MEMBERS OF THE BOARD
Madhu Chawla, OD, President
Cyd Brandvein, Vice President
Rachel Michelin, Secretary
Alejandro Arredondo, OD
Donna Burke
Frank Giardina, OD
Glenn Kawaguchi, OD
William H. Kysella, Jr.
Mark Morodomi
David Turetsky, OD
Lillian Wang, OD

CALIFORNIA STATE BOARD OF OPTOMETRY

QUARTERLY BOARD MEETING AGENDA

Friday, November 20, 2015
9:00 A.M. – 5:00 P.M.
(or until conclusion of business)

Elihu Harris Building
1515 Clay Street, Room 15
Oakland, CA 94612

ORDER OF ITEMS SUBJECT TO CHANGE

FULL BOARD OPEN SESSION

1. Call to Order/Roll Call and Establishment of a Quorum

2. Public Comment for Items Not on the Agenda
   Note: The Board may not discuss or take action on any matter raised during this public comment section, except to decide whether to place the matter on the agenda of a future meeting [Government Code Sections 11125, 11125.7(a)]

3. President's Report
   A. Welcome and Introductions
   B. 2016 Board Meeting Dates and Locations
   C. Committee Appointments

4. Approval of Board Meeting Minutes
   A. August 28, 2015
   B. September 9, 2015
   C. October 16, 2015

5. Department of Consumer Affairs Report

6. Executive Officer's Report
   A. BreEZe Database
   B. Strategic Plan
   C. Budget
   D. Personnel
   E. Examination and Licensing Programs
   F. Enforcement Program

7. Consideration and Approval of the Board Member Handbook

8. Update and Consideration of Potential Board Action Related to Online Refractions and the Laws Governing Optometry in the State of California

9. Discussion and Possible Action Regarding Legislative Proposal Setting Enforcement Case Prioritization

10. Update on the Supreme Court Decision Regarding the *North Carolina Board of Dental Examiners v. Federal Trade Commission*

11. Petition for Reduction of Penalty and Early Termination of Probation (12:30 P.M.)

    A. Dr. David Butchert, OD

FULL BOARD CLOSED SESSION

12. Pursuant to Government Code Section 11126(c)(3), the Board Will Meet in Closed Session for Discussion and Possible Action on Disciplinary Matters and the Above Petition

FULL BOARD OPEN SESSION

13. Presentation by UC Berkeley School of Optometry Regarding Its Concerns Related to the National Board of Examiners in Optometry (NBEO) and National Board Examinations (Parts I, II, and III)

14. Consideration and Approval of Legislation and Regulation Committee Recommendations Related to AB 684 Implementation and other Legislation Impacting the Practice of Optometry

    A. Legislation
        1. Proposed Amendment to Business and Professions Code (BPC) § 655 to Regulate Optical Companies; Cite and Fine for Non-Compliance; Lease Information to be Provided by Licensees
        2. Proposed Amendment to BPC § 2556.1 to Require Registered Dispensing Opticians to Report Co-location
        3. Proposed Amendment to BPC § 2556.2 Related to Reporting Requirements
        4. Review and Possible Amendment to BPC § 3011: Board Composition
        5. Review and Possible Amendment to BPC § 3020: RDO Advisory Committee
        6. SB 402 (Mitchell) Pupil health: vision examinations
        7. SB 496 (Nguyen) Optometry: graduates of a foreign university: examinations and licensure
        8. SB 349 (Bates) Optometry: mobile optometric facilities
        9. SB 622 (Hernandez): Optometry

    B. Regulation
        1. Proposed Addition to California Code of Regulations (CCR) for BPC § 2556.1: Co-Location Reporting Requirement
        2. Proposed Addition to CCRs for BPC § 655: Implement Inspection Program
        3. Proposed Amendment to CCR § 1399.260 RDO Fees, § 1399.261 Contact Lens Dispenser Fees, § 1399.263 Spectacle Lens Dispenser Fees

15. Future Agenda Items

16. Adjournment

The mission of the California State Board of Optometry is to protect the health and safety of California consumers through licensing, education, and regulation of the practice of Optometry

Meetings of the California State Board of Optometry are open to the public except when specifically noticed otherwise in accordance with the open meeting act. Public comments will be taken on agenda items at the time the specific item is raised. Time limitations will be determined by the Chairperson. The Board may take action on any item listed on the agenda, unless listed as informational only. Agenda items may be taken out of order to accommodate speakers and to maintain a quorum.

NOTICE: The meeting is accessible to the physically disabled. A person who needs a disability-related accommodation or modification in order to participate in the meeting may make a request by contacting Lydia Bracco at (916) 575-7170 or sending a written request to that person at the California State Board of Optometry, 2450 Del Paso Road, Suite 105, Sacramento, CA 95834. Providing your request at least five (5) business days before the meeting will help ensure availability of the requested accommodation. This meeting will not be webcast.

CALIFORNIA STATE BOARD OF OPTOMETRY

Memo

2450 Del Paso Road, Suite 105
Sacramento, CA 95834
(916) 575-7170, (916) 575-7292 Fax
www.optometry.ca.gov

To: Board Members **Date:** November 20, 2015

From: Madhu Chawla, OD
Board President **Telephone:** (916) 575-7170

Subject: **Agenda Item 1 – Call to Order and Roll Call/ Establishment of Quorum**

Dr. Madhu Chawla, O.D., Board President, will call the meeting to order and call roll to establish a quorum of the Board.

Madhu Chawla, O.D., President, Professional Member

Cyd Brandvein, Vice President, Public Member

Rachel Michelin, Secretary, Public Member

Alejandro Arredondo, O.D., Professional Member

Donna Burke, Public Member

Frank Giardina, O.D., Professional Member

Glenn Kawaguchi, O.D., Professional Member

William H. Kysella, Jr., Public Member

Mark Morodomi, Public Member

David Turetsky, O.D., Professional Member

Lillian Wang, O.D., Professional Member

CALIFORNIA STATE BOARD OF OPTOMETRY

Memo

2450 Del Paso Road, Suite 105
Sacramento, CA 95834
(916) 575-7170, (916) 575-7292 Fax
www.optometry.ca.gov

To: Board Members **Date:** November 20, 2015

From: Madhu Chawla, O.D.
Board President **Telephone:** (916) 575-7170

Subject: **Agenda Item 2 – Public Comment for Items Not on the Agenda**

The Board may not discuss or take action on any matter raised during this public comment section, except to decide whether to place the matter on the agenda of a future meeting [Government Code Sections 11125, 11125.7(a)].

CALIFORNIA STATE BOARD OF OPTOMETRY

Memo

2450 Del Paso Road, Suite 105
Sacramento, CA 95834
(916) 575-7170, (916) 575-7292 Fax
www.optometry.ca.gov

To: Board Members **Date:** November 20, 2015

From: Madhu Chawla, O.D.
Board President **Telephone:** (916) 575-7170

Subject: Agenda Item 3 - President's Report

The Board's Mission is to protect the health and safety of California consumers through licensing, education, and regulation of the practice of Optometry.

A. Welcome and Introductions

Introductions of Board staff and members of the public (voluntary)

B. 2016 Board Meeting Dates

Please see attached calendar showing all Board meeting dates and state holidays (Attachment 1). The quarterly board meeting dates are scheduled for the following:

- January 22, 2016 – Southern California
- April 29, 2016 - Oakland
- August 26, 2016 – Sacramento
- November 18, 2016 – Southern California

In addition, depending on pending legislation, the Board may hold meetings on the following dates:

- May 20, 2016
- June 10, 2016

C. Committee Appointments

The Board President will announce appointments to the following committees:

- Practice and Education Committee
- Public Relations and Consumer Outreach Committee
- Consumer Protection Committee

California State Board of Optometry
2016 Meeting Calendar

January

Su	M	T	W	Th	F	S
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

February

Su	M	T	W	Th	F	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29					

March

Su	M	T	W	Th	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

April

Su	M	T	W	Th	F	S
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

May

Su	M	T	W	Th	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

June

Su	M	T	W	Th	F	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

July

Su	M	T	W	Th	F	S
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

August

Su	M	T	W	Th	F	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

September

Su	M	T	W	Th	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

October

Su	M	T	W	Th	F	S
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

November

Su	M	T	W	Th	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30			

December

Su	M	T	W	Th	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

January

1	New Year's Day
18	Martin Luther King Jr. Day
22	CSBO Meeting – Southern California

February

15	President's Day

March

31	César Chávez Day

April

29	CSBO Meeting - Oakland

May

20	CSBO Meeting – Sacramento (Tentative)
30	Memorial Day

June

10	CSBO Meeting – Sacramento (Tentative)

July

4	Independence Day

August

26	CSBO Meeting – Sacramento

September

5	Labor Day

November

18	CSBO Meeting – Southern California
11	Veteran's Day
24	Thanksgiving
25	Day After Thanksgiving

December

25	Christmas Day

BLUE: State Holidays RED: Board Meetings

CALIFORNIA STATE BOARD OF OPTOMETRY

Memo

2450 Del Paso Road, Suite 105
Sacramento, CA 95834
(916) 575-7170, (916) 575-7292 Fax
www.optometry.ca.gov

To: Board Members **Date:** November 20, 2015

From: Rachel Michelin
Board Secretary **Telephone:** (916) 575-7170

Subject: **Agenda Item 4 – Approval of Board Meeting Minutes**

A. August 28, 2015 (Attachment 1)

B. September 9, 2015 (Attachment 2)

C. October 16, 2015 (Attachment 3)

Board of Optometry
2450 Del Paso Road, Suite 105, Sacramento, CA 95834
P: (916) 575-7170 F: (916) 575-7292 www.optometry.ca.gov

BOARD MEETING ACTION MINUTES **DRAFT**
August 28, 2015
Department of Consumer Affairs, HQ2
1747 North Market Boulevard
First Floor Hearing Room
Sacramento, CA 95834

Members Present		**Staff Present**
Madhu Chawla, O.D., President, Professional Member		Jessica Sieferman, Acting Executive Officer
Cyd Brandvein, Vice-President, Public Member		Nooshin Movassaghi, Policy Analyst
Rachel Michelin, Secretary, Public Member		Cheree Kimball, Enforcement Analyst
Frank Giardina, O.D., Professional Member		Brad Garding, Enforcement Technician
Glenn Kawaguchi, O.D., Professional Member		Nancy Day, Licensing Analyst
William H. Kysella, Jr., Public Member		
Mark Morodomi, Public Member		Kurt Heppler, Legal Counsel
David Turetsky, O.D., Professional Member		
Lillian Wang, O.D., Professional Member		
Excused Absences		
Alejandro Arredondo, O.D. Professional Member		**Guest List**
Donna Burke, Public Member		On File

Friday, August 28, 2015
9:00 a.m.

