

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

INITIAL STATEMENT OF REASONS

HEARING DATE: May 13, 2014

SUBJECT MATTER OF PROPOSED REGULATIONS: Revocation for Sexual Misconduct

SECTION(S) AFFECTED: California Code of Regulations, Title 16, Division 10, Section 1018

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.

In response to this, 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. In November 2010, as part of its discussion on which provisions of SB 1111 to implement via regulation, the Board discussed promulgating a regulation to require revocation for sexual misconduct; however, the Board did not move forward with promulgating a proposal because it felt the existing provisions within the Dental Practice Act provided similar and adequate public protection. In the end, the Board promulgated 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. This regulation became effective on March 9, 2012.

In January 2014, Senate Business, Professions and Economic Develop Committee (Committee) staff requested that the Board revisit the discussion on revocation of licensure for sexual misconduct and reconsider promulgation of a regulation as other healing arts boards within the Department had already done so. At its February 2014 meeting, the Board reconsidered promulgation of a regulatory package to amend California Code of Regulations, Title 16, Section 1018 as it relates to revocation for sexual misconduct and directed staff to initiate the rulemaking.

SPECIFIC PURPOSE OF EACH ADOPTION OR AMENDMENT:

The Board proposes to amend California Code of Regulations, Title 16, Section 1018 to require an Administrative Law Judge (ALJ) to order revocation of a license when issuing a proposed decision that contains any findings of fact that: (1) a licensee engaged in any act of sexual contact with a patient, client, or customer; or, (2) the licensee has been convicted of or committed a sex offense. This proposal would prohibit the proposed decision issued by the ALJ under such circumstances from containing an order staying the revocation of the license or placing the licensee on probation.

Furthermore, this proposal specifies that the terms “sexual contact” has the same meaning as defined in Business and Professions Code Section 729(c) and the term “sex offense” has the same meaning as defined in Education Code Section 44010.

FACTUAL BASIS/RATIONALE:

Pursuant to Business and Professions Code (BPC) Section 1614, the Board is authorized to adopt, amend, or repeal such rules and regulations as may be reasonably necessary to enable the Board to carry into effect the provisions of the Dental Practice Act.

Pursuant to BPC Section 1601.2, the protection of the public is the highest priority of the Board when exercising its licensing, regulatory, and disciplinary functions.

Existing law, BPC Section 726, specifies that the commission of any act of sexual abuse, misconduct, or relations with a patient, client, or customer constitutes unprofessional conduct and is grounds for disciplinary action for any person licensed under Division 2 (Healing Arts) of the BPC. Section 726 provides that it does not apply to sexual contact between a physician and surgeon and his or her spouse or person in an equivalent domestic relationship when that physician and surgeon provides medical treatment, other than psychotherapeutic treatment, to his or her spouse or person in an equivalent domestic relationship.

Existing law, BPC Section 729, defines “sexual contact” as sexual intercourse or the touching of an intimate part of a patient for the purpose of sexual arousal, gratification, or abuse.

Existing law, BPC Section 1670, specifies that any Board licensee may have his license revoked, or suspended, or be reprimanded, or be placed on probation by the Board for

unprofessional conduct, or incompetence, or gross negligence, or repeated acts of negligence in his or her profession, or for the issuance of a license by mistake, or for any other cause applicable to the licensee provided in this chapter. These proceedings are required to be conducted in accordance with the administrative adjudication requirements contained within Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

Existing law, BPC Section 1670.1, 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.

Existing law, BPC Section 1680, defines the committing of any act or acts of sexual abuse, misconduct, or relations with a patient that are substantially related to the practice of dentistry as unprofessional conduct by a person licensed by the Board.

Existing law, Education Code Section 44010, defines “sex offense” as any one or more of the following offenses:

