 2009, the *Los Angeles Times* published an article indicating that the Board of Registered Nursing often takes years to take disciplinary action on complaints of egregious misconduct, while the licensees were still practicing. These articles exposed the need for healing arts boards within the Department of Consumer Affairs (Department) to improve the enforcement process to ensure patient safety.

As a result of the article, the Department held an informational hearing and investigated the problems that were addressed in the *Los Angeles Times* article. The Department developed a report (*Department of Consumer Affairs "Consumer Protection Enforcement Initiative BCP Independent Verification & Validation Report, March 2010"*) regarding the existing enforcement problems and made recommendations for improving the enforcement programs of the healing arts boards. The Department also sponsored legislation, Senate Bill 1111 (Negrete McLeod), during the 2009-2010 Legislative Session to codify many of the recommendations contained within the report. However, the bill failed to be enacted.

When the bill failed to be enacted into law, the Department encouraged the healing arts boards to pursue regulatory action to assist the boards with investigating and prosecuting complaints in a timely manner, and to provide the boards with tools to improve the enforcement process and ensure patient safety.

On November 5, 2010, the Dental Board of California (Board) reviewed proposed regulatory amendments that would improve the Board's enforcement process in an effort to address public concern. The Board directed staff to initiate a rulemaking to further define unprofessional conduct and to permit the Board to require the

examination of an applicant who may be impaired by a physical or mental illness affecting competency.

SPECIFIC PURPOSE OF EACH ADOPTION OR AMENDMENT:

Adopt Section 1018.05 of Article 4.6 of Division 10 of Title 16 of the California Code of Regulations (Unprofessional Conduct Defined):

This section adopts a new Article 4.6 of Division 10 of Title 16 of the California Code of Regulations to further define unprofessional conduct.

Section 1018.05(a):

Section 1018.05(a) specifies that the failure of a licensee to provide records requested by the Board within 15 days constitutes unprofessional conduct unless the licensee is unable to comply for good cause. "Good cause" is specified to include physical inability to access the requested records in the time allowed due to an illness or travel.

Factual Basis/ Rationale:

Existing law, California Business and Professions Code (Code) Section 1684.1, specifies that a licensee who fails or refuses to comply with the Board's request for records, within 15 days of receiving the request, is required to pay a civil penalty to the Board of \$250 per day for each day the records are not provided, up to a maximum of \$5,000. Existing law, Section 1670 of the Code, specifies that any licensee may have their license revoked, suspended, reprimanded, or placed on probation by the Board for unprofessional conduct, incompetence, gross negligence, or repeated acts of negligence in their profession. Current Law, Section 1680 of the Code, does not specify that failure to provide records is a ground for finding that unprofessional conduct occurred.

While the Board has the authority to impose a monetary fine against a licensee as a penalty, there is no current provision for the Board to take disciplinary action against the license for not complying with a records request. A licensee who does not provide requested information, or who does not cooperate with the Board, can create a significant delay in an investigation and can endanger patient safety. This proposed subdivision identifies the failure of a licensee to provide requested records as an act of unprofessional conduct, and ultimately authorizes the Board to take disciplinary action against a licensee who fails to provide records. This will enable the Board to more quickly investigate the underlying allegations and offenses and act accordingly to provide better consumer protection. If a licensee is able to demonstrate "good cause" for being unable to comply with a records request, they may contact the Board and

may be granted an extension of time to return the records depending on the licensee's circumstances.

Section 1018.05(b)(1):

Section 1018.05(b)(1) specifies that the failure of the licensee to provide information regarding the bringing of an indictment or the charge of a felony against the licensee to the Board within 30 days constitutes unprofessional conduct.

Factual Basis/ Rationale:

Existing law, Section 1670 of the Code, specifies that any licensee may have their license revoked, suspended, reprimanded, or placed on probation by the Board for unprofessional conduct, incompetence, gross negligence, or repeated acts of negligence in their profession. Current Law, Section 1680 of the Code, does not specify failure of a licensee to provide information regarding the bringing of an indictment or the charge of a felony within 30 days as a ground for finding that unprofessional conduct occurred.

This proposed subdivision identifies the failure of a licensee to provide information regarding the bringing of an indictment or the charge of a felony against a licensee to the Board within 30 days as an act of unprofessional conduct, and ultimately authorizes the Board to take disciplinary action against a licensee who fails to provide this information. As current law does not allow for such timely reporting, this will enable the Board to more quickly investigate the underlying allegations and offenses and act accordingly to provide better consumer protection.

Section 1018.05(b)(2):

Section 1018.05(b)(2) specifies that the failure of a licensee to provide information regarding the conviction of the licensee to the Board within 30 days constitutes unprofessional conduct. The conviction of a licensee includes any verdict of guilty, pleas of guilty or no contest, of any felony or misdemeanor.