1. **<u>FULL BOARD OPEN SESSION</u>**
   Call to Order/Roll Call and Establishment of a Quorum

   Board President, Dr. Madhu Chawla, O.D. called the meeting to order. She called roll and a quorum was established.

2. **Public Comment for Items Not on the Agenda**
   Note: The Board may not discuss or take action on any matter raised during this public comment section, except to decide whether to place the matter on the agenda of a future meeting [Government Code Sections 11125, 11125.7(a)]

   A comment was made by Dr. Pam Miller, O.D. representing the Optometric Society regarding concerns surrounding online refractions.

3. **President's Report**
   A. Welcome and Introductions
   B. Solicitation and Possible Appointment of Committees
   C. The 2016 Board Meeting Dates

   No action was taken on this agenda item.

4. Approval of the Board Meeting Minutes
A. January 23, 2015
B. April 23-24, 2015
C. June 12, 2015

Cyd Brandvein moved to accept all three of the minutes. Frank Giardina seconded. The Board voted unanimously (9-0) to pass the motion.

Member	Aye	No	Abstain	Absent	Recusal
Dr. Arredondo				X	
Dr. Chawla	X				
Ms. Burke				X	
Ms. Brandvein	X				
Dr. Giardina	X				
Dr. Kawaguchi	X				
Mr. Kysella	X				
Ms. Michelin	X				
Mr. Morodomi	X				
Dr. Turetsky	X				
Dr. Wang	X				

5. Board Member Communications with Interested Parties

No action was taken on this agenda item. The Board requested additional clarification from legal counsel be provided on the parameters of this topic prior to the next meeting.

6. Department of Consumer Affairs Report
Deputy Director of Board and Bureau Relations, Christine Lally presented the Department of Consumer Affairs Report.

No action was taken on this agenda item.

7. Executive Officer's Report
Acting Executive Officer, Jessica Sieferman presented the Executive Officer's Report
A. BreEZe Database
B. Strategic Plan
C. Budget
Budget Office Manager, Cynthia Dines reported on the Board's budget.
D. Personnel
E. Examination and Licensing Programs
F. Enforcement Program

No action was taken on this agenda item.

8. Consideration and Approval of the Board Member Handbook

Madhu Chawla, with the consensus of the Board directed staff and legal counsel to review and bring this item back to the next Board meeting. There was no opposition and this agenda item was tabled to the next meeting.

9. Update and Possible Action on Legislation Impacting the Practice of Optometry

Policy Analyst, Nooshin Movassaghi provided an update on legislation impacting optometry.

A. AB595 (Alejo) Registered Dispensing Opticians: Certificates
B. AB684 (Alejo) Healing Arts: Licensees: Disciplinary Actions
C. AB789 (Calderon) Contact Lens Sellers: Fines
D. AB 1253 (Steinorth) Optometry: License: Retired Volunteer Service Designation
E. AB 1359 (Nazarian) Optometry: Therapeutic Pharmaceutical Agents Certification
F. SB 349 (Bates) Optometry: Mobile Optometric Facilities
G. SB 402 (Mitchell) Pupil Health: Vision Examinations
H. SB 496 (Nguyen) Optometry: Graduates of a Foreign University: Examinations and Licensure
I. SB 622 (Hernandez) Optometry
J. SB 800 (Committee on Business, Professions & Economic Development) Healing Arts

Rachel Michelin requested additional information, including the Board's positions, be included on future updates to the Board.

Rachel Michelin moved to adopt staff recommendations as presented here except for those pieces of legislation, on which the Board has either sponsored or previously supported, in which the Board will continue on with its previously adopted position. Lillian Wang seconded. The Board voted unanimously (9-0) to pass the motion.

Member	Aye	No	Abstain	Absent	Recusal
Dr. Arredondo				X	
Dr. Chawla	X				
Ms. Burke				X	
Ms. Brandvein	X				
Dr. Giardina	X				
Dr. Kawaguchi	X				
Mr. Kysella	X				
Ms. Michelin	X				
Mr. Morodomi	X				
Dr. Turetsky	X				
Dr. Wang	X				

Public comment was heard from Kathryn Scott with EYEXAM of California.

Public comment was heard from Kristine Shultz with the California Optometric Association.

Public comment was heard from John Valencia representing VSP Vision Service Plan.

Public comment was heard from Robert Patton, President and CEO of First Sight Vision Services.

Lillian Wang moved to adopt a watch position on AB 684 and look for any developments. Cyd Brandvein seconded. Lillian Wang and Cyd Brandvein accepted friendly amendment to the previous motion to not take any position until further information becomes available. The Board voted (2-Aye, 6-No, and 1-abstention). The motion did not pass.

Member	Aye	No	Abstain	Absent	Recusal
Dr. Arredondo				X	
Dr. Chawla		X			
Ms. Burke				X	
Ms. Brandvein	X				
Dr. Giardina	X				
Dr. Kawaguchi			X		
Mr. Kysella		X			
Ms. Michelin		X			
Mr. Morodomi		X			
Dr. Turetsky		X			
Dr. Wang		X			

David Turetsky moved to oppose unless amended with opposition to the concept of a moratorium and in search of a more comprehensive solution. Madhu Chawla seconded. The Board voted (7-Aye, 1-No, 1-Abstain) to pass the motion.

Member	Aye	No	Abstain	Absent	Recusal
Dr. Arredondo				X	
Dr. Chawla	X				
Ms. Burke				X	
Ms. Brandvein	X				
Dr. Giardina		X			
Dr. Kawaguchi			X		
Mr. Kysella	X				
Ms. Michelin	X				
Mr. Morodomi	X				
Dr. Turetsky	X				
Dr. Wang	X				

10. Update and Possible Action on California Code of Regulations (CCR)

A. Consideration of Recommendations to Amend CCR §1506 – "Certificates Posting" to Include Certification Explanations after Optometrist License Number and Clarify Existing Language

Public comment was heard from Kara Corches on behalf of the California Optometric Association.

Glen Kawaguchi moved to accept all of the amendments provided and instruct staff to prepare the proper rulemaking documents and set the matter for public hearing. David Turetsky seconded. The Board voted (8-Aye, 1-No, 0-Abstain) to pass the motion.

Member	Aye	No	Abstain	Absent	Recusal
Dr. Arredondo				X	
Dr. Chawla	X				
Ms. Burke				X	
Ms. Brandvein	X				
Dr. Giardina		X			

Dr. Kawaguchi	**X**				
Mr. Kysella	**X**				
Ms. Michelin	**X**				
Mr. Morodomi	**X**				
Dr. Turetsky	**X**				
Dr. Wang	**X**				

B. Rulemaking Pertaining to CCR §1516, Applicant Medical Evaluations and CCR §1582, Unprofessional Conduct Defined

William Kysella moved to approve the modified text with the changes proposed by legal counsel, circulate the approved text for 15 days and in the absence of any adverse comments, delegate to the Executive Officer to complete the rulemaking file and submit for approval to the proper agencies. Frank Giardina seconded. The Board voted (8-Aye, 0-No, 1-Abstain) to pass the motion.

Member	Aye	No	Abstain	Absent	Recusal
Dr. Arredondo				**X**	
Dr. Chawla	**X**				
Ms. Burke				**X**	
Ms. Brandvein	**X**				
Dr. Giardina	**X**				
Dr. Kawaguchi	**X**				
Mr. Kysella	**X**				
Ms. Michelin	**X**				
Mr. Morodomi	**X**				
Dr. Turetsky			**X**		
Dr. Wang	**X**				

C. Rulemaking Pertaining to CCR §1536: Consideration of Proposed Revisions to Add Continuing Education Credits for Subject Matter Experts Participating in Law Examination Workshops, Child and Elderly Abuse Detection Courses, and Increase Amount Accepted for Board Meeting Participation

Frank Giardina moved to adopt staff recommendations to reject all three comments. Rachel Michelin seconded. The Board voted (8-Aye, 0-No, 0-Abstain) to pass the motion.

Member	Aye	No	Abstain	Absent	Recusal
Dr. Arredondo				**X**	
Dr. Chawla	**X**				
Ms. Burke				**X**	
Ms. Brandvein	**X**				
Dr. Giardina	**X**				
Dr. Kawaguchi	**X**				
Mr. Kysella	**X**				
Ms. Michelin	**X**				
Mr. Morodomi				**X**	

Dr. Turetsky	**X**				
Dr. Wang	**X**				

Frank Giardina moved to approve the modified text of numbers 4 and 7 on page 190 of §1536 Continuing Optometric Education; Purpose and Requirements including the suggestions made by legal counsel, to circulate for 15 days and in the absence of any adverse comments delegate to the Executive Officer to complete the rulemaking file and submit for approval to the proper agencies. Rachel Michelin seconded. The Board voted (8-Aye, 0-No, 1-Abstain) to pass the motion.

Member	Aye	No	Abstain	Absent	Recusal
Dr. Arredondo				**X**	
Dr. Chawla	**X**				
Ms. Burke				**X**	
Ms. Brandvein	**X**				
Dr. Giardina	**X**				
Dr. Kawaguchi	**X**				
Mr. Kysella	**X**				
Ms. Michelin	**X**				
Mr. Morodomi			**X**		
Dr. Turetsky	**X**				
Dr. Wang	**X**				

William Kysella moved to refer the proposed language of l, m, and n regarding concept of reporting on page 191 back to the committee for further deliberation and refinement. Cyd Brandvein seconded. The Board voted (8-Aye, 0-No, 1-Abstain) to pass the motion.

Member	Aye	No	Abstain	Absent	Recusal
Dr. Arredondo				**X**	
Dr. Chawla	**X**				
Ms. Burke				**X**	
Ms. Brandvein	**X**				
Dr. Giardina	**X**				
Dr. Kawaguchi	**X**				
Mr. Kysella	**X**				
Ms. Michelin			**X**		
Mr. Morodomi	**X**				
Dr. Turetsky	**X**				
Dr. Wang	**X**				

11. Future Agenda Items

No action was taken on this agenda item.

