RESPONSE TO THE LEGISLATIVE OVERSIGHT COMMITTEES' BACKGROUND PAPER AND CURRENT SUNSET REVIEW ISSUES FOR THE DENTAL BOARD OF CALIFORNIA
Submitted Electronically April 3, 2019

The Dental Board of California (DBC) is submitting its response to issues identified in the Legislative Oversight Committees' Background Paper; as well as issues that were identified during the oversight hearing that took place on March 5, 2019.

FISCAL ISSUES

ISSUE #1: ***Merger of Special Funds. Should the State Dentistry Fund and the State Dental Assisting Fund be merged to simplify and streamline accounting and budgeting processes for the DBC?***

Background: Following discussions conducted during the DBC's last sunset review, board staff researched the feasibility of merging the State Dentistry Fund and the State Dental Assisting Funds, in consultation with the Department of Consumer Affairs' Budget Office. Staff determined that the merging of the two funds would streamline certain processes. Combining of the two separate funds and two separate appropriations into one would create efficiencies in budgeting and accounting processes in the long term and make budgeting issues simpler to understand.

It has been noted that there would be a significant amount of work involved in consolidating the two distinct funds, and statute would have to be amended to accommodate the transition. However, the Department of Consumer Affairs' Budget Office has stated its belief that the long-term benefits of merging the two funds outweigh the short-term concerns and increased workload. At the May 2017 meeting, the DBC voted to support the merging of the State Dentistry Fund and the State Dental Assisting Fund and directed staff to continue to research and identify the process by which the two funds may be merged; and to include a request to merge the funds as part of the DBC's Sunset Review Report.

Staff Recommendation: ***In light of the extensive research that was conducted into the feasibility and benefits of merging the Dentistry and Dental Assisting Funds in the long-term, statute should be amended to facilitate the process of combining the funds.***

DBC Response: The DBC agrees with this recommendation and once given the statutory authority to proceed, will work with the Department of Consumer Affairs' (DCA) Budget Office to merge the Dentistry and Dental Assisting Funds.

ADMINISTRATIVE ISSUES

ISSUE #2: ***Dental Hygiene Board. What is the current state of the DBC's relationship with the Dental Hygiene Board of California, which also regulates licensees involved in the dental profession?***

Background: The Dental Hygiene Committee of California was established nearly a decade ago as the only standalone regulatory entity for dental hygienists in the nation. The committee was formally renamed the Dental Hygiene Board (DHBC) following its sunset review in 2018 in recognition of its

functionality as an independent body with fully independent authority to regulate the practice of dental hygiene. The DHBC's sunset extension vehicle also struck language from statute misleadingly stating that the DHBC was an entity "within the jurisdiction of the Dental Board of California."

As the exclusive regulator of individuals licensed as registered dental hygienists, registered dental hygienists in alternative practice, and registered dental hygienists in extended functions, the DHBC shares the responsibility for overseeing professionals working in dental offices along with the DBC. Therefore, any discussions regarding potential scope changes or other changes to practice within the range of dental professionals licensed by each entity respectively must therefore be done with open communication and collaboration between the boards. A strong relationship between board staff for the DBC and the DHBC is necessary to promote an ongoing balance of professional practice within the team environment of a dental office.

Staff Recommendation: ***The DBC should provide the committees with an overview of how it operates collaboratively with the Dental Hygiene Board of California and describe whether any adjustments are being made in light of recent statutory changes made during the DHBC's latest sunset review.***

DBC Response: The executive officers of the DBC and the Dental Hygiene Board of California (DHBC) have enjoyed a collaborative relationship since the breakup of the Committee on Dental Auxiliaries (COMDA) and the formation of the Dental Hygiene Committee of California in 2009. The executive officers accompany their board presidents to each regular meeting to keep each board apprised of the issues of concern and activities of the other board. The lines of communication remain open. The DBC and DHBC work together on enforcement cases when appropriate. The Legislature created the Dental Hygiene Committee (now recognized as a Board) so that it could make independent decisions on issues related to the regulation of the hygienist profession. The DBC anticipates no adjustments are necessary in light of recent statutory changes made during the DHBC's last sunset review.

ISSUE #3: *Board Attorney. Does the DBC have sufficient legal counsel?*

Background: Business and Professions Code § 1616 expressly provides the DBC with "full power to … appoint its own attorney, prescribe his duties and fix his compensation."[1] However, the DBC does not currently have its own dedicated attorney. Legal representation in disciplinary prosecution is provided by the Attorney General's Licensing Section, and the Department of Consumer Affairs offers counsel as part of the centralized services it provides to boards, as needed to assist with rulemaking, address legal issues that arise, and support compliance with open meeting laws. Dedicated board counsel is, however, considered to provide substantial value when questions of law occur regularly enough to warrant the presence of attorney who specializes in a board's Practice Act and areas of jurisdiction. It is under this line of thinking that the Legislature has authorized the DBC to appoint its own lawyer, and any reasons for that position remaining unfilled should be discussed before the committees.

Staff Recommendation: ***The DBC should give an update on the current structure under which the board receives legal advice and representation; inform the committees of whether it believes the hiring of dedicated board counsel, as permitted in statute, would be of substantial benefit; and provide any background on why the board attorney position has not been filled.***

[1] *Pronouns quoted as currently written in statute.*

DBC Response: At present, the DCA has control over department legal counsel assignments to specific boards and bureaus. The DCA frequently shifts legal counsel assignments, which creates undue hardship on board and bureau operations. The DBC is currently assigned legal counsel representation from the DCA.

In an effort to promote continuity and stability on highly complex, sensitive, and political legal matters, the DBC believes it is critical to its mission and success that it permanently employs its own Attorney. The DBC submitted a package to establish an Attorney III blanket position at limited term for 24 months in order to address and record the workload that is required of an Attorney III allocation for a future Budget Change Proposal for a permanent position. The recruitment package was submitted to DCA Human Resources in July 2017.

Discussions between the DBC's Executive Officer and the DCA Deputy Director of Legal Affairs resulted in the recruitment package being suspended and new legal counsel was assigned to the DBC. As a result of the newly assigned legal counsel leaving DCA, the DBC reinitiated the recruitment package, which has been held in the DCA Executive Office since February 21, 2019. As of April 2, the DCA Chief Deputy Director indicated that "the recruitment package is being reviewed and he hopes to have more information to report soon."

