

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

**FINAL STATEMENT OF REASONS**

**HEARING DATE:** May 13, 2014

**SUBJECT MATTER OF PROPOSED REGULATION:** Revocation for Sexual Misconduct

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

**UPDATED INFORMATION:**

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

At its February 2014 meeting, the Dental Board of California (Board) approved proposed regulatory language relative to Revocation of Licensure for Sexual Misconduct and directed staff to initiate the rulemaking. Board staff filed the initial rulemaking documents with the Office of Administrative Law (OAL) on March 18<sup>th</sup> and the proposal was published in the California Regulatory Notice Register on Friday, March 28, 2014. The 45-day public comment period began on Friday, March 28, 2014 and ended on Monday, May 12, 2014. The Board held a regulatory hearing in Sacramento on Tuesday, May 13, 2014. The Board received written comments from the California Dental Association (CDA).

The Board considered the comments from the CDA at its May 2014 meeting and voted to reject the comments and adopted the final text as noticed in the proposed text. The Board directed staff to finalize the rulemaking file and file with the OAL.

**LOCAL MANDATE:**

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

**SMALL 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 following alternative was proposed to lessen such adverse economic impact on small businesses, and was rejected for the reasons set forth below:

- (1) Do not seek a regulatory change.

Reason for rejection: 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.

The anticipated benefits from these proposed regulations are:

- 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).
- Ensure that individuals who have violated the laws relating to sexual misconduct will be effectively disciplined in a manner that will protect the public.

#### **CONSIDERATION OF ALTERNATIVES:**

No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the Board would be more effective in carrying out the purpose for which it was proposed or would be as effective and less burdensome to affected private persons than the adopted regulation or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

#### **OBJECTIONS OR RECOMMENDATIONS/RESPONSES:**

The California Dental Association (CDA) submitted a letter in response to the Board's proposed rulemaking to amend California Code of Regulations, Title 16, Section 1018 relative to Revocation for Sexual Misconduct.

#### **Comments Received from the CDA:**

The CDA submitted a letter to the Board in response to the Board's rulemaking proposal. The CDA commented that it was concerned that two different and seemingly conflicting statutes define unprofessional conduct with regard to sexual contact with a patient. The first is section 1680 in the Dental Practice Act, which defines unprofessional conduct for dentists and addresses sexual misconduct in subsection (e) as follows: "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*" (italics added). The conflicting statute is section 726, which is located in the overall division for

healthcare providers. Section 726 restates the first portion of 1680 (e), but deletes the phrase that links the misconduct to the practice of dentistry. Of particular concern to CDA on this matter is a recent understanding that the interpretation that the section 726 exemption for sexual contact with spouses and domestic partners does not include dentists, and despite the limitation under 1680(e), it would be illegal for a dentist to provide dental care to his or her spouse or domestic partner.

Further adding to the confusion on this matter is that the authorization cited for the proposed regulatory amendments does not reference section 1680 (e) at all. The CDA found this omission curious because it is the relevant statute governing dentists within the Dental Practice Act. The CDA commented that the general rules of statutory construction suggest that a more specific statute, such as section 1680(e), prevails over a general statute, such as section 726, especially if the two statutes are conflicting, as in this case (see Code of Civil Procedure §1859). The CDA requested that, at a minimum, the Board provide a legal analysis of this issue, including recommendations for possible remedial action. Notwithstanding the discussion above and CDA's request for legal examination, CDA recommends the board consider the following amendment to section (d) of the regulatory proposal:

(d) For the purposes of this section, "sexual contact" means sexual intercourse or the touching of an intimate part of a patient, not including a spouse or domestic partner, for the purpose of sexual arousal, gratification, or abuse ~~has the same meaning as defined in subdivision (c) of Section 729 of the Business and Professions Code and~~ "sex offense" has the same meaning as defined in Section 44010 of the Education Code.

*Board's Response to Comments Received from the CDA:*

The Board rejected the CDA's comments for the following reasons:

The Board does not share the view that Business and Professions Code sections 726 and 1680 are conflicting statutes; rather the Board believes that both provisions operate concurrently in the interest of consumer protection. Section 726 provides 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 healing arts professional licensed under Division 2 of the Business and Professions Code. Section 1680(e) 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. Both sections 726 and 1680 are applicable to licensees of the Board; one provision does not prevail over the other unless there is express authority, such as utilizing the term "notwithstanding", as is customary within the statutes contained in the Dental Practice Act.

Additionally, since Section 726 does not expressly exempt its provisions from applying to dentists, like it does for physicians and surgeons licensed by the Medical Board of California, one could subjectively argue that sexual contact with any patient, regardless

of the relationship status, could be conceived to be substantially related to the practice of dentistry.

It should be noted that the provisions of Section 726 that provides the exemption for sexual relations between a physician and surgeon and his or her spouse or person in an equivalent domestic relationship, has been in effect for the last twenty (20) years. Neither dentists, nor any other healing arts professional licensed under Division 2 of the Business and Professions Code have ever shared a like exemption.

Section 1680 is not cited as an “authority”, rather it has been cited as a “reference” for the following reasons:

- Pursuant to the California Code of Regulations, Title 1, Section 14, an “authority” source is considered a California constitutional or statutory provision which expressly permits or obligates the rulemaking agency to adopt, amend, or repeal the regulation, or a California constitutional or statutory provision that grants a power to the agency which impliedly permits or obligates the agency to adopt, amend, or repeal the regulation in order to achieve the purpose for which the power was granted. Pursuant to Business and Professions Code Section 1614, the Board is granted rulemaking authority and 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. Therefore, section 1614 is cited as the “authority”.
- California Code of Regulations, Title 1, Section 14 also provides that a “reference” source is presumed to exist if an agency is empowered to implement, interpret or make specific a California constitutional provision, a California statute, federal statute or regulation, or a court decision or order. Consequently, this proposed rulemaking lists sections 1680 and 726 as “reference” sources to implement how an Administrative Law Judge (ALJ) handles cases when issuing proposed decisions for the Board that contain findings of fact that the licensee engaged in any act of sexual contact with a patient, client, or customer, or the licensee has been convicted of or committed a sex offense.

No further legal analysis of the issue would be warranted as the rulemaking’s *Notice of Proposed Action* and *Initial Statement of Reasons* clearly explains the purpose of this rulemaking and provides a comprehensive analysis of the factual basis and rationale for the Board’s adoption of this proposed rule.

Recommendations for possible remedial action are unnecessary as this proposal merely provides direction from the Board to the ALJs that specifies that proposed decisions that contain findings of fact that the licensee engaged in any act of sexual contact with a patient, client, or customer, or the licensee has been convicted of or committed a sex offense are required to contain an order of revocation which may not be stayed. As provided in the *Initial Statement of Reasons*, 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”.

Lastly, the Board rejected the CDA’s proposed amendment to the rulemaking language. The Board does not have the express statutory authority to provide an exemption from the provisions of Business and Professions Code Section 726 to permit sexual relationships between a dentist and a patient who is a spouse or significant other. Doing so would exceed the Board’s rulemaking authority.