12. Petition for Reduction of Penalty or Early Termination of Probation

A. Duc Bui, OPT 11044

Board Members heard the Petition for Reduction of Penalty or Early Termination of Probation for Dr. Duc Bui, O.D. Administrative Law Judge, Ed Washington, with the Office of Administrative Hearings preceded over the Hearing. Deputy Attorney General, Stephanie Alamo-Latif represented the state. The Petitioner was not present.

13. FULL BOARD CLOSED SESSION

A. Pursuant to Government Code Section 11126(c)(3), the Board Will Meet in Closed Session for Discussion and Possible Action on Disciplinary Matters and the Above Petition

B. Pursuant to Government Code Section 11126(a)(1), the Board Will Meet in Closed Session to Interview Candidates for and Consider Appointment of an Executive Officer

14. RETURN TO OPEN SESSION

15. Adjournment

No action was taken on this agenda item.

CALIFORNIA STATE BOARD OF OPTOMETRY

Board of Optometry
2450 Del Paso Road, Suite 105, Sacramento, CA 95834
P: (916) 575-7170 F: (916) 575-7292 www.optometry.ca.gov

SPECIAL MEETING ACTION MINUTES **DRAFT**
TELECONFERENCE
September 9, 2015

MAIN LOCATION:
Sequoia Room, 2420 Del Paso Road, Sacramento, CA 95834

TELECONFERENCE LOCATIONS:

Kaiser Permanente
Department of Optometry
Room 1761
5601 De Soto Avenue
Woodland Hills, CA 91367

4349 E. Slauson Avenue
Maywood, CA 90270

Community Health Center
150 Tejas Place
Nipomo, CA 93444

Peet's Coffee Courtyard
University Center
4213 Campus Drive
Irvine, CA 92612

Allan Lindsey Park
2150 Armsmere Circle
El Dorado Hills, CA 95762

Capital Public Radio
Conference Room A
7055 Folsom Blvd.
Sacramento, CA 95826

Members Present		**Staff Present**
Madhu Chawla, O.D., President, Professional Member		Jessica Sieferman, Executive Officer
Cyd Brandvein, Vice-President, Public Member		Kurt Heppler, Legal Councel
Rachel Michelin, Secretary, Public Member		
Alejandro Arredondo, O.D., Professional Member		
Donna Burke, Public Member		
Frank Giardina, O.D., Professional Member		
William Kysella, Public Member		
David Turetsky, O.D., Professional Member		
Lillian Wang, O.D., Professional Member		
Excused Absence		
Glenn Kawaguchi, O.D., Professional Member		**Guests**
Mark Morodomi, Public Member		On File

FULL BOARD OPEN SESSION

1. Call to Order/Roll Call and Establishment of a Quorum

Board President, Madhu Chawla called roll and a quorum was established. The meeting was called to order.

2. Finding of Necessity for Special meeting (Gov. Code, §11125.4)

Legal Counsel, Kurt Heppler explained the necessity of a motion of hardship due to the requirement of a ten day meeting notice.

Donna Burke moved for the Board to find that the ten day notice requirement would constitute a substantial hardship on the body such that the legislative session would have concluded before the Board would have had the opportunity to offer input on a bill that dramatically affects consumers, the practice of optometry, and the Board's operations. Rachel Michelin seconded. The Board voted unanimously (8-0) to pass the motion.

Member	Aye	No	Abstain	Absent	Recusal
Dr. Arredondo				X	
Dr. Chawla	X				
Ms. Burke	X				
Ms. Brandvein	X				
Dr. Giardina	X				
Mr. Kysella	X				
Ms. Michelin	X				
Dr. Turetsky	X				
Dr. Wang	X				

3. Discussion and Consideration of Position on Assembly Bill 684, (Alejo) (State Board of Optometry; Registered Dispensing Opticians)

Executive Officer, Jessica Sieferman provided an overview and staff analysis of this bill and its impact.

Comments were heard from member of the public, Kenneth Moss.

Comments were heard from member of the public, Kathryn Scott.

Comments were heard from member of the public, Christine Schultz with the California Optometric Association.

Comments were heard from member of the public, Robert Sumner with the Attorney General Office.

Cyd Brandvein moved to oppose AB 684 in its current form with the understanding that additional study, debate, meetings and discussions are necessary on this topic. Rachel Michelin seconded. The Board voted (6-Aye, 2-No, 1-Abstain) to pass the motion.

Member	Aye	No	Abstain	Absent	Recusal
Dr. Arredondo	X				
Dr. Chawla	X				
Ms. Burke			X		
Ms. Brandvein	X				
Dr. Giardina		X			
Mr. Kysella	X				
Ms. Michelin	X				

Dr. Turetsky		**X**			
Dr. Wang	**X**				

4. Adjournment

Board of Optometry
2450 Del Paso Road, Suite 105, Sacramento, CA 95834
P: (916) 575-7170 F: (916) 575-7292 www.optometry.ca.gov

BOARD MEETING ACTION MINUTES DRAFT
Friday, October 16, 2015
Department of Consumer Affairs, HQ2
1747 North Market Boulevard
First Floor Hearing Room
Sacramento, CA 95834

Members Present		**Staff Present**
Madhu Chawla, O.D., President, Professional Member		Jessica Sieferman, Acting Executive Officer
Cyd Brandvein, Vice-President, Public Member		Cheree Kimball, Enforcement Analyst
Rachel Michelin, Secretary, Public Member		Robert Stephanopoulos, Enforcement Lead
Frank Giardina, O.D., Professional Member		Kurt Heppler, Legal Counsel
Glenn Kawaguchi, O.D., Professional Member		
William H. Kysella, Jr., Public Member		
Mark Morodomi, Public Member		
David Turetsky, O.D., Professional Member		
Lillian Wang, O.D., Professional Member		
Excused Absence		
Alejandro Arredondo, O.D. Professional Member		**Guest List**
Donna Burke, Public Member		On File

Friday, October 16, 2015
12:00 p.m.

1. **<u>FULL BOARD OPEN SESSION</u>**
   Call to Order/Roll Call and Establishment of a Quorum

   Board President, Dr. Madhu Chawla, O.D. called the meeting to order. She called roll and a quorum was established.

2. **Public Comment for Items Not on the Agenda**
   Note: The Board may not discuss or take action on any matter raised during this public comment section, except to decide whether to place the matter on the agenda of a future meeting [Government Code Sections 11125, 11125.7(a)]

   No action was taken on this agenda item.

3. **Vision Healthcare Plans and Regulatory Oversight Thereof – Presentation by the Department of Managed Health Care**

   A presentation was provided by:
   - Kathleen McKnight, Assistant Chief Counsel with the Office of Plan Licensing, Department of Managed Health Care
   - Steven Kofsky
   - Mary Watanabe, Deputy Director for Health Policy and Stakeholder Relations

   No action was taken on this agenda item.

4. Update and Discussion on AB 684 Implementation

A. Implementation Plan and Timeline

Executive Officer, Jessica Sieferman provided a background on AB 684.

Janice Shintako, Department of Consumer Affairs, Fiscal Officer provided a current analysis of the Registered Dispensing Optician programs budget.

Department of Consumer Affairs, Director, Awet Kidane provided recommendations.

Kimberly Kirchmeyer, Executive Director for the Medical Board provided information regarding the Registered Dispensing Opticians program position.

Gary Bazlin, representing California dispensing opticians, addressed the Board providing an overview of optician laws, interpretations and the problem with enforcement of the laws.*

Kathryn Scott, representing LensCrafters spoke to the Members assuring continued commitment in working with the Board.

B. BreEZe Considerations

C. Resource Allocations

D. Budgetary Concerns

No action was taken on this agenda item.

5. Discussion and Consideration of Potential Legislative and Regulatory Revisions Related to the Implementation of AB 684

A. Conceptual Proposal to Revise Statutory Fee Limits

B. Conceptual Proposal to Regulate Optical Companies; Reporting Requirements

C. Proposed Revision to Section 655 of the Business and Professions Code Relating to the Lease Information to be Provided by Licensees

D. Conceptual Regulatory Proposal to Implement Co-Location Reporting Requirements, Inspection Program, and Fee Increases

No formal action was taken on this agenda item.

6. Future Agenda Items

No action was taken on this agenda item.

7. Adjournment

CALIFORNIA STATE BOARD OF OPTOMETRY

Memo

2450 Del Paso Road, Suite 105
Sacramento, CA 95834
(916) 575-7170, (916) 575-7292 Fax
www.optometry.ca.gov

To: Board Members **Date:** November 20, 2015

From: Madhu Chawla
Board President **Telephone:** (916) 575-7170

Subject: **Agenda Item 5 – Department of Consumer Affairs Report**

CALIFORNIA STATE BOARD OF OPTOMETRY

Memo

2450 Del Paso Road, Suite 105
Sacramento, CA 95834
(916) 575-7170, (916) 575-7292 Fax
www.optometry.ca.gov

To: Board Members **Date:** November 20, 2015

From: Jessica Sieferman
Acting Executive Officer **Telephone:** (916) 575-7184

Subject: Agenda Item 6 – Executive Officer's Report

A. BreEZe Database

The Department of Consumer Affairs (DCA) continues to assist staff in ensuring BreEZe meets the Board's needs. The Organizational Change Management (OCM) Team completed its examination of the new processes in BreEZe and compared them to existing processes in legacy systems. The OCM team identified any process changes (gaps) and worked with staff on a plan to help mitigate the gaps to ensure as smooth of a transition as possible. The OCM team is now developing transition guides for staff. The work the OCM team is providing staff not only assists in the transition, but it also will serve as training materials for new staff.

All documented procedures developed with the OCM team helps the Board meet its Strategic Plan's Organizational Effectiveness Goal (objective 6.1) to document all internal Board procedures and processes.

Four staff members (Rob, Cheree, Jeff, and Nancy) are now dedicated full time to User Acceptance Testing (UAT). Rob, Cheree and Brad are also participating in Data Validation (DV) during each run. In addition, DCA's SOLID Training team is providing various BreEZe training courses to all remaining staff. The training is scheduled to be completed for all staff prior to BreEZe Go-Live (January 19, 2015). Thus far, all staff members attending the BreEZe training have positive experiences; they report that BreEZe is very user-friendly and are looking forward to implementation.

UAT, DV, and SOLID Training all help the Board meet its Strategic Plan's Licensing and Enforcement Goals (objective 1.1 and 4.2): Work with DCA to ensure successful implementation of the BreEZe system including CAS data clean-up to prepare for migration.