ISSUE #4: ***NC Dental. Are there any outstanding concerns that the Supreme Court's decision in*** **North Carolina State Board of Dental Examiners v. FTC** ***could have implications for the DBC?***

Background: In 2015, the United States Supreme Court ruled in *North Carolina State Board of Dental Examiners v. Federal Trade Commission* ("*NC Dental*") that when a state regulatory board features a majority share of active market participants, any allegedly anticompetitive decision-making may not be subject to Parker antitrust litigation immunity unless there is "active state supervision" to ensure that all delegated authority is being executed in the interest of the public and not the private commercial interests of the members.

This case has not yet resulted in any meaningful litigation against public bodies established under California law, and it remains to be seen whether any of the state's regulatory entities are vulnerable to antitrust claims. However, the *NC Dental* decision remains a persistent topic of discussion for each regulatory body that has since undergone review.

The DBC is a majority-professional member board overseeing the practice of dentistry. However, numerous distinctions between the DBC's regulatory activities and the facts of the *NC Dental* case make the likelihood of similarly successful antitrust litigation substantially improbable. For example, while the North Carolina State Board of Dental Examiners is considered an "agency of the State," its eight-member board featured six practicing dentists and one practicing dental hygienist, all of whom were elected by practicing licensees within the profession. A single public member was appointed by the Governor to the board. By contrast, the DBC has eight practicing dentists, one registered dental hygienist, one registered dental assistant, and five public members, all of whom are appointed by either the Governor or legislative leadership.

Further, the oversight provided by the Department of Consumer Affairs uniquely confirms the presence of "active state supervision" for purposes of *NC Dental*. The DBC is considered only semi-autonomous, with much of its rulemaking and disciplinary activity subject to involvement by multiple other

governmental entities. The Department of Consumer Affairs has also worked to ensure that members are adequately trained in certain procedures to ensure an adequate record of deliberation for purposes of defense against any potential allegations of antitrust.

Staff Recommendation: ***The DBC should describe what efforts it has taken to ensure its decision-making is subject to sufficient state supervision so as to provide board members with confidence that their actions are covered by Parker immunity from antitrust allegations.***

DBC Response: As part of the DCA's Board Member Orientation, it provides members with information and guidance regarding the NC Dental case. The guidance includes the following: Always remember the board's mission is consumer protection; be cognizant of how a board decision could impact a particular marketplace as compared to the public policy benefits; recognize that individual disciplinary decisions are not likely to trigger antitrust liability; make regulatory and policy decisions after robust discussions that focus on consumer protection, and prepare and retain records and minutes that capture those discussions; and consult with DCA legal counsel as necessary. Additionally, when the DBC promulgates regulations there are 13 levels of review in the initial phase of the regulatory process and 13 levels of review in the final phase of the regulatory process. The process is transparent and allows for public comment and oversight by other state agencies. The DBC has monitored previous legislative attempts in California to provide clarification that the DBC's actions are covered by Parker immunity from antitrust allegations; appreciates this effort and would continue to support it.

EDUCATION AND EXAMINATION ISSUES

ISSUE #5: ***RDA Practical Examination. Should the practical examination requirement for registered dental assistants be permanently eliminated?***

Background: On April 6, 2017, the DBC voted to suspend the RDA practical examination as a result of the findings of a review conducted by the Office of Professional Examination Services (OPES) within the Department of Consumer Affairs. (As discussed under "Prior Sunset Issues.") This review was prompted by issues highlighted during the DBC's last sunset review in 2015, when it was revealed that the average passage rate for the RDA practical examination had dropped from roughly 83% in 2014 to between 19% and 38%. AB 179 (Bonilla) subsequently authorized the DBC to suspend the examination pending the results of the study. This suspension was then extended until January 1, 2020 by AB 1707 (Low).

The OPES report determined that the practical examination did not accurately measure the competency of RDAs and recommended that the DBC immediately suspended the administration of the examination. OPES opined that correcting compliancy with technical and professional standards will require a great deal of time and resources from the DBC and industry and recommended that the DBC initiate a process to evaluate options other than the examination to ensure the competency of a RDA. OPES evaluated the practical examination with regard to reliability of measurement, examiner training and scoring, test administration, test security, and fairness. Specifically, OPES identified that the inconsistencies in different test site conditions, deficiencies in scoring criteria, poor calibration of examiners, and the lack of a clear definition of minimum acceptable competence indicated that the practical examination does not meet critical psychometric standards.

At its August 2017 meeting, the DBC took action to appoint a subcommittee of the DBC to develop alternatives to RDA licensure, other than a practical exam, to bring back for consideration at a future meeting. This subcommittee integrated stakeholder feedback in a workshop. At its November 2017 meeting, the DBC voted to adopt the alternative which requires that eligibility for RDA licensure be based on completion of the current licensure requirements and passage of the RDA written examination and the RDA Law & Ethics written examination, without the practical examination. The DBC has stated its belief that this option was the most reasonable and optimal and will not introduce additional barriers to RDA licensure. The decision is supported by the fact that OPES indicated that the RDA written examinations, along with the fact that RDA duties are supervised by the dentist, places the public at little risk of harm. A practical examination, the DBC believes, would not provide additional public protection beyond that conferred by successful completion of an educational program or a written examination.

Staff Recommendation: ***The DBC should speak to whether it has received any complaints relating to RDAs that have not passed the suspended practical examination; whether it believes a practical examination is essential to measuring competency of RDAs; and whether it believes this examination should be revived effective January 1, 2020 or if its current suspension should be made permanent.***

DBC Response: During the DBC's last sunset review in 2015, concerns were raised relating to the passing rate of its Registered Dental Assistant (RDA) practical examination. Discussions surrounding these concerns resulted in the passage of AB 179, authored by Assembly Member Bonilla, that authorized the DBC to suspend the practical examination if a review of the DCA Office of Professional Examination Services (OPES) concluded the practical examination was unnecessary or did not accurately measure the competency of RDAs in California.