Factual Basis/ Rationale:

Existing law, Section 1670 of the Code, specifies that any licensee may have their license revoked, suspended, reprimanded, or placed on probation by the Board for unprofessional conduct, incompetence, gross negligence, or repeated acts of negligence in their profession. Existing law, Section 1670.1 of the Code, specifies that a licensee may have their license revoked, suspended, reprimanded, or placed on probation by the Board for the conviction of a crime substantially related to their qualifications, functions, or duties as a dentist or dental auxiliary. Current Law, Section 1680 of the Code, does not specify failure of a licensee to provide information

regarding the conviction of the licensee within 30 days as a ground for finding that unprofessional conduct occurred.

Currently, a licensee is required to renew their license every two years. Upon renewal, a licensee is asked if they have been convicted of a crime since their last renewal. If a licensee notifies the Board that they have been convicted since the last renewal, the Board identifies the type of conviction. If the conviction is found to be substantially related to the practice of dentistry, the Board will take disciplinary action against the license. The types of convictions that can be found to be substantially related to the practice of dentistry include: crimes of violence, dishonesty, sexual abuse or misconduct, or cases related to repeated acts of substance abuse.

This proposed subdivision identifies that the failure of a licensee to provide information regarding their conviction to the Board within 30 days as an act of unprofessional conduct, and ultimately authorizes the Board to take disciplinary action against a licensee who fails to provide this information. The Board will now be notified of a licensee's conviction within 30 days of the occurrence, rather than the licensee's next renewal. As current law does not allow for such timely reporting, this will enable the Board to more quickly investigate the underlying offenses and act accordingly to provide better consumer protection.

Section 1018.05(b)(3):

Section 1018.05(b)(3) specifies that the failure of a licensee to provide information regarding disciplinary action taken by another professional licensing entity, an authority of this state or of another state, an agency of the federal government, or the United States military to the Board within 30 days constitutes unprofessional conduct.

Factual Basis/ Rationale:

Existing law, Section 1670 of the Code, specifies that any licensee may have their license revoked, suspended, reprimanded, or placed on probation by the Board for unprofessional conduct, incompetence, gross negligence, or repeated acts of negligence in their profession. Current Law, Section 1680 of the Code, does not specify failure of a licensee to provide information regarding disciplinary action taken by another professional licensing entity, an authority of this state or another state, an agency of the federal government, or the United States military to the Board within 30 days as a ground for finding that unprofessional conduct occurred.

This proposed subdivision identifies that the failure of a licensee to provide information regarding a disciplinary action taken by another professional licensing entity, an

authority of this state or of another state, an agency of the federal government, or the United States military to the Board within 30 days as an act of unprofessional conduct, an ultimately authorizes the Board to take disciplinary action against a licensee who fails to provide this information. Boards and Bureaus within the Department have experienced difficulties being notified of their licensees facing disciplinary action by professional licensing entities in other states in a timely manner. By requiring licensees to report disciplinary action from other professional licensing entities or other authorities, the Board will be able to quickly investigate the underlying allegations and offenses and act accordingly to provide better consumer protection.

Section 1018.05(b)(4):

Section 1018.05(b)(4) specifies that for the purposes of this section, the term “conviction” means a plea or verdict of guilty, or a conviction following a plea of no contest and any conviction that has been set aside or deferred pursuant to California Penal Code Sections 1000 or 1203.4, including infractions, misdemeanors, and felonies. For the purposes of this section, the term “conviction” does not include traffic infractions with a fine of less than one thousand dollars unless the infraction involved alcohol or controlled substances.

Factual Basis/ Rationale:

Existing law, Section 1670.1 of the Code, states: “A plea or verdict of guilty or a conviction following a plea of nolo contendere made to a charge of a felony or of any misdemeanor substantially related to the qualifications, functions, or duties of a dentist or dental auxiliary is deemed to be a conviction within the meaning of this section.”

This proposed subdivision further defines the meaning of “conviction” to include the language from Section 1670.1 of the Code, but also includes language referencing Penal Code section 1000 and 1203.4 pertaining to convictions that have been set aside or deferred. The definition also specifies that “convictions” do not include traffic infractions with a fine of less than one thousand dollars unless it involved alcohol or controlled substances. The Board has previously proposed regulations requiring retroactive fingerprinting of all licensees. Within that proposed regulation, the definition of “conviction” specified that it did not include traffic infractions with a fine of less than one thousand dollars. In order to provide consistency throughout the Board’s regulations, the same language has been used in this proposed language.

Amend Section 1020 of Division 10 of Title 16 of the California Code of Regulations (Application Review and Criteria for Evaluating Rehabilitation)

Section 1020(a):

This proposed subdivision amends Section 1020 of Title 16 of the California Code of Regulations to provide the Board with the authority to require an applicant for licensure to be examined by a physician and surgeon, or psychologist if the applicant appears to be unable to safely practice due to a mental illness or physical illness that affects competency. If the applicant does not comply with the evaluation, the application will be deemed incomplete. The report of the evaluation will be provided to the applicant and the Board is responsible for the cost of the examination. The Board may deny the application if the evaluation demonstrates that the applicant is unable to safely practice.