In addition, DCA's Director Awet Kidane met with the Board President, Dr. Madhu Chawla, Executive Officer and the California Optometric Association's Executive Director, Bill Howe, on October 16, 2015 to assist the board in informing licensees about BreEZe and how to be prepared for the BreEZe launch. After discussing outreach coordination efforts, Director Kidane provided a tour of the UAT lab and organized a BreEZe demonstration of the online renewal process. DCA's Office of Public Affairs is now assisting the Board in social media messaging to further inform licensees about BreEZe.

Teaming with Director Kidane, DCA's Office of Public Affairs, the Board President, and the COA Executive Director all help the Board meet its Licensing Goal (objective 1.2): Inform licensees about the new online services that will be available with the launch of BreEZe.

B. Strategic Plan

The Strategic Plan Report (Attachment 1) provides updates on the status of Board objectives.

C. Budget

The Fiscal Year for the State of California is July 1 – June 30.

The 2014/2015 Board budget is $1,802,000.

Expenditures as of Month 3: $459,552.
Expenditure Report (Attachment 2)

Board Fund Condition

As of Month 3, the Board's Fund Condition reflects $1,809[1] revenue collected and 10.1 months in reserve (Attachment 3).

General Fund Loans

The Board's loan balance to the General Fund remains $1 million dollars. Boards with repayment schedules are in or close to a negative fund reserve.

D. Personnel

The Board currently has two vacancies: the Assistant Executive Officer (SSMI) and the Policy Analyst (AGPA). All applications for the SSMI position have been received and interviews will be scheduled for the end of November. Applications for the AGPA position will be received until November 19, 2015. Interviews will be held the first week of December.

In addition, the Board will receive a 0.9 MST position from the Medical Board of California (MBC) for the RDO Program. The individual within that position recently accepted a full time position at the MBC. The MBC offered to post the position, assist in hiring, and provide the necessary training to the new MST prior to the MST moving to the Board. This is essential to ensuring as smooth of a transition for registrants as possible, as Board staff currently does not have the process knowledge to take over the RDO registration process.

E. Examination and Licensing Programs

With two of the Board's primary licensing staff participating full time in BreEZe UAT, the remaining licensing staff has absorbed the additional workload to ensure licensing and permit applications are still processed timely.

Despite the smaller staff and additional workload distributed to others, most of the Board's licensing cycle times have decreased. Please refer to the licensing statistics (Attachment 4).

F. Enforcement Program

All three enforcement staff members continue to participate in UAT and DV. Since there is no enforcement staff to absorb that workload, they have balanced their schedules to work in the office, when possible, and take advantage of BreEZe overtime opportunities on the weekends.

Due to the balanced schedules, willingness to work overtime, and streamlining processes, the enforcement staff met the Enforcement Performance Measure targets. The first quarter Performance Measures have not been finalized by DCA, but below are the performance measures report for the Board's database. There were no probation performance measures for this quarter.

[1] Dollars in Thousands

Enforcement Performance Measures
Fiscal Year 2015/16

	July	Aug	Sept	YTD	Target
Complaint Volume	24	20	18	62	-
Intake	2	2	2	2	7
Intake & Investigation	123	93	69	89	90
Formal Discipline	0	0	0	0	540

CURES
Pursuant to Health and Safety Code section 11165.1, optometrists with a TPA (or above) certification *and* a Drug Enforcement Administration number were required to register by January 1, 2016. However, AB 679 extended the deadline to July 1, 2016. Being declared an urgency bill, it took effect immediately upon signature (October 11, 2015).

Any questions related to the CUREs database and registration should contact the Department of Justice at cures@doj.ca.gov or (916) 227-3843.

Attachments

1. Strategic Plan Report
2. Expenditure Report
3. Fund Condition Report
4. Licensing Statistics

STATE BOARD OF OPTOMETRY
STRATEGIC PLAN STATUS REPORT
November 13, 2015

Licensing Goal 1 *The Board provides applicants and licensees a method for obtaining and maintaining license registration, business licenses, and certifications required to practice optometry in California.*	
Objective 1.1: Work with DCA to ensure successful implementation of the BreEZe system including ATS data clean-up to prepare for migration.	**STATUS/ COMPLETION DATE**
Board staff is actively participating in BreEZe activities such as Organizational Change Management (OCM), Data Validation (DV), and User Acceptance Testing (UAT). Through multiple DV runs, staff is able to continuously clean erroneous data. In addition, all staff is in the process of completing various BreEZe training courses to ensure they are fully prepared for the BreEZe launch.	Ongoing (End date has been extended thru Jan. 2016).
Objective 1.2: Inform licensees about the new online services that will be available with the launch of BreEZe.	**STATUS/ COMPLETION DATE**
Board staff met with schools in April and May 2015 to inform them about BreEZe features and benefits. The Schools were instructed to contact the Board with any questions regarding the BreEZe system. Board staff will continue to provide additional outreach to students and faculty members. Staff is working with the BreEZe team and publications unit to create and disseminate information to its licensees and profession associations. DCA's Director Kidane met with the Board President and the Executive Director of COA to assist the board with informing licensees about BreEZe and how to be prepared for the BreEZe launch. DCA is also assisting with the messaging and assisting staff in monitoring our social media pages to make sure licensees are aware.	Ongoing.
Objective 1.3: Evaluate effectiveness of existing multi-level license structure to determine if current structure adequately meets needs of the profession and consumers.	**STATUS/ COMPLETION DATE**
	No update.
Examination Goal 2 *The Board works to provide a fair, valid and legally defensible licensing exam (California Law and Regulation Examination) and exam process to ensure that only qualified and competent individuals are licensed to provide optometric services in California.*	
Objective 2.1: Perform an occupational analysis to ensure examination integrity and address possible scope of practice expansion.	**STATUS/ COMPLETION DATE**
	No update.
Objective 2.2: Evaluate the benefit and cost of increasing the frequency of offering the California Law and Regulations Examination.	**STATUS/ COMPLETION DATE**

It was previously reported that the benefit did not outweigh the cost of increasing the frequency of offering the CLRE exam; however, Board staff is reevaluating the cost benefit analysis.	No update.
Law and Regulation Goal 3 *The Board works to establish and maintain fair and just laws and regulations that provide for the protection of consumer health and safety and reflect current and emerging, efficient and cost-effective practices.*	
Objective 3.1: Actively engage in the evaluation and/or development of scope-of-practice issues and any associated legislation. If required: **1. Promulgate regulations to implement legislative changes.** **2. Identify Board functions that may be impacted by legislative changes.** **3. Develop and implement a plan to manage the increased workload created by legislative changes.**	**STATUS/ COMPLETION DATE**
Board staff participated in discussions pertaining to SB 622. The Board took a support if amended position; however, it did not make it through the legislative cycle. SB 622 will continue through this legislative session (January 2016). The author and the sponsors (COA) did accept technical amendments provided by the Board, but they did not include the inspection authority the Board requested. Staff will continue to participate in any future discussions regarding scope expansion, provide updates to the Board, and seek Board input at each Board meeting.	Ongoing.
Objective 3.2: Sponsor legislation to expand or clarify the Optometry Practice Act.	**STATUS/ COMPLETION DATE**

The Board has sponsored:
 	
• AB1253, which provides licensees with a retired license status
  ○ Status: Chaptered July 16, 2015
• AB1359, addresses the method to earn TPA certification
  ○ Status: Chaptered October 2, 2015
• SB349, regarding mobile optometric facilities
  ○ Status: hearing postponed April 16, 2015
• SB402, which relates to school vision screenings
  ○ Status: Placed in APPR. Suspense file, held in committee May 28, 2015
• SB496, regarding foreign graduates
  ○ Status: Sen Business, Professions and Economic Development – hearing postponed April 13, 2015
 	
Staff is currently evaluating the Optometry Practice Act to identify areas requiring expansion or clarification. Staff will continuously update the Board on any potential need for Board sponsored legislation.
	Ongoing.

Objective 3.3: Review regulations to determine need for clarity then revise and/or amend as needed.	**STATUS/ COMPLETION DATE**
Staff has identified multiple regulations requiring revision. Rulemaking has been initiated regarding CCR §1536 to allow licensees to take Continuing Medical Education courses for license renewal. In addition, the rulemaking process continues on CCR §1516, which permits the Board to compel for a psychological examination, and further defines unprofessional conduct.	Ongoing. No Update

Staff will work with Legislation/Regulation Committee to prioritize and develop/amend regulations for Board approval	
Objective 3.4: Inform and educate licensees and interested stakeholders about new or unfamiliar laws and regulations.	**STATUS/ COMPLETION DATE**
The Board is using social media to reach out to licensees.	Ongoing. No Update
Objective 3.5: Explore the feasibility of transferring regulation authority for Registered Dispensing Opticians (RDO) from the Medical Board of California to the Board of Optometry.	**STATUS/ COMPLETION DATE**
In January 2015, the Medical Board of California voted to keep the RDO program under their regulatory authority. However, AB 684, effective January 1, 2016, moves the RDO Program from the MBC to the Board. AB 684 received overwhelming support from impacted stakeholders, the legislature, and the Administration. The Board did oppose AB 684, due to many unresolved concerns with the bill. The Board is now working through the concerns and developing ways to effectively address them.	RDO Program Moves January 1, 2016
Enforcement Goal 4 *The Board protects the health and safety of consumers of optometric services through the active enforcement of the laws and regulations governing the safe practice of Optometry in California.*	
Objective 4.1: Submit a Budget Change Proposal (BCP) to request additional enforcement analysts and clerical positions to support the CURES implementation, improve investigative processing times, and streamline the enforcement process.	**STATUS/ COMPLETION DATE**
The Board's Enforcement Unit is currently being restructured in order to improve efficiencies with existing resources. Existing workload did not justify additional enforcement positions; however, with CURES 2.0 implementation and the ability to create Board-specific reports, there may be justification to pursue a BCP next fiscal year.	Ongoing. No Update
Objective 4.2: Work with DCA to ensure successful implementation of the BreEZe system including CAS data clean-up to prepare for migration.	**STATUS/ COMPLETION DATE**
Board staff is actively participating in BreEZe activities such as Organizational Change Management (OCM), Data Validation (DV), and User Acceptance Testing (UAT). Through multiple DV runs, staff is able to continuously clean erroneous data. In addition, all staff is in the process of completing various BreEZe training courses to ensure they are fully prepared for the BreEZe launch.	Ongoing (End date has been extended thru Jan. 2016).
Objective 4.3: Identify and implement process improvements in the Enforcement unit to reduce enforcement and discipline cycle times.	**STATUS/ COMPLETION DATE**