- Any offense defined in Section 220, 261, 261.5, 262, 264.1, 266, 266j, 267, 285, 286, 288, 288a, 288.5, 289, 311.1, 311.2, 311.3, 311.4, 311.10, 311.11, 313.1, 647b, 647.6, or former Section 647a, subdivision (a), (b), (c), or (d) of Section 243.4, or subdivision (a) or (d) of Section 647 of the Penal Code.
- Any offense defined in former subdivision (5) of former Section 647 of the Penal Code repealed by Chapter 560 of the Statutes of 1961, or any offense defined in former subdivision (2) of former Section 311 of the Penal Code repealed by Chapter 2147 of the Statutes of 1961, if the offense defined in those sections was committed prior to September 15, 1961, to the same extent that an offense committed prior to that date was a sex offense for the purposes of this section prior to September 15, 1961.
- Any offense defined in Section 314 of the Penal Code committed on or after September 15, 1961.
- Any offense defined in former subdivision (1) of former Section 311 of the Penal Code repealed by Chapter 2147 of the Statutes of 1961 committed on or after September 7, 1955, and prior to September 15, 1961.
- Any offense involving lewd and lascivious conduct under Section 272 of the Penal Code committed on or after September 15, 1961.
- Any offense involving lewd and lascivious conduct under former Section 702 of the Welfare and Institutions Code repealed by Chapter 1616 of the Statutes of 1961, if that offense was committed prior to September 15, 1961, to the same

extent that an offense committed prior to that date was a sex offense for the purposes of this section prior to September 15, 1961.

- Any offense defined in Section 286 or 288a of the Penal Code prior to the effective date of the amendment of either section enacted at the 1975–76 Regular Session of the Legislature committed prior to the effective date of the amendment.
- Any attempt to commit any of the offenses specified in this section.
- Any offense committed or attempted in any other state or against the laws of the United States which, if committed or attempted in this state, would have been punishable as one or more of the offenses specified in this section.
- Any conviction for an offense resulting in the requirement to register as a sex offender pursuant to Section 290 of the Penal Code.
- Commitment as a mentally disordered sex offender under former Article 1 (commencing with Section 6300) of Chapter 2 of Part 2 of the Welfare and Institutions Code, as repealed by Chapter 928 of the Statutes of 1981.

When reviewed in 2010, the Board's primary concern seemed to be focused on the potential for a licensee to have a license revoked due to a complaint being filed by an ex-significant other when a relationship ended badly. Committee staff believes that those cases would be able to be handled at a Board staff level in the form of a settlement rather than being forwarded to an ALJ for proposed decision; only the egregious cases of sexual misconduct would be forwarded to an ALJ for hearing and proposed decision. Pursuant to BPC Section 726, a dentist should not be having a sexual relationship with a patient; thus, the concern regarding a licensee having a license revoked due to a complaint being filed by an ex-significant other when a relationship ends badly would be a non-issue.

It should be noted that professional dental associations have codes of ethics as it relates to violations of law and interpersonal relationships. The following statements support the Board's decision to promulgate a regulation:

- The California Dental Association (CDA) Code of Ethics states: "A dentist has the obligation to comply with all state and federal laws and regulations. It is unethical for a dentist to violate any law of the state of California relating to the practice of dentistry or to engage in activity for which the dentist may be reprimanded, disciplined, or sentenced by final action of any court or other authority of competent jurisdiction, when such action reflects unfavorably on dentists or the dental profession. It is also unethical for a dentist to engage in unprofessional conduct as it is defined by the Dental Practice Act."

- An Advisory Opinion from the American Dental Association (ADA) Code of Ethics states: "Dentists should avoid interpersonal relationships that could impair their professional judgment or risk the possibility of exploiting the confidence placed in them by a patient."

Violations of these codes of ethics can result in loss of membership from the applicable association. Anyone expelled from a professional association has to report this when applying to become a provider for insurance panels. If panel membership is denied, a significant financial impact may be incurred.

According to the Administrative Procedure Act, ALJs are not granted any discretion to decide a matter. They can only propose a decision predicated upon findings made during a hearing in which he or she presided. This allows a board to retain the sole discretion to decide a matter. As provided in Government Code section 11517(c)(2)(B), the Board has the authority and discretion to "reduce or otherwise mitigate the proposed penalty and adopt the balance of a proposed decision". However, if a board believes that a stiffer penalty should be assessed, it can only be done by non-adopting a proposed decision.

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. February 28, 2014 Dental Board Meeting Minutes

BUSINESS IMPACT:

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

The Board has determined that the following types of businesses may be affected by the proposal:

- Businesses owned by licensees of the Board who face disciplinary action due to sexual misconduct.
- Businesses that employ licensees of the Board who face disciplinary action due to sexual misconduct.