Factual Basis/Rationale:

Existing law, Section 820 of the Code, authorizes the Board to examine licensees for mental illness or physical illness affecting competency. In the past, the Board has experienced applicants demonstrating behavior that could potentially affect competency and could lead to unprofessional conduct endangering patient safety. The Board has experience with examination applicants who have displayed unreasonable anger and have endangered patient safety during the examination process. Currently, the Board is not authorized to further evaluate applicants who pass a licensure examination, even though they may demonstrate a physical or mental illness affecting the competency necessary to safely practice. This section provides the Board with the ability to have applicants examined by physicians and surgeons or psychologists if the applicant demonstrates that he may be unable to practice competently due to physical or mental illness to protect the consumers of dental services from unsafe, incompetent, negligent or impaired dentists or dental auxiliaries.

UNDERLYING DATA:

1. Charles Ornstein, Tracy Weber and Maloy Moore, "Problem nurses stay on the job as patients suffer", *Los Angeles Times*, July 12, 2009
<<http://www.latimes.com/news/local/la-me-nurse12-2009jul12,0,2185588.story>>, accessed on January 19, 2011
2. Department of Consumer Affairs "Consumer Protection Enforcement Initiative A Systematic Solution to a Systematic Problem, Updated 1/21/10"
3. Department of Consumer Affairs "Consumer Protection Enforcement Initiative BCP Independent Verification & Validation Report, March 2010"
4. Senate Bill 1111 (Negrete McLeod) from 2009/2010 Legislative Session as Amended in Senate April 12, 2010
5. July 26, 2010 Dental Board Meeting Minutes
6. November 5, 2010 Dental Board Meeting Minutes

BUSINESS IMPACT:

The Board has made an initial determination that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. The Board currently regulates a total of 72,866 licensees, including 37,508 dentists, 34,084 registered dental assistants, and 1,277 registered dental assistants in extended functions.

The proposed regulation will provide the Board with the means to expedite the enforcement process by further defining unprofessional conduct. The proposed regulation also gives the Board the ability to require the examination of an applicant who may be impaired by a physical or mental illness that may affect competency. These changes have been proposed to allow the Board the ability to provide better public protection.

Licensees may incur a nominal fee for the copying and mailing of records requested by the Board. However, current statute requires licensees to comply with the Board's records request or they risk being fined. Since current statute previously required the copying and submission of records, there should be no additional fiscal impact to the licensee or their business as a result of this regulation.

Licensees will be considered to have committed unprofessional conduct if they fail to provide records requested by the Board within 15 days. As a result, licensees may face disciplinary action against their license.

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

A license that has been revoked, suspended, reprimanded or placed on probation may cause a significant fiscal impact on the business where the licensee worked depending on the nature and severity of the violation. A business owned by a licensee who faces disciplinary action may incur a significant fiscal impact depending on the nature and severity of the violation. The Board does not maintain data relating to the number or

percentage of licensees who own a business; therefore the number or percentage of businesses that may be impacted cannot be predicted. The Board only has authority to take administrative action against a licensee and not a business. Accordingly, the initial or ongoing costs for a small business owned by a licensee who is the subject of disciplinary action cannot be projected. Businesses operated by licensees who are in compliance with the law will not incur any fiscal impact.

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

The Board currently regulates 72,866 licensees, including dentists, registered dental assistants, and registered dental assistants in extended functions. In the last five (5) years the Board has been compelled to examine seventeen (17) licensees as provided in Section 820 of the Code. Such an examination has cost the Board approximately \$2,500 each time. The Board receives approximately 1,100 applications for licensure as a dentist each year, approximately 2,300 applications for registered dental assistant licensure each year, and approximately 90 applications for registered dental assistant in extended functions licensure each year. The Board does not maintain data regarding the number of applicants who have demonstrated physical or mental illnesses affecting competency, therefore it is difficult to estimate the number of applicants the Board may examine. Based upon the number of licensees examined pursuant to existing authority, the fiscal impact of the proposed regulatory action on State government would be minor and any additional expenditure would be absorbable by the Board. This proposed regulation will not affect any federally funded State agency or program.

SPECIFIC TECHNOLOGIES OR EQUIPMENT:

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

CONSIDERATION OF ALTERNATIVES:

No reasonable alternative to the regulation would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulations. Set forth below are the alternatives which were considered and the reasons each alternative was rejected:

1. Do not seek a regulatory change.

Rejected: The Board's highest priority is the protection of the public while exercising its licensing, regulatory, and disciplinary functions. These proposed regulatory changes provide the Board with the means to expedite the enforcement process and provide better public protection.

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

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