The Board's Enforcement Unit is currently being restructured in order to improve efficiencies with existing resources. In addition, the Board's Enforcement Unit identified and eliminated unnecessary processes, which should improve discipline cycle times. Enforcement staff will continuously monitor the effectiveness of these changes.	Ongoing. No update
Objective 4.4: Create inspection authority to enable the Board to inspect practice locations to proactively identify areas of non-compliance.	**STATUS/ COMPLETION DATE**
As part of its "support if amended" position, the Board requested inspection authority be added to SB 622. However, as previously stated, SB 622 did not pass this legislative cycle. AB 684 did grant inspection authority to leases and premises of co-located settings (when an optometrist and a registered dispensing optician are working in the same location). While determining legislative amendments to AB 684, the Board may want to consider amending the inspection authority statutes to remove the limited inspection scope.	Ongoing.
Objective 4.5: Increase enforcement efforts to address optometry practice in unlicensed locations.	**STATUS/ COMPLETION DATE**
The Board's Enforcement Unit is proactively investigating potential unlicensed practice by companies offering online optometric services to California consumers. In addition, Staff (as the Board directed) is currently working on an outreach plan, including educational materials for the public so they are aware of the dangers of these online services.. Further, staff is working with DCA's publication unit to develop short PSA videos informing consumers about contact lens safety, including the potential dangers of receiving services from an unlicensed individual.	Ongoing. No update
Objective 4.6: Increase communication to administrators of community and school clinics to educate administrators about the Board's complaint process.	**STATUS/ COMPLETION DATE**
	No update.
Outreach Goal 5 *The Board proactively educates, informs and engages consumers, licensees, students and other stakeholders on the practice of optometry and the laws and regulations which govern it.*	
Objective 5.1: Create a Budget Change Proposal (BCP) to request one additional position to support expansion of the Board's outreach program.	**STATUS/ COMPLETION DATE**
	No update.
5.2 Develop a communications plan that includes the following:	**STATUS/ COMPLETION DATE**
a) Include inserts with renewal notices to optometrists with reminders about the requirement to make consumer protection information available to patients. **b) Research the feasibility of using free public service announcements to disseminate optometric health information to consumers.** Board staff has researched using free public services announcements through Capitol Public Radio. However, their free PSAs appear to be limited to nonprofit	No update.

organizations. Staff is continuing to research this to see if they make an exception for the Board. Since Cap Radio's mission is to serve listeners and the community, perhaps the Board's consumer protection mission and its interest to educating consumers will help. **c) Identify public relations agencies that could provide pro bono work to assist the Board with expanding outreach to consumers.** **d) Work with DCA's Office of Publications, Design and Editing to create multi-language consumer education materials.** **e) Expand social media by using more frequent messages and exploring additional online opportunities.** Board staff is currently utilizing multiple social media platforms including Facebook, Twitter, and Youtube. The links to these social media sites are included in the signature blocks of all Board staff. **f) Explore having a Board representative attend major optometric continuing education events for direct outreach to licensees.** During the October 22, 2015 DCA Director's meeting with Executive Officers and Board Presidents, DCA reminded everyone that the Governor's Office Executive Order (EO) B-06-11 remains in effect. DCA's Executive Office delegated Executive Officers authority to approve in-state travel requests deemed as mission-critical pursuant to EO B-06-11. Providing outreach to licensees, although important, does not meet the mission critical conditions provided. Therefore, travel will not be approved for these events.	
Organizational Effectiveness Goal 6 *The Board works to develop and maintain an efficient and effective team of professional and public leaders and staff with sufficient resources to improve the Board's provision of programs and services.*	
Objective 6.1: Document all internal Board procedures and processes to ensure successful succession planning of Board staff and Board members.	**STATUS/ COMPLETION DATE**
With the assistance of the DCA's OCM team, Board staff has mapped all current licensing and enforcement business processes. The OCM team has also mapped out to-be processes in BreEZe and identified any gaps (process changes). The OCM team is now working on developing transition guides that will be used for all staff. In addition, staff members participating in UAT and DV are identifying process changes to be included in those guides. The Board is also updating the Board member handbook to ensure the board members have the most updated and accurate information to assist current and future Board members.	Ongoing.
6.2 Conduct a job analysis for all Board programs to identify areas for resource allocation and enhancement.	**STATUS/ COMPLETION DATE**
The Board's Enforcement, Licensing, and Administration Units are currently being restructured in order to improve efficiencies with existing resources. Staff will continuously monitor the effectiveness of these changes and present recommendations in the near future.	Ongoing. No update
6.3 Use the Individual Development Plan (IDP) process to increase professional development of Board staff.	**STATUS/ COMPLETION DATE**

During the July staff meeting, sample IDP's and performance appraisals were distributed. Once the Assistant Executive Officer vacancy is filled, the Executive Officer will work with him/her to set initial and quarterly meetings to utilize the IDP process and research all ways to increase professional development of Board staff.	Ongoing.

BOARD OF OPTOMETRY - FUND 0763
BUDGET REPORT
FY 2014-15 EXPENDITURE PROJECTION

FM 3

OBJECT DESCRIPTION	FY 2014-15 ACTUAL EXPENDITURES (MONTH 13)	FY 2014-15 PRIOR YEAR EXPENDITURES 9/30/2014	FY 2015-16 BUDGET STONE 2014-15	FY 2015-16 CURRENT YEAR EXPENDITURES 9/30/2015	FY 2015-16 PERCENT SPENT	FY 2015-16 PROJECTIONS TO YEAR END	FY 2015-16 UNENCUMBERED BALANCE
PERSONNEL SERVICES							
Salary & Wages (Staff)	434,990	96,052	**427,304**	122,192	29%	**463,550**	(36,246)
Statutory Exempt (EO)	71,550	21,465	**84,180**		0%	**77,076**	7,104
Temp Help Reg (907)	72,094	5,730	**41,000**	8,175	20%	**50,115**	(9,115)
Temp Help (Exam Proctors)							0
Board Member Per Diem	13,900	1,400	**7,353**		0%	**13,000**	(5,647)
Committee Members (DEC)							0
Overtime	4,830	1,745		571		**3,400**	(3,400)
Staff Benefits	244,711	54,431	**292,373**	57,842	20%	**219,431**	72,942
TOTALS, PERSONNEL SVC	842,075	180,823	**852,210**	**188,780**	**22%**	**826,572**	25,638
OPERATING EXPENSE AND EQUIPMENT							
General Expense	8,909	1,504	**15,554**	1,790	12%	**10,600**	4,954
Fingerprint Report	4,009	882	**5,306**	1,338	25%	**4,000**	1,306
Minor Equipment	2,989	2,989	**12,450**	942	8%	**5,600**	6,850
Printing	1,808	1,320	**12,023**	1,355	11%	**2,000**	10,023
Communications	3,665	705	**5,446**	339	6%	**2,000**	3,446
Postage	16,336	2,022	**13,056**	2,613	20%	**16,000**	(2,944)
Insurance			**0**				0
Travel In State	41,225	3,301	**21,710**	2,090	10%	**41,000**	(19,290)
Travel, Out-of-State			**0**				0
Training	350		**1,037**		0%	**350**	687
Facilities Operations	111,133	217,448	**58,676**	108,920	186%	**111,133**	(52,457)
Utilities			**0**				0
C & P Services - Interdept.	2	37,000	**2,943**		0%	**0**	2,943
C & P Services - External	16,205	17,000	**15,000**	15,200		**15,200**	(200)
DEPARTMENTAL SERVICES:							
OIS Pro Rata	176,558	39,139	**241,554**	60,500	25%	**241,554**	0
Admin Pro Rata	118,209	28,593	**124,372**	31,000	25%	**124,372**	0
Interagency Services	0		**146**		0%	**0**	146
IA w/ OPES	24,784	23,052	**0**	24,784		**24,784**	(24,784)
DOI-Pro Rata	3,562	895	**2,580**	750	29%	**2,580**	0
Public Affairs Pro Rata	3,131	874	**3,494**	750	21%	**3,494**	0
PCSD Pro Rata	3,993	955	**4,820**	1,250	26%	**4,820**	0
INTERAGENCY SERVICES:							0
Consolidated Data Centers	335	72	**4,509**	248	6%	**0**	4,509
DP Maintenance & Supply	1,990	1,990	**942**	3,378	359%	**3,378**	(2,436)
Statewid Pro Rata	82,909	20,727	**100,909**	25,312	25%	**100,909**	0
EXAM EXPENSES:							0
Exam Supplies			**0**				0
Exam Freight	0		**484**		0%	**0**	484
Exam Site Rental			**0**				0
C/P Svcs-External Expert Administrative	98	98	**0**	49		**98**	(98)
C/P Svcs-External Expert Examiners	0		**20,703**		0%	**0**	20,703
C/P Svcs-External Subject Matter	15,200		**0**			**15,200**	(15,200)
ENFORCEMENT:							0
Attorney General	149,353	18,610	**229,055**	5,048	2%	**150,000**	79,055
Office Admin. Hearings	32,318		**37,930**		0%	**32,000**	5,930
Court Reporters	3,098	150				**3,000**	(3,000)
Evidence/Witness Fees	8,904	1,950	**15,877**		0%	**9,000**	6,877
DOI - Investigations	149,358	37,054	**214**		0%	**214**	0
Major Equipment	0		**5,000**		0%	**0**	5,000
Other Items of Expense	58	58	**0**			**0**	0
Vehicle Operations			**0**				0
TOTALS, OE&E	980,489	458,388	**955,790**	287,656	30%	923,286	32,504
TOTAL EXPENSE	1,822,564	639,211	**1,808,000**	476,436	52%	**1,749,858**	58,142
Reimb. - State Optometry Fund							0
Sched. Reimb. - Fingerprints	(3,871)	(784)	**(6,000)**	(392)	7%	**(3,871)**	(2,129)
Sched. Reimb. - Other	(3,760)	(1,645)		(470)		**(3,760)**	3,760
Probation Monitoring Fee - Variable	(17,633)	(3,400)		(2,200)		**(17,633)**	17,633
Unsched. Reimb. - Investigative Cost Recovery	(43,913)	(19,739)		(13,822)		**(43,913)**	43,913
Unsch - DOI ICR Administrative Case							0
Unsched. Reimb. - ICR - Prob Monitor							0
NET APPROPRIATION	1,753,387	613,643	**1,802,000**	459,552	26%	**1,680,680**	**121,320**
						SURPLUS/(DEFICIT):	**6.7%**