The DBC along with the Dental Assisting Council (DAC) determined that an occupational analysis of the RDA profession must be conducted to develop a description of current practice in terms of the actual job tasks that entry-level licensees must be able to perform safely and competently.

The OPES conducted the occupational analysis as requested and the results of the project were also used to ensure the content of written, practical, and law and ethics licensing examinations reflected the knowledge and skills that are critical for public protection.

In addition to the occupational analysis, the OPES conducted a review of the RDA practical examination and recommended the DBC immediately suspend its administration. Further, the OPES concluded there was a relatively low risk of harm to the public from the suspension of the examination because of the other measures in place, such as the requirement for applicants to pass a written examination and RDAs are required to be under general or direct supervision of a licensed dentist. On April 6, 2017, the DBC voted to suspend the administration of the practical examination.

At its August 2017 meeting, the DBC and the DAC considered alternatives, presented by the OPES, relating to assessing the competency of RDA candidates to perform the clinical procedures necessary for licensure. The DBC appointed a subcommittee of its members to evaluate alternatives, other than a practical examination, to bring back to the DBC and DAC for consideration at a future meeting.

After considering feedback received during a stakeholder workshop, the subcommittee recommended alternatives at the November 2017 DBC meeting. Consideration was given not only to public protection, but also whether the new eligibility requirements would eliminate overly restrictive eligibility standards, or standards of practice that unduly limit competition between professionals or place undue burdens on those who want to enter the profession.

Ultimately, the DBC and DAC voted to adopt an alternative to a practical exam which requires eligibility for RDA licensure be based on completion of the current application requirements as established by current law and regulation and successful completion and passing of the RDA written examination and the RDA law & ethics written examination.

The DBC and DAC believe that this option was the most reasonable and optimal and will not introduce additional barriers to RDA licensure. The decision is supported by requiring candidates to take and pass a written examination and once licensed, the duties are supervised by the dentist therefore the public is at little risk of harm. A practical examination would not provide additional public protection beyond that conferred by successful completion of an educational program or a written examination.

Since the suspension of the practical examination in April 2017, the DBC has issued approximately 4,500 RDA licenses. It is important to note, the DBC has not received complaints relating to RDAs licensed without having taken a practical examination.

The DBC does not believe an RDA practical examination is essential to measuring competency to become initially licensed in California because proficiency in performing the RDA abilities occurs after licensure and is related to the RDA gaining further practice and experience in dental offices under the supervision of their employer dentists. Additionally, the supervising dentist is the ultimate judge and arbiter of the extent to which the RDA demonstrates sufficient proficiency to perform duties in the dentist's office.

Currently, the suspension of the practical examination is only authorized in statute until January 1, 2020. The DBC recommends the current suspension of the RDA practical examination be made permanent and eligibility for RDA licensure be based on completion of the current application requirements as established by current law and regulation and successful completion and passing of the RDA written examination and the RDA law & ethics written examination.

ISSUE #6: ***Portfolio Examinations. Is the DBC's portfolio examination process adequately providing pathways to licensure for dental students as an effective alternative to conventional examinations?***

Background: Licensure by portfolio is a recently enacted alternative pathway to licensure as a dentist in California, available to applicants since November 2014. Under portfolio licensure requirements, instead of taking a single examination, students build a portfolio of completed clinical experiences and clinical competency examinations in six subject areas over the normal course of their clinical training during dental school. The portfolio option gives students in California an alternative to being tested on a live patient over the course of one weekend. The applicant's portfolio is assessed for demonstration of experiences and competencies, following a letter of good standing signed by the dean of the applicant's dental school. The applicant must also pass Parts I and II of the National Board Written Examinations.

The portfolio option gives students an alternative to being tested on a live patient over the course of one weekend, which is the method of assessing competency used in the Western Regional Examination Board (WREB) exam process, as well as other examinations throughout the country. The portfolio process offers multiple benefits to students and patients, including letting students extend treatment over multiple patient visits, which reduces the stress of a one-time testing event and more closely simulates real-world care. The pathway provides an opportunity for patients to receive follow-up treatment as needed; and provides a method by which students are ready for licensure upon graduation.

Concerns have been raised that because California has the distinction of being one of the first states to pursue this method of qualifying for licensure, dentists who have obtained their license through the portfolio pathway may face difficulties when seeking reciprocal acknowledgment of qualification by other states. The DBC's successful implementation of licensure by portfolio continues to be an important demonstration of the effectiveness of what could be considered regulatory innovation. However, if applicants are denied license portability as a result of the novel nature of this examination alternative, the DBC should consider whether additional steps should be taken to safeguard licensee mobility.

Staff Recommendation: ***The DBC should characterize the success of licensure by portfolio examination and inform the committees of any issues relating to how this pathway to the dental profession impacts students seeking to practice dentistry within and outside California.***

DBC Response: The portfolio examination pathway to licensure in California is an example of the effectiveness of innovative methods of dental licensure. The concept of the DBC's portfolio curriculum integrated clinical examination was born from the idea that no more human subjects would be used for post-graduation clinical licensure examinations. Upon this premise, the DBC moved forward with the development and implementation of a curriculum integrated clinical licensure examination for students graduating from dental schools in California.

The portfolio pathway to licensure allows students to build a portfolio of completed clinical experiences and clinical competency examinations in six subject areas over the course of their clinical training in dental school, instead of taking a single examination on a live patient over the course of a weekend. The portfolio process offers multiple benefits to students and patients, including letting students extend treatment over multiple patient visits, which reduces the stress of a one-time testing event and more closely simulates real-world patient care. The pathway provides an opportunity for patients to receive follow-up treatment as needed; and provides a method by which students are ready for licensure upon graduation.

This pathway to licensure has the full support of the six dental schools in California. However, student participation has dropped. Some have speculated that students are concerned with portability between states, for example, if the student is licensed by the portfolio pathway in California would this license be accepted in another state.

The DBC continues to work with schools and students to respond to challenges presented by this pathway to licensure in California.

During the past four years the DBC has responded to inquiries from other states expressing an interest in the California portfolio model. The DBC has made all material developed from inception to implementation of the portfolio pathway to licensure available on the DBC's website, including but not limited to the legislation, the consultant psychometric examination reports, and the regulations as well as the candidate and examiner handbooks developed for implementation. Other states now have the road map on how to develop and implement California's curriculum integrated clinical examination should they choose to do so.