The Board currently regulates approximately 102,000 licensees; consisting of approximately 45,600 dentists (DDS), approximately 54,700 registered dental assistants (RDA), and 1,700 registered dental assistants in extended functions (RDAEF). The average salary of a DDS in California is approximately \$150,000 per year and the annual salary of a RDA in California is approximately \$35,000 per year.

A business owned by a licensee whose license is revoked may incur a significant fiscal impact. Businesses that employ a licensee whose license is revoked may incur a significant fiscal impact. 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 license and not a business. Accordingly, the initial or ongoing costs for a small business owned by a licensee who is the subject of revocation cannot be projected. Businesses operated by licensees who are in compliance with the law will not incur any fiscal impact.

Fiscal Impact on Individuals:

This proposal would impact individual licensees of the Board whose license has been revoked as a result of committing a violation relating to sexual misconduct (i.e. engaging in sexual contact with a patient, client, or customer, or having been convicted of or committed a sex offense as defined). Revocation of a license means that the individual would no longer be able to legally practice which would result in a loss of income earned by an individual when the license was valid. Licensees who are in compliance with the law will not incur any fiscal impact.

Fiscal Impact on the Board:

The Board estimates that approximately one (1) licensee will have his or her license revoked annually as a result of committing a violation relating to sexual misconduct. This estimate is based on the number of cases the Board has encountered over the last three years that have gone to an ALJ for a proposed decision involving sexual misconduct violations. Every case referred to the Attorney General's Office costs the Board an average of \$5,000 (\$3,500 Attorney General's Office Expenses + \$750 Office of Administrative Hearing Expenses + \$750 Evidence/Witness Expenses).

ECONOMIC IMPACT ASSESSMENT:

This regulatory proposal will have the following effects:

- It will not create or eliminate jobs within the State of California because this proposal will not be of sufficient amount to have the effect of creating or eliminating jobs. The Board has made this determination because this proposal would only impact individual licensees of the Board whose license has been revoked as a result of committing a violation relating to sexual misconduct. The Board estimates that approximately one (1) licensee will have his or her license revoked annually as a result of committing a violation relating to sexual misconduct which may result in the potential elimination of employment.

- It will not create new business or eliminate existing businesses within the State of California because this proposal will not be of a sufficient amount to have the effect of creating or eliminating business. The Board has made this determination because this proposal would only impact individual licensees of the Board whose license has been revoked as a result of committing a violation relating to sexual misconduct. The Board estimates that approximately one (1) licensee will have his or her license revoked annually as a result of committing a violation relating to sexual misconduct which may result in the potential elimination of a business if owned by a licensee whose license to practice is revoked.
- It will not affect the expansion of businesses currently doing business within the State of California because the proposal will not be of a sufficient amount to have the effect of limiting or furthering the expansion of businesses. The Board has made this determination because this proposal would only impact individual licensees of the Board whose license has been revoked as a result of committing a violation relating to sexual misconduct. The Board estimates that approximately one (1) licensee will have his or her license revoked annually as a result of committing a violation relating to sexual misconduct which may result in the potential limiting of the expansion of a business if owned by a licensee whose license to practice is revoked.
- This regulatory proposal does not affect worker safety because this proposal is not relative to worker safety.
- This regulatory proposal does not affect the state's environment because this proposal is not relevant to the state's environment.

Benefits:

The benefit from these proposed regulations will be to provide maximum protection to the California consumers against licensees who are found to be in violation of the laws relating to sexual misconduct. These benefits are a direct result of the Board's statutorily mandated priority (BPC Section 1601.2). The protection of the public is the highest priority of the Board in exercising licensing, regulatory, and disciplinary functions. This proposal will ensure that individuals who have violated the laws relating to sexual misconduct will be effectively disciplined in a manner that will protect the public.

SPECIFIC TECHNOLOGIES OR EQUIPMENT:

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

CONSIDERATION OF ALTERNATIVES:

No reasonable alternative to the regulation would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation or would be more

cost effective to affected private persons and equally effective in implementing the statutory requirement or other provision of law.

Set forth below are the alternatives which were considered and the reasons each alternative was rejected:

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

Rejected: The Board's highest priority is the protection of the public while exercising its licensing, regulatory, and disciplinary functions. These proposed regulatory changes provide the Board with the means to ensure that individuals who have violated the laws relating to sexual misconduct will be effectively disciplined in a manner that will protect the public.