0763 - State Board of Optometry
Analysis of Fund Condition

11/13/2015

(Dollars in Thousands)

2015 Budget Act w/ BCP NOTE: $1 Million Dollar General Fund Repayment Outstanding	ACTUAL 2014-15	Budget Act CY 2015-16	BY 2016-17	BY + 1 2017-18
BEGINNING BALANCE	$ 1,438	$ 1,517	$ 1,521	$ 1,535
Prior Year Adjustment	$ -9	$ -	$ -	$ -
Adjusted Beginning Balance	$ 1,429	$ 1,517	$ 1,521	$ 1,535
REVENUES AND TRANSFERS				
Revenues:				
125600 Other regulatory fees	$ 44	$ 50	$ 63	$ 63
125700 Other regulatory licenses and permits	$ 162	$ 151	$ 152	$ 152
125800 Renewal fees	$ 1,619	$ 1,591	$ 1,597	$ 1,597
125900 Delinquent fees	$ 11	$ 10	$ 10	$ 10
141200 Sales of documents	$ -	$ -	$ -	$ -
142500 Miscellaneous services to the public	$ 2	$ 2	$ 2	$ 2
150300 Income from surplus money investments	$ 4	$ 5	$ 5	$ 5
160400 Sale of fixed assets	$ -	$ -	$ -	$ -
161000 Escheat of unclaimed checks and warrants	$ 2	$ -	$ -	$ -
161400 Miscellaneous revenues	$ -	$ -	$ -	$ -
Totals, Revenues	$ 1,844	$ 1,809	$ 1,829	$ 1,829
Transfers from Other Funds				
GF loan per item 1110-001-0763 BA of 2011 (repay)	$ -	$ -	$ -	$ -
Totals, Revenues and Transfers	$ 1,844	$ 1,809	$ 1,829	$ 1,829
Totals, Resources	$ 3,273	$ 3,326	$ 3,350	$ 3,364
EXPENDITURES				
Disbursements:				
0840 State Controller (State Operations)	$ -	$ -	$ -	$ -
8880 Financial Information System for CA (State Operations)	$ 2	$ 3	$ -	$ -
1110 Program Expenditures (State Operations)	$ 1,754	$ 1,802	$ 1,815	$ 1,851
Total Disbursements	$ 1,756	$ 1,805	$ 1,815	$ 1,851
FUND BALANCE				
Reserve for economic uncertainties	$ 1,517	$ 1,521	$ 1,535	$ 1,513
Months in Reserve	10.1	10.1	10.0	9.6

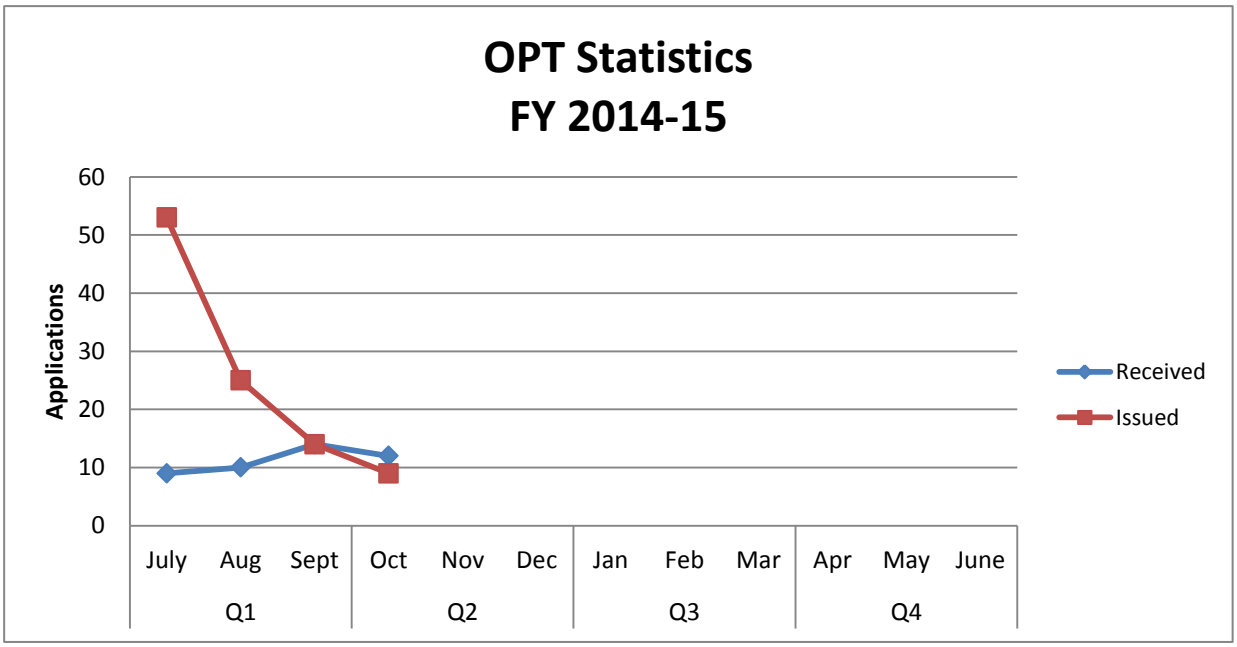
NOTES:

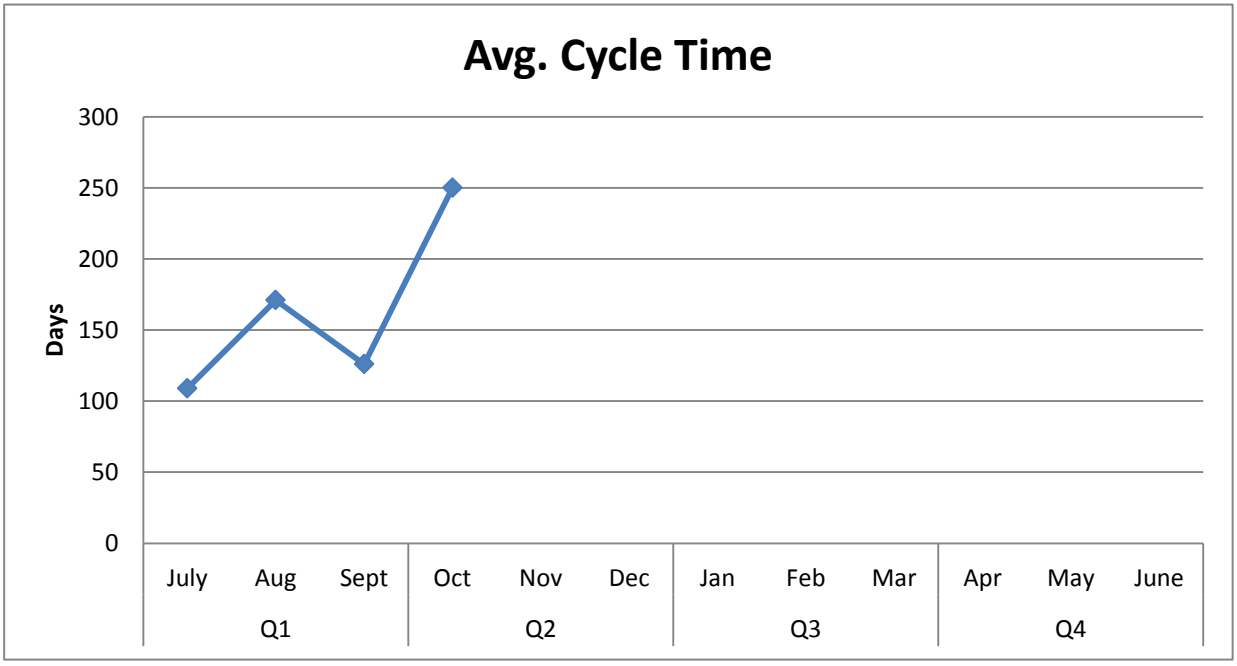
A. ASSUMES WORKLOAD AND REVENUE PROJECTIONS ARE REALIZED IN BY+1 AND ON-GOING.

B. ASSUMES APPROPRIATION GROWTH OF 2% PER YEAR BEGINNING IN BY+1.

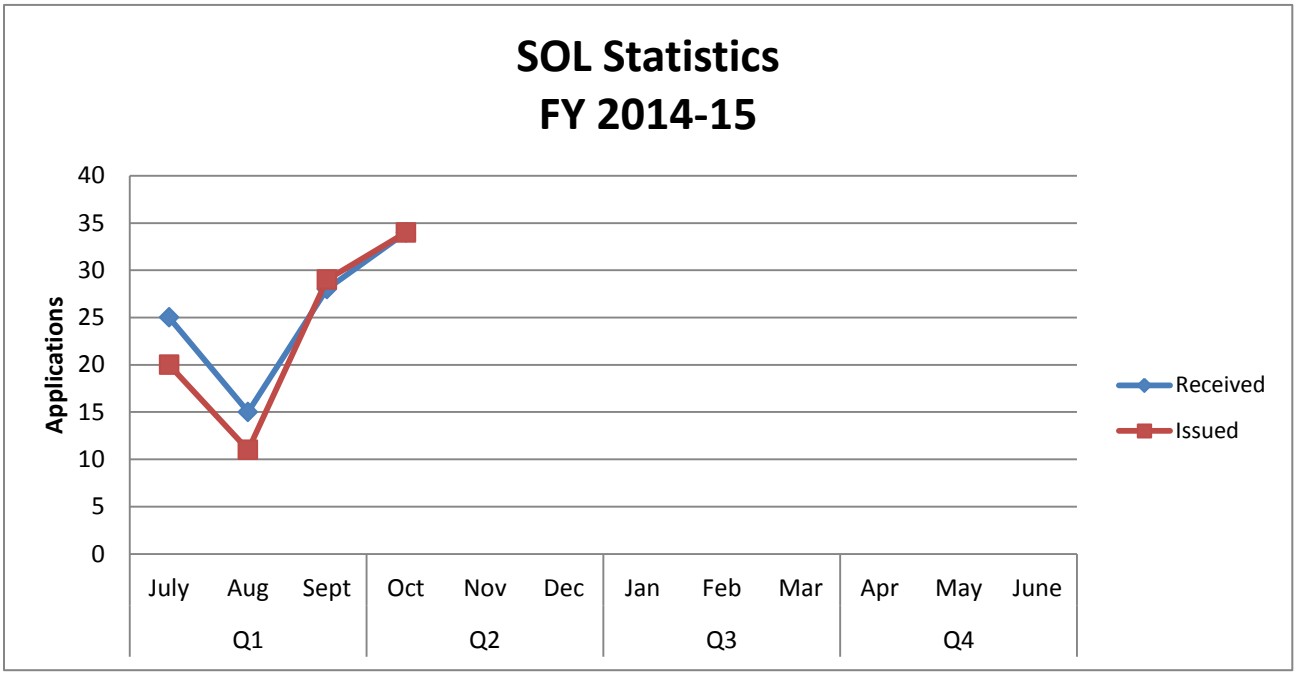
C. ASSUMES INTEREST RATE AT 0.3%.