A national movement has begun to consider using California's hybrid portfolio examination as the clinical examination throughout the country. Efforts are being made by the American Dental Association, the American Dental Educators Association, and the American Student Dental Association to promote a compendium of clinical competencies based on California's program. The

DBC will support this effort and will be working with other state regulatory agencies to promote this pathway to licensure.

ISSUE #7: *Foreign Dental Schools. Should the current process by which the DBC approves foreign dental schools continue?*

Background: Statute enacted in 1998 granted the DBC responsibility for approving foreign dental schools, recognizing that "graduates of foreign dental schools who have received an education that is equivalent to that of accredited institutions in the United States and that adequately prepares their students for the practice of dentistry shall be subject to the same licensure requirements as graduates of approved dental schools or colleges." Schools outside the United States and Canada seeking approval to graduate students eligible for licensure as dentists in California must apply to the DBC and undergo an evaluation process, with renewal applications required every seven years.

The DBC's investigative process for reviewing applications from foreign dental schools is outlined in regulations. Schools are required to meet basic curriculum requirements as well as administrative and programmatic standards to ensure a certain degree of equivalency with schools operating within the United States. An "onsite inspection and evaluation team" appointed by the board is then responsible for making "a comprehensive, qualitative onsite review of each institution that applies for approval." This review includes examining documents, inspecting facilities, auditing classes, and interviewing administrators, faculty, and students. Reviewed schools are required to reimburse the DBC for all reasonable costs incurred by staff and the site team relating to the inspection. The DBC must notify the school of whether it has been approved within 225 days of a completed application.

Two foreign dental schools are currently approved by the DBC: The University De La Salle School of Dentistry, located in Leon, Guanajuato, Mexico, and the State of Medicine and Pharmacy "Nicolae Testemintanu" of the Republic of Moldova. The Moldova dental school Moldova received a two-year provisional approval in December 2016 and full approval in May 2018. Subsequently, members of the DBC grew concerned that additional details of the Moldova school's recruitment program and admission standards were not disclosed in the application or to the DBC site evaluation team during the review.

In the DBC's November 2018 meeting, the board discussed a recently uncovered flyer advertising the Moldova school titled "Become a dentist… while living in Europe!" The flyer was widely distributed in California through "the University of Moldova USA Inc."—a separate entity operating an admissions office for the Moldova dental school based in Encino, CA. According to the DBC, the relationship between the dental school and the entity in Encino "was never divulged during the site evaluation conducted in October 2016." It is apparent that the Moldova dental school has actively recruited students in California, promising DBC-approved dental school education (taught entirely in English) without the need for a four-year college degree. Further, the tuition charged to students recruited in the United States appears to be four times that of Moldovan students.

To date, representatives of the Moldova school have not thoroughly responded to the DBC's questions and concerns. However, representatives of the school will attend the May 2019 meeting to address the DBC's concerns. As the DBC continues to debate what appropriate action should be taken concerning

the Moldova school's approval status, the DBC has concluded that it does not have the resources or expertise to sufficiently evaluate foreign dental schools.
During the DBC's last sunset review, an issue was raised regarding whether the DBC should "consider heavier reliance on accrediting organizations for foreign school approvals if those options become available." Currently, dental schools established within the United States but outside California are approved by the Commission on Dental Accreditation (CODA), which further recognizes Canadian dental schools approved by the Commission on Dental Accreditation of Canada. CODA has established an International Accreditation process designed to assess and approve foreign dental schools through robust investigation and evaluation. To date, CODA has yet to approve any foreign dental schools through this lengthy process. However, CODA has begun to evaluate applications for approval, including one submitted by a school in Leon, Guanajuato, Mexico. If it is determined that the role of the DBC in approving foreign dental schools should be reduced, the CODA process may be a desirable alternative.

Staff Recommendation: ***The DBC should provide background on how foreign dental schools are currently approved and whether accrediting organizations such as CODA should play a larger role in the approval process.***

DBC Response: During the prior sunset review, the oversight committee discussed foreign dental school approvals and whether the current process for approving foreign dental schools is sufficient; or whether the DBC should consider heavier reliance on accrediting organizations such as the Commission on Dental Accreditation (CODA) for foreign school approvals.

The legislature recognized the need to ensure that graduates of foreign dental schools who have received an education that is equivalent to that of accredited institutions in the United States and that adequately prepares their students for the practice of dentistry shall be subject to the same licensure requirements in California as graduates of approved dental schools or colleges. The institutional standards upon which the board evaluates foreign dental schools were initially established based upon the CODA standards used for dental schools located within the United States. At the time that this statute went into effect, CODA did not have a program to evaluate international dental schools. While throughout the years CODA has continued to review and revise its standards, the DBC has not kept pace with these changes by updating its regulations.

The DBC acknowledges that the California standards should be updated to reflect the CODA standards, however, completing this update through the regulatory process has proven very arduous. The process by which regulations are updated takes anywhere from 9 to 18 months to become effective. CODA implements revisions of its accreditation standards regularly. Between January 1, 2017 and January 1, 2018, CODA implemented revisions to three (3) of its accreditation standards for dental education programs. If the DBC began the process of bringing its educational standards in line with CODA at this time, it is likely that by the time the process is finished, those standards again will have been revised by CODA. This makes it virtually impossible for the DBC to keep current with CODA's accreditation standards.

It is important to point out that over the last twenty years, since this statute was created, there have been only three foreign dental schools that have applied for board approval; two have been successful and one did not complete the process.

In addition, statute states, in pertinent part, the following: "the legislature hereby urges all dental schools in this state to provide in their curriculum a two-year course of study that may be utilized by

graduates of foreign dental schools to attain the prerequisites for licensure in California. Since the inception of this statute, five of the six the dental schools in California have established two-year international dentist programs.

Advancements have been made at CODA with regard to international dental school accreditation. In November 2015, the American Dental Association (ADA) House of Delegates supported the establishment of the CODA Standing Committee on International Accreditation (SCIA). CODA now has a rigorous and comprehensive international accreditation program for predoctoral dental education.

Currently there are a number of international dental schools utilizing the CODA consultative services and are in various phases of the accreditation process.