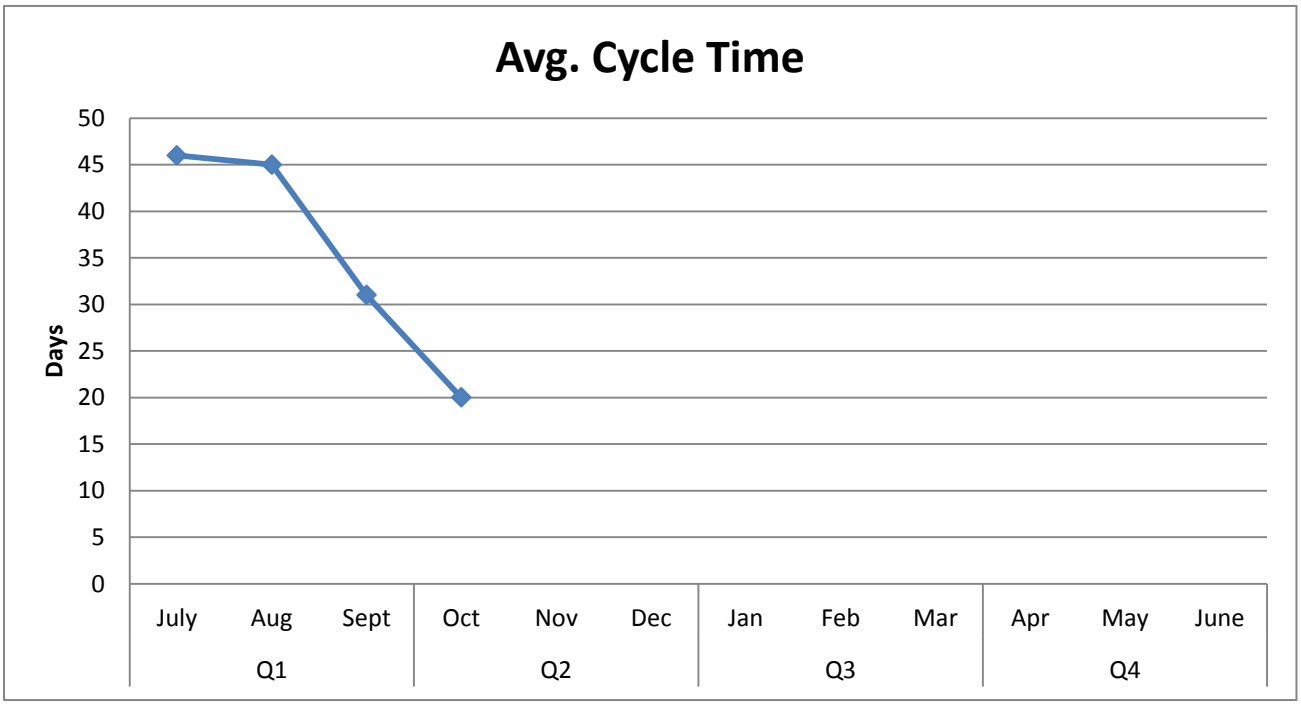
		FY 2015-16												
		Q1			Q2			Q3			Q4			FY TOTAL
		July	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	June	
OPTs	Received	9	10	14	12									45
	Issued	53	25	14	9									101
	Avg. Cycle Time	109	171	126	250									133



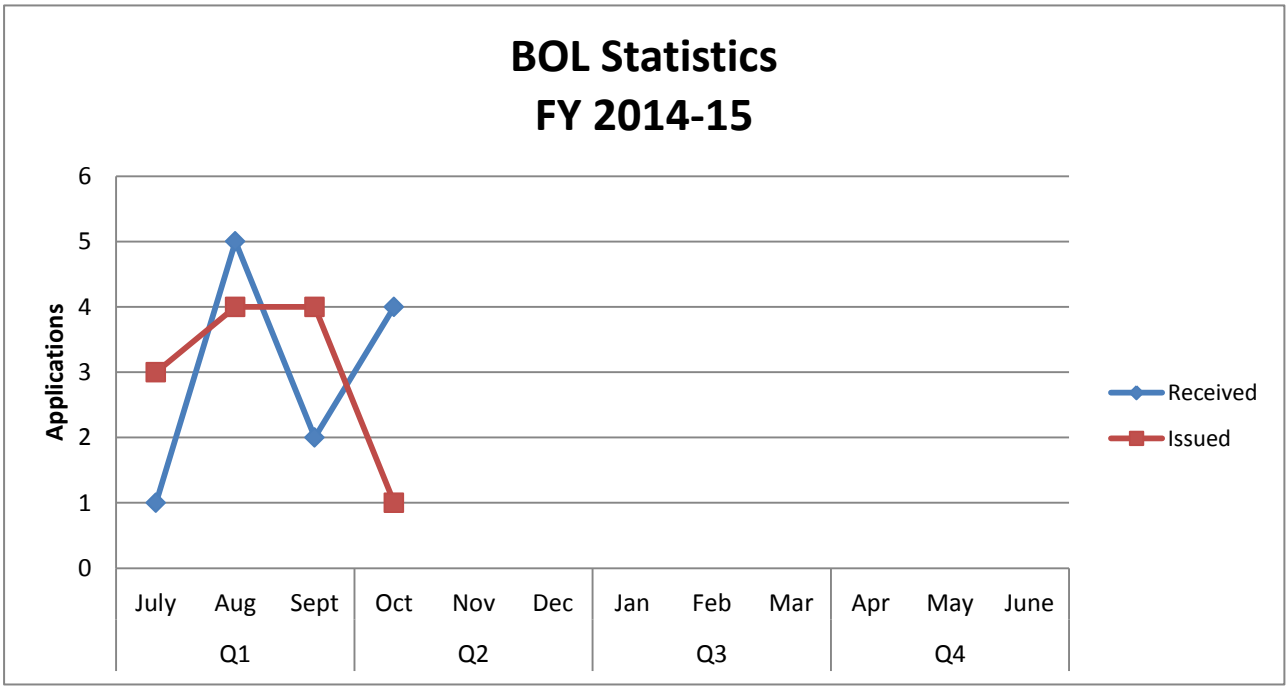


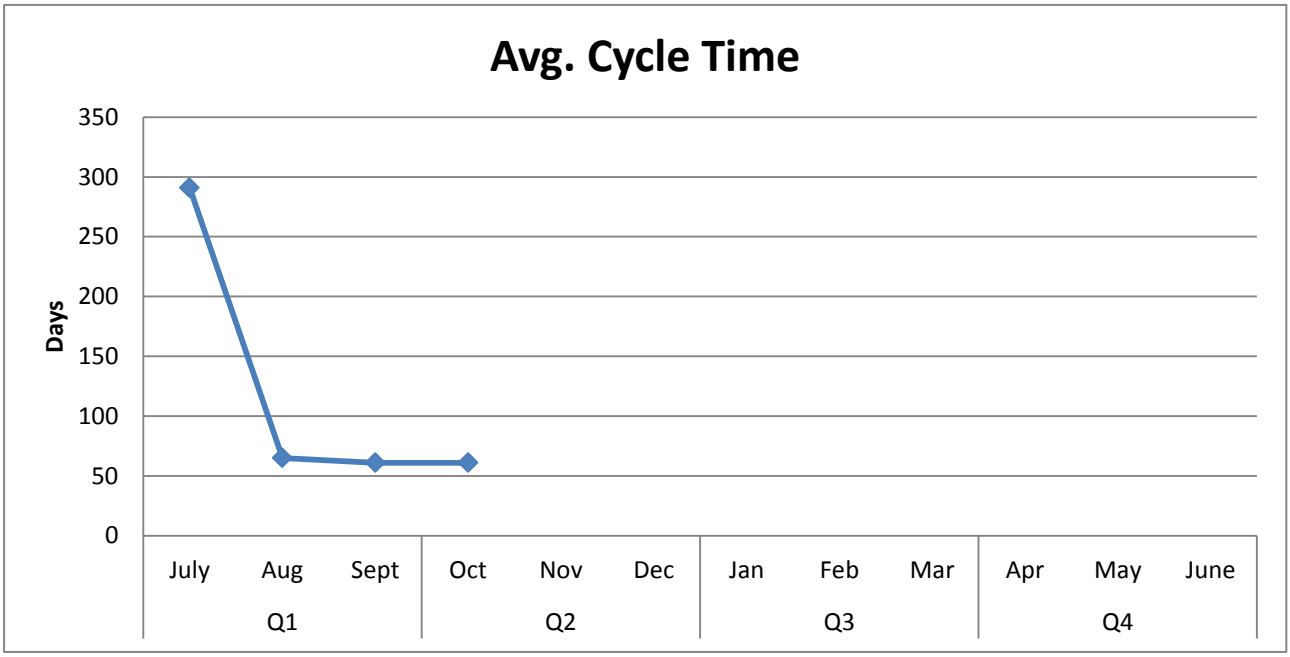
		FY 2015-16												
		Q1			Q2			Q3			Q4			FY TOTAL
		July	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	June	
SOLs	Received	25	15	28	34									102
	Issued	20	11	29	34									94
	Avg. Cycle Time	46	45	31	20									32