The DBC believes that the best way to meet the legislature's need to ensure that graduates of foreign dental schools have received an education that is equivalent to that of accredited institutions in the United States is to require foreign dental schools to successfully complete the CODA international consultation and accreditation process that is currently available to all foreign dental schools.

ENFORCEMENT ISSUES

ISSUE #8: ***Consumer Products. Does the DBC have sufficient oversight over consumer products advertising self-applied corrective treatments for structural or aesthetic oral health conditions?***

Background: Within the many professions and occupations regulated in California, the advent of new technologies has enhanced access and ease for service to consumers. Dentistry and oral health is no exception, and individuals seeking a "better smile" are able to participate in a growing marketplace for products enabling consumers to improve their oral health and appearance from the comfort of their homes. Like with all services contained within the scope of a profession licensed by the state, however, there is benefit to analyzing the balance of convenience and any potential risk of consumer harm.

One example of a self-applied dental treatment is teeth whitening, which is estimated to be a $15 billion industry. Numerous methods for whitening teeth are available, from pastes to strips to trays molded to fit a consumer's teeth. Whitening services are available through licensed dental professionals; however, many products can be ordered online or purchased off the shelf. Based on the method of the whitening product, it is likely that the majority of related consumer products pose little risk of patient harm, so while dentist consultation is valuable and recommended for more intensive treatment, the absence of a licensed professional's involvement in many teeth whitening products is unlikely to be problematic.

Another growing market for self-applied dental treatments is in the field of orthodontia. Several companies offer aligners that can be customized for the consumer at either a boutique storefront or through an at-home kit mailed to the customer. Through these products, an individual is able to realign the positioning of their teeth into what they believe will be a straighter smile. While companies offering such products describe the mailed aligners as being "reviewed" by a dental professional through the use of remote tele-dentistry, it is possible for a consumer to go through the realignment process without ever actually consulting with a licensed dentist. This may be cause for some concern in light of reported incidents where teeth have been misaligned when using at-home aligners. Dental boards in other states have begun to take action against the marketers of such products, and ongoing litigation has resulted.

Veneers are another product that can be purchased outside of a dental office. Companies offering clip-on veneers allow consumers to improve their oral aesthetics by masking their real teeth with a more attractive surface. These products can also be ordered online and created through at-home impression kits. While companies offering these kinds of veneers will not sell to consumers who self-report the presence of health issues affecting their teeth, there may still be questions of whether any potential harm could result for consumers who do not speak to a licensed dentist before applying such products.

The DBC has stated that it will be "looking closely at tele-dentistry statutes to determine if corporations are interpreting the law too broadly, or whether the DBC should seek statutory language to narrow the application of tele-dentistry in order to ensure public protection." The DBC has also stated that it will be "gathering background information on the newly recognized specialty of dental radiology to determine whether utilizing dental radiologists, outside the state, would be considered unlicensed activity." These inquiries by the DBC may ultimately resolve questions about self-applied treatments.

Staff Recommendation: ***The DBC should speak generally to its authority to oversee consumer products aimed at promoting oral health through self-applied corrective treatments and communicate any recommendations for statutory enhancements to the committees.***

DBC Response: Self-applied dental products are regulated by the U.S. Food and Drug Administration and therefore the DBC does not have authority to oversee consumer products aimed at promoting oral health through self-applied corrective treatments. The DBC receives complaints regarding self-applied corrective treatments and investigates for violations of the Dental Practice Act. At a future meeting, the DBC will discuss current statutes and whether or not changes should be made to protect the California consumer.

ISSUE #9: ***Enforcement Targets. Does available data relating to enforcement timelines suggest any inefficiencies in discipline cases brought by the DBC in collaboration with the Attorney General?***

Background: Enforcement timelines and the DBC's expediency in resolving complaints against licensees have long been traditional topics in the oversight of the DBC, as it is with other regulatory entities in California. Under the Consumer Protection Enforcement Initiative (CPEI), a series of policies and regulations resulting from a 2010 report, various timeframe targets have been identified for the DBC to complete segments of the enforcement process for the approximately 3,750 complaints received each year. These targets are important for measuring performance, and resolving complaints quickly works to both protect consumers and release good actors from the cloud of an allegation.

Currently, the DBC is meeting many, but not all, of its goals. The target for intake of a complaint is mandated at ten days; the DBC is currently averaging seven days. The target for both intake and investigation of a complaint is 270 days; the DBC is currently averaging 265 days. The 65% of complaints that are ultimately closed without being referred to an investigator are closed within an average of 150 days. For the remaining 35% that are referred to an investigator, the average time to closure is 347 days for non-sworn staff and 449 days for sworn staff. These statistics indicate that delays persist in the investigative phase, which could potentially be due to factors such as vacancy rates within the DBC's Enforcement Division or the relative challenges of investigating more complex cases.

For complaints that are investigated and then taken through the entire enforcement process in cases seeking formal discipline, the target is 540 days. The current average for this complete process is currently 886 days—arguably a significant gap. It should be noted that for cases that go to hearing, the DBC is not entirely responsible for the timeline. The Attorney General's office is responsible for handling legal representation for each case, and the Office of Administrative Hearings is typically limited as to the availability of hearing dates and Administrative Law Judges. Factors such as continuances, witness scheduling, criminal trial conflicts, and others may also lead to delays during the enforcement process.
Beginning in 2017, the Attorney General's office is now annually reporting statistics relating to its role in the discipline process for the client boards and bureaus it represents in hearings. The Attorney General has reiterated the necessary context that not all complaints are equal, and a variety of factors may make the administrative adjudication process take much longer for one case than another. In Fiscal Year 2017-18, a total of 110 accusation matters were referred by the DBC to the Attorney General, with 76 matters ultimately adjudicated.

Reported timelines for the Attorney General's involvement in cases may be useful to identify where delays are occurring in the DBC's targets. In Fiscal Year 2017-18, the average number of dates for an accusation to be filed by the Attorney General following referral of a complaint was 131 days. This means that for complex cases investigated by sworn staff, the 540-day target for the DBC's enforcement process has already been exceeded by the time an accusation is actually filed. The average time from the filing of an accusation to a stipulated settlement is 300 days; the average time to a default decision is 149 days. Complaints that go to through the entire hearing process average 148 days from filing to the Attorney General requesting a hearing date, and from that point until the commencement of a hearing there is an average span of 134 days.

The above statistics from the DBC and the Attorney General supply a useful context to the 886-day average currently applicable to the DBC's enforcement process. However, it is unlikely that the overall failure to meet the 540-day target is attributable to any one deficiency in any one component of the current system, and it is likely that examination of averages, to some degree, obfuscates the nuances that arise from the unique nature of each individual case. As the Legislature continues its ongoing oversight efforts to improve case timelines for the DBC and other regulatory entities, it should continue to seek a deeper understanding of how case timelines develop and how statute can be improved to better support the board's enforcement efforts.

Staff Recommendation: ***The DBC should identify what it believes to be any deficiencies in the enforcement process, describe efforts to improve overall enforcement timelines, and offer any available suggestions to improve the current framework for discipline cases brought by the board.***

DBC Response: The DBC has identified its difficulty to complete the entire enforcement process for cases resulting in formal discipline within the target of 540 days. For the previous four fiscal years, the DBC's average to complete formal discipline is 886 days. While the DBC is not meeting the expectation of 540 days, the average has improved slightly since the last sunset review period where the average days to complete formal discipline was 998 days. This represents a reduction of 11% of the formal discipline cycle time from the previous sunset review period.

The DBC regularly reviews its enforcement statistics and continues to look for ways to efficiently and effectively improve overall enforcement timelines. In December 2018, the DBC implemented several internal processes which it hopes will improve the formal discipline target days.

- New management processes have been developed as tools for first level managers to measure and monitor staff workload, performance, and expectations.
- Clear workload expectations have been shared with employees; and one-on-one check-ins have been scheduled between the managers and staff to document deficiencies.
- The Department of Consumer Affairs has implemented an Enforcement Work Group where managers from various Boards/Bureaus meet every quarter to work together to help improve timelines, resolve enforcement processes, and to establish best practices.
- Management is conducting (at minimum) quarterly desk audits and/or case reviews with staff in the Complaint and Compliance Unit, Non-sworn personnel in the Investigative Analysis Unit and with sworn personnel (Peace Officers). The case reviews ensure investigative time lines are on track and if cases need to be reprioritized.

The DBC has increased its issuance of citations to address a wider range of violations that can be more efficiently and effectively addressed through the cite and fine process with abatement and/or remedial education, thus filing the more serious allegations with the Attorney General's Office.

PRACTICE ISSUES

ISSUE #10: *Opioid Crisis. What role do dentists play in the ongoing epidemic of opioid abuse and addiction, and how can the DBC support efforts to curb overprescribing within the dental profession?*

Background: In October 2017, the White House declared the opioid crisis a public health emergency, formally recognizing what had long been understood to be a growing epidemic responsible for devastation in communities across the country. According to the Centers for Disease Control and Prevention, as many as 50,000 Americans died of an opioid overdose in 2016, representing a 28 percent increase over the previous year. Additionally, the number of Americans who died of an overdose of fentanyl and other opioids more than doubled during that time with nearly 20,000 deaths. These death rates compare to, and potentially exceed, those at the height of the AIDS epidemic.

In September 2018, the California Dental Association (CDA) published a special edition of its *Update* newsletter entitled "The Opioid Issue." In it, CDA members contributed numerous entries discussing the status of the fight against the opioid crisis and the dental profession's involvement, including a piece entitled *Dentists play crucial role in fighting opioid epidemic*.
According to the article, a 2009 nationwide study "found that dentists were responsible for 8 percent of all opioid prescriptions in the U.S." and that dentists "were the major prescribers of opioids among the 10- to 19-year-old age group and frequent prescribers of immediate-release opioids, which tend to be more frequently abused than extended-release opioids." While dentists are less likely to be approached by opioid addicted patients who seek out multiple prescribers, they may be placed at the inception of addiction for many patients who receive their first prescription for legitimate pain management—a concept referred to as "first exposure." The role of dentists in preventing addiction and abuse of opioids has therefore risen to the heights of the dental profession's national dialogue.

As prescribers of controlled substances, dentists are required to register with the Department of Justice's Prescription Drug Monitoring Program, CURES, and as of October 2018 they are required to consult a patient's prescription history in CURES prior to writing a Schedule II-IV drug for the first time.

According to data provided by the Attorney General, between October 2014 and October 2018, dentists prescribed an average of 700,000 controlled substances per month out of the approximate four million prescriptions that traditionally get entered into CURES each month. Meanwhile, dentists requested a total of 33,597 activity reports from CURES during that four-year time frame. This suggests that dentists were not regular users of CURES prior to the October 2018 mandate despite being significant prescribers of controlled substances.

Legislation chaptered last year authorized the DBC to include "the risks of addiction associated with the use of Schedule II drugs" as a continuing education course required for license renewal. This bill was supported by both the DBC and the CDA. Since its enactment, the DBC has discussed the possibility of promulgating regulations to achieve that purpose. DBC staff recently reported to the board that it had developed proposed language, and the DBC voted to move forward with the regulations at its February 2019 board meeting.

Staff Recommendation: ***The DBC should describe the efforts it has taken to participate in the state's fight against the opioid crisis, the status of its proposed continuing education mandate regarding Schedule II drugs, and whether the new requirement that dental professionals consult the CURES database prior to prescribing controlled substances has been successful.***

DBC Response: The DBC recognizes that dentists play a crucial role in fighting the widespread use and abuse of opioids in the country; and it makes every effort not only to keep informed about strategies to combat the epidemic but also participates in the development of these strategies.

In 2013, the DBC participated in the Medical Board of California's Prescribing Task Force, which was intended to identify ways to proactively approach and find solutions to the epidemic of prescription drug overdoses and prescribing for pain through education, prevention, best practices, communication and outreach by engaging stakeholders with a vision to significantly reduce prescription drug overdoses. The Medical Board adopted its prescribing guidelines from this discussion.

In the spring of 2014 the Director of the California Department of Health convened an Opioid Misuse and Overdose Prevention Workgroup and invited the DBC to be one of its initial members. The workgroup has changed its name to the Statewide Opioid Safety Workgroup (SOS) and continues to explore opportunities to improve collaboration among state departments working to address this epidemic.

In 2015, the DBC established its own Substance Use Awareness Committee which developed the DBC's mission statement regarding prescription drug abuse and authorized the creation of a page on the DBC's website which lists links to educational resources to assist both consumers and licensees. The DBC believes that educating both licensees and consumers on this important issue coincides with our mission of public protection; and therefore, encourages its licensees to learn more about this epidemic and its tragic effects on individuals and their families; and to understand best prescribing practices and patient education methods that can be used when prescribing opioids including prescribing less and alternative pain relievers.

To this end and in support of its commitment to finding a solution to prescription drug abuse, during the 2018 legislative session, the DBC supported the passage of Senate Bill 1109, authored by Senator Bates, which adds "risks of addiction associated with the use of schedule II drugs" to the DBC's area of continuing education. At its February 2019, meeting the DBC approved regulatory language that would require dentists to take 2 units of mandatory continuing education every two years upon license

renewal. The continuing education will cover pain management, the identification of addiction, and the practices by which opioids are prescribed or dispensed.

Regarding the use of the Controlled Substance Utilization Review and Evaluation System, otherwise known as "CURES", and whether it has been successful – it is a work in progress.

The DBC recognizes that dentists play a pivotal role in providing quality care, ensuring patient safety, and supporting the improvement of public health. As prescribers of opioids for dental pain management, dentists have a professional responsibility to reduce the misuse and abuse of opioids. The DBC is hopeful that CURES provides a valuable tool to assist in that effort.

ISSUE #11: ***Probation Disclosure. Should dental professionals placed on probation by the DBC be required to disclose their probation status to patients in a manner similar to other healing arts licensees?***

Background: Last year, Senate Bill 1448 (Hill, Chapter 570, Statutes of 2018) enacted the Patient's Right to Know Act of 2018, requiring various healing arts licensees on probation for certain offenses to provide their patients with information about their probation status prior to the patient's first visit following the probationary order beginning July 1, 2019. Licensees covered by the bill include physicians and surgeons, podiatrists, chiropractors, acupuncturists, and naturopathic doctors. The bill did not, however, include dentists. If the ultimate objective of probation disclosure is protecting patients from being unknowingly placed in vulnerable contexts with licensees placed on probation for serious offenses, there is no clear reason as to why dentists should be treated differently and excluded from the patient notification requirement.

Staff Recommendation: ***The DBC should opine on whether probation status disclosure would be a valuable way to protect the public and provide transparency into discipline imposed by the board.***

DBC Response: The DBC continues to look for ways to ensure public protection when exercising its licensing, regulatory, and disciplinary functions. Regulations were promulgated that require licensed dentists engaged in the practice of dentistry to provide notice to each patient of the fact that the dentist is licensed and regulated by the Dental Board of California; and that complaints against a dentist should be forwarded to the DBC for review and possible disciplinary action. In addition, the notice is required to include the DBC's telephone number and internet address. This notice is required to be posted prominently in a conspicuous location accessible to public view on the premises where the dentist provides the licensed services. The DBC also posts all disciplinary actions taken against licensees, including but not limited to Accusations, Stipulated Settlements, Decisions, Suspensions, and Revocations on its website for the consumer to review. The DBC actively pursues revocation of a license for violations relating to sexual abuse or misconduct; drug or alcohol abuse; criminal convictions directly involving harm to patient health; and inappropriate prescribing. In these cases, there would likely be no probation and therefore the necessity for probation status disclosure would not be necessary.

<u>ISSUE #12</u>: *Dynamex. Does the new test for determining employment status, as prescribed in the court decision* Dynamex Operations West Inc. v. Superior Court*, have any potential implications for licensees working in the dental profession as independent contractors?*

<u>Background</u>: In the spring of 2018, the California Supreme Court issued a decision in *Dynamex Operations West, Inc. v. Superior Court* (4 Cal.5th 903) that significantly confounded prior assumptions about whether a worker is legally an employee or an independent contractor. In a case involving the classification of delivery drivers, the California Supreme Court adopted a new test for determining if a worker is an independent contractor, which is comprised of three necessary elements:

A. That the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
B. That the worker performs work that is outside the usual course of the hiring entity's business; and
C. That the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Commonly referred to as the "ABC test," the implications of the *Dynamex* decision are potentially wide-reaching into numerous fields and industries utilizing workers previously believed to be independent contractors. Occupations regulated by entities under the Department of Consumer Affairs are no exception to this unresolved question of which workers should now be afforded employee status under the law. In the wake of *Dynamex*, the new ABC test must be applied and interpreted for licensed professionals and those they work with to determine whether the rights and obligations of employees must now be incorporated.

In the case of the dental profession, there are some scenarios in which workers who were previously believed to be independent contractors may in fact be classified as employees. For example, Registered Dental Hygienists in Alternative Practice (RDHAPs) work in a variety of settings, often dividing their time between multiple offices that may not employ a full-time hygienist. RDHAPs are authorized in statute to work as either independent contractors, sole proprietors, or employees.[2] While these hygienists may have believed themselves to be independent contractors, under the ABC test, this status may be in question. Dentists would theoretically exercise *some* exercise and control over when these hygienists see their patients, and these hygienists would likely comply with the practices of the office they work in. It is also arguable that dental hygiene is not "outside the usual course" of a dental office's business.

There is a strong potential that other examples of workers within the dental profession whose status may be impacted by the *Dynamex* decision. While the DBC's role as a regulator may not have many direct responsibilities relating to the employment status of those working within the profession, these issues nevertheless implicate the rights and responsibilities of licensees and there is a great deal of uncertainty around what dental professionals should expect as dust surrounding the *Dynamex* decision begins to settle. Whether the DBC has considered the impact of the ruling and if it has any sense as to what impact there may be on the licensed profession is therefore a worthwhile topic of discussion.

<u>Staff Recommendation</u>: *The DBC should inform the committees of any discussions it has had about the* Dynamex *decision and whether the ruling has potential to impact the current landscape of the dental profession.*

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[2] Bus. & Prof. Code, § 1925

DBC Response: The DBC has not received any complaints regarding licensees working in the dental profession as independent contractors. However, the DBC will place this issue on an agenda for discussion at a future meeting.

IMPLEMENTATION ISSUES

ISSUE #13: ***Pediatric Anesthesia. Does the DBC anticipate a smooth implementation of Senate Bill 501 (Glazer), a recently enacted measure regarding pediatric dental anesthesia?***

Background: Senate Bill 501 (Glazer, Chapter 929, Statutes of 2018) was signed into law last year, serving as the culmination of years of policy discussion that followed the tragic death of young boy while undergoing dental work under anesthesia. In February 2016, the Senate Committee on Business, Professions and Economic Development sent a letter to the DBC requesting that a subcommittee be formed to investigate pediatric anesthesia in dentistry and requested that information from that investigation be reported back to the Legislature no later than January 1, 2017. The DBC concluded that existing California law was sufficient to provide protection of pediatric patients during dental sedation; however, it made several recommendations to enhance statute and regulations to provide a greater level of public protection.

SB 501 established a series of new requirements and minimal standards for the use of sedation and anesthesia in pediatric dental procedures. Specifically, the bill created a new process for the DBC to issue general anesthesia permit (that may include a pediatric endorsement) as well as moderate and pediatric minimal sedation permits to applicants based on their level of experience and training; and established new requirements for general anesthesia or sedation administered to patients under thirteen years of age. The bill also required the DBC to review data on adverse events related to general anesthesia and sedation and all relevant professional guidelines for purposes of reporting to the Legislature on any relevant findings.

The bill's provisions governing the use of general anesthesia, deep sedation, moderate sedation, or minimal sedation go into effect beginning January 1, 2022, as well as the new reporting requirement. With the delayed effective date and a substantial amount of regulatory framework likely needed, it is anticipated that the DBC is currently only in the beginning stages of implementing SB 501. However, given the important subject matter of the bill and the significant work needed to put it into effect, it is important that the DBC demonstrate its commitment to a successful implementation that will meet the timelines included in the bill.

Staff Recommendation: ***The DBC should provide an overview of the actions it has taken to date to prepare for the effective date of SB 501 and discuss any potential obstacles to implementation that may be addressed administratively or by the Legislature.***

DBC Response: The DBC will need to promulgate new regulations to update current requirements to meet the updated legislation. Staff has begun to review the legislation to identify any areas which will need to be updated for requirements that may have been overlooked. At this time, no potential obstacles to implementation have been identified other than what was identified during the legislative process relating to the timeframe from the development of the regulatory language to the effective date.

- Current GA permit will become the Deep Sedation/General Anesthesia permit and changes include the following:
  - Initial application requirements
  - Renewal requirements
  - Develop training standards for equivalency in pediatric dental anesthesia related emergencies
  - Monitoring of patients under the age of seven
  - Updating application and renewal forms
  - Updating the wall and pocket license
  - Modify existing IT programs
  - Update website
  - Notify existing permit holders of changes, and provide continuous updates

- Current MGA permit will become the Deep Sedation/Medical General Anesthesia permit and changes include the following:
  - Initial application requirements
  - Renewal requirements
  - Develop training standards for equivalency in pediatric dental anesthesia related emergencies
  - Monitoring of patients under the age of seven
  - Updating application and renewal forms
  - Updating the wall and pocket license
  - Modify existing IT programs
  - Update website
  - Notify existing permit holders of changes, and continuous updates

- Current CS permit will become the Moderate Sedation permit and changes include the following:
  - Initial application requirements
  - Renewal requirements
  - Develop training standards for equivalency in pediatric dental anesthesia related emergencies
  - Monitoring of patients under seven
  - Monitoring of patients age 7 to 13
  - Updating application and renewal forms
  - Updating the wall and pocket license
  - Modify existing IT programs
  - Update website
  - Notify existing permit holders of changes, and provide continuous updates

- Current OCS for Minors permit will no longer be issued. New PMS permit will be initiated, and will include the following:
  - Initial application requirements
  - Renewal requirements
  - Monitoring of patients under 13
  - Create application and renewal forms

- Create a wall and pocket license
- Modify existing IT programs and create new transactions
- Update website
- Notify existing permit holders of changes, and continuous update

- Current OCS for Adult permit will remain with no changes.

Due to the modification of existing permits staff will begin to review the current IT system to identify areas that will need to be modified, as well as identify new requirements that must be created. The configuration, development and testing of the changes cannot be initiated until the regulations become effective. Staff will work closely with the Office of Information Services and the BreEZe vendor to ensure a smooth transition.

The DBC submitted a legislative Budget Change Proposal (BCP) to request additional staff to implement SB 501. This BCP is included in the current Governor's budget. Once the budget is signed, and after July 1, 2019, recruitment will begin to fill these additional staffing positions and work will begin on developing the regulations.

TECHNICAL CLEANUP

ISSUE #14: ***Technical Cleanup. Is there a need for technical cleanup?***

Background: As the dental profession continues to evolve and new laws are enacted, many provisions of the Business and Professions Code relating to dentistry become outmoded or superfluous. The DBC should recommend cleanup amendments for statute.

Staff Recommendation: ***The DBC should work with the committees to enact any technical changes to the Business and Professions Code needed to add clarity and remove unnecessary language.***

DBC Response: The DBC supports this recommendation and is happy to work with committee staff to enact any technical changes to the Business and Professions Code needed to add clarity and remove unnecessary language.

CONTINUED REGULATION OF THE DENTAL PROFESSION BY THE DENTAL BOARD OF CALIFORNIA

ISSUE #15: ***Continued Regulation. Should the licensing of dental professionals be continued and be regulated by the Dental Board of California?***

Background: The health, safety, and welfare of patients are protected by the presence of a strong licensing and regulatory board with oversight over dental professions. Dentists offer important healing art services requiring substantial training, and they along with allied dental professionals are trusted by millions of Californians to competently provide oral health care advice and perform complex dental procedures. The DBC should be continued with a four-year extension of its sunset date so that the

Legislature may once again review whether the issues and recommendations in this background paper have been sufficiently addressed.

Staff Recommendation: ***DBC's current regulation of the dental profession should be continued, to be reviewed once again in four years.***

DBC Response: The DBC supports this recommendation.