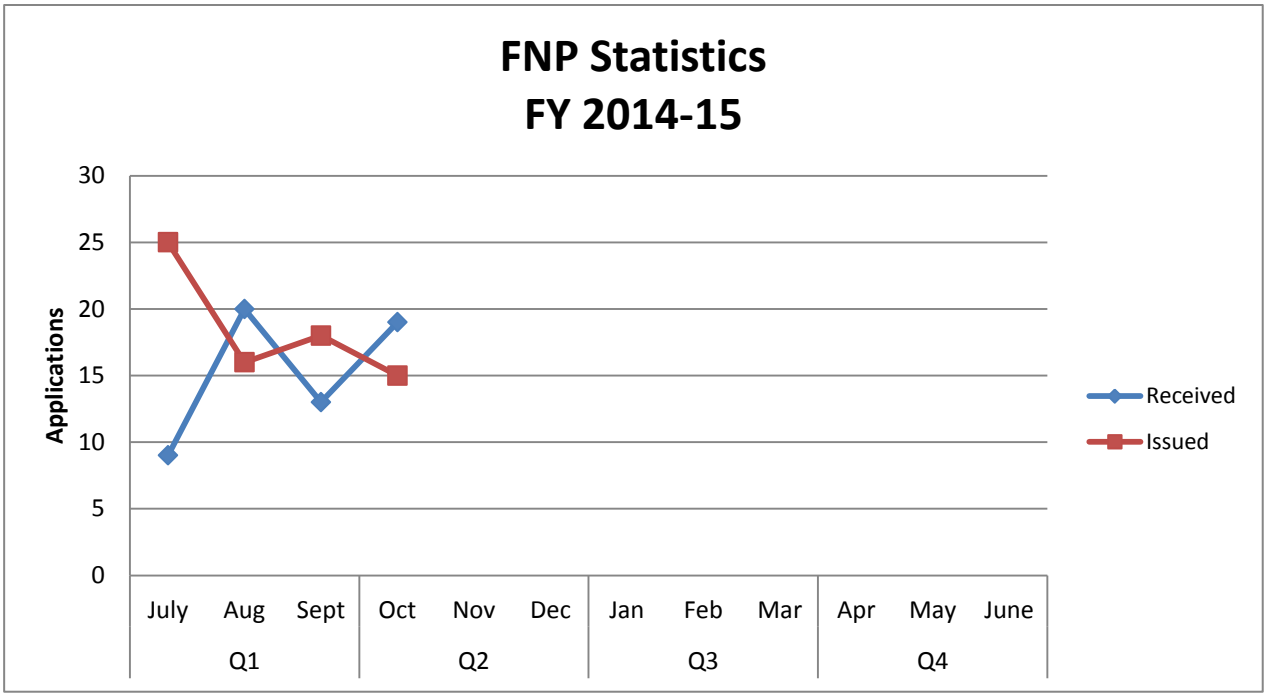


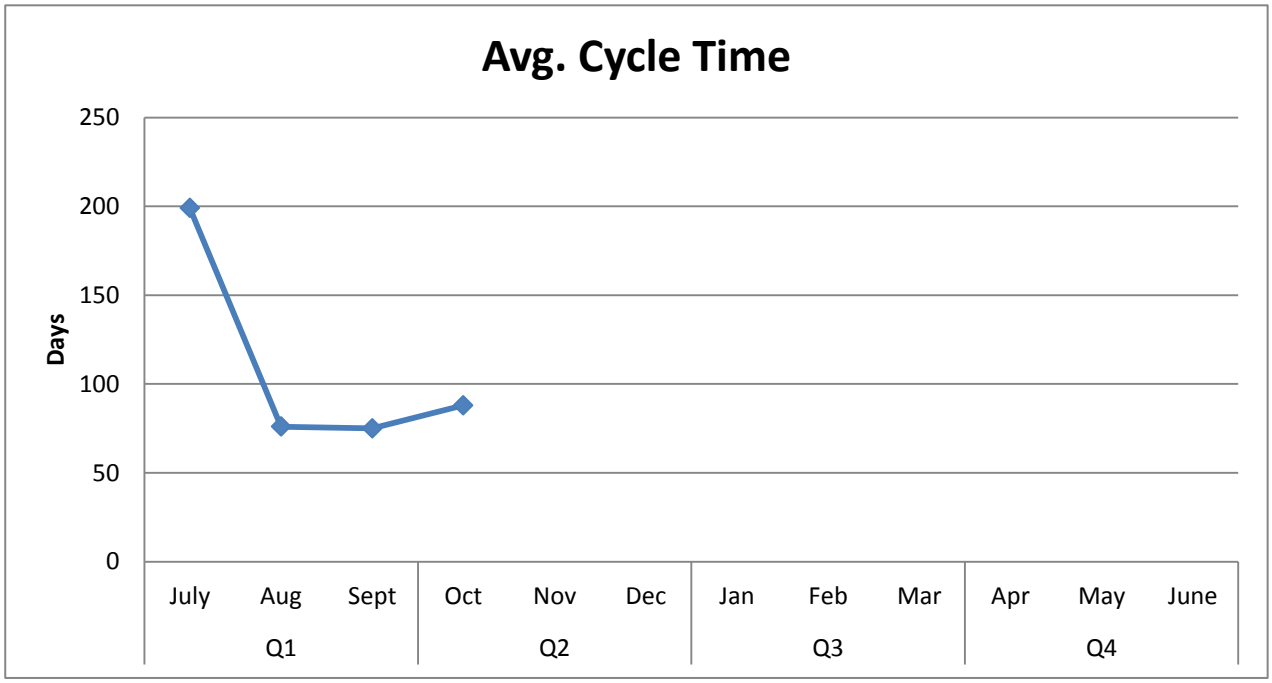
		FY 2015-16												
		Q1			Q2			Q3			Q4			FY TOTAL
		July	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	June	
BOLs	Received	1	5	2	4									12
	Issued	3	4	4	1									12
	Avg. Cycle Time	291	65	61	61									120





		FY 2015-16												
		Q1			Q2			Q3			Q4			FY TOTAL
		July	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	June	
FNPs	Received	9	20	13	19									61
	Issued	25	16	18	15									74
	Avg. Cycle Time	199	76	75	88									120





CALIFORNIA STATE BOARD OF OPTOMETRY

Memo

2450 Del Paso Road, Suite 105
Sacramento, CA 95834
(916) 575-7170, (916) 575-7292 Fax
www.optometry.ca.gov

To: Board Members **Date:** November 20, 2015

From: Jessica Sieferman
Assistant Executive Officer **Telephone:** (916) 575-7184

Subject: Agenda Item 7 – Consideration and Approval of the Board Member Handbook

---

Background

During the April 23-24, 2015 Board Meeting, the Board provided several edits to the draft Board Member Handbook. Staff worked with the Board Member Handbook Committee (Cyd Brandvein and Donna Burke) to incorporate those edits. Board legal counsel and other Board members provided additional edits.

Action Requested

Please consider and vote to approve the proposed amendments to the Board Member Handbook.

Attachment

1. Revised Board Member Handbook

State of California
Business, Consumer Services, and Housing Agency
Department of Consumer Affairs

CALIFORNIA STATE BOARD OF
OPTOMETRY

Board Member Handbook

California State Board of Optometry
2450 Del Paso Road, Suite 105
Sacramento, CA 95834
www.optometry.ca.gov

2015 Edition

Table of Contents

1. INTRODUCTION 3

OVERVIEW 3
MISSION STATEMENT 4
VISION STATEMENT 4
VALUES STATEMENT 4
BOARD RESPONSIBILITIES 4
DEFINITIONS 5
LICENSES AND CERTIFICATION ISSUED BY THE BOARD 6
GENERAL RULES OF CONDUCT 7

2. BOARD MEETING PROCEDURES 9

OPEN MEETINGS 9
CLOSED SESSION 9
SPECIAL MEETINGS 10
EMERGENCY MEETINGS 10
COMMITTEE MEETING REQUIREMENTS 10
MAKING A MOTION AT MEETINGS 11
MEETING FREQUENCY ..... 13~~12~~
BOARD MEMBER ATTENDANCE AT BOARD MEETINGS ..... 13~~12~~
QUORUM ..... 13~~12~~
AGENDA ITEMS ..... 14~~13~~
NOTICE OF MEETING ..... 14~~13~~
NOTICE OF MEETINGS TO BE POSTED ON THE INTERNET ..... 15~~14~~
RECORD OF MEETINGS ..... 15~~14~~
TAPE RECORDING ..... 15~~14~~
MEETING BY TELECONFERENCING ..... 15~~14~~
USE OF ELECTRONIC DEVICES DURING MEETINGS ..... 16~~15~~

3. TRAVEL & SALARY POLICIES & PROCEDURES ..... 17~~16~~

TRAVEL APPROVAL ..... 17~~16~~
TRAVEL ARRANGEMENTS ..... 17~~16~~
OUT-OF-STATE TRAVEL ..... 17~~16~~
TRAVEL CLAIMS ..... 17~~16~~
SALARY PER DIEM ..... 17~~16~~

4. SELECTION OF OFFICERS AND COMMITTEES ..... 20~~19~~

OFFICERS OF THE BOARD ..... 20~~19~~
ROLES AND RESPONSIBILITIES OF BOARD OFFICERS ..... 20~~19~~
PRESIDENT ..... 20~~19~~
VICE PRESIDENT ..... 21~~20~~
SECRETARY ..... 21~~20~~
ELECTION OF OFFICERS ..... 21~~20~~
OFFICER VACANCIES ..... 21~~20~~
COMMITTEE APPOINTMENTS ..... 22~~21~~
ATTENDANCE OF COMMITTEE MEETINGS ..... 22~~21~~

5. BOARD ADMINISTRATION AND STAFF ..... 24~~23~~

BOARD ADMINISTRATION ..... 24~~23~~
BOARD STAFF ..... 24~~23~~
APPOINTMENT OF EXECUTIVE OFFICER ..... 25~~24~~
EXECUTIVE OFFICER EVALUATION ..... 25~~24~~
LEGAL COUNSEL ..... 25~~24~~
STRATEGIC PLANNING ..... 25~~24~~

BOARD BUDGET ..... 25~~24~~
PRESS RELEASES ..... 26~~25~~
LEGISLATION ..... 26~~25~~

6. OTHER POLICIES AND PROCEDURES ..... 27~~26~~

BOARD MEMBER ORIENTATION AND TRAINING ..... 27~~26~~
BOARD MEMBER DISCIPLINARY ACTIONS ..... 27~~26~~
REMOVAL OF BOARD MEMBERS ..... 28~~27~~
RESIGNATION OF BOARD MEMBERS ..... 28~~27~~
CONFLICT OF INTEREST ..... 28~~27~~
CONTACT WITH CANDIDATES, APPLICANTS AND LICENSEES ..... 28~~27~~
COMMUNICATION WITH OTHER ORGANIZATIONS AND INDIVIDUALS ..... 28~~27~~
GIFTS FROM CANDIDATES ..... 28~~27~~
REQUEST FOR RECORDS ACCESS ..... 29~~28~~
EX PARTE COMMUNICATIONS ..... 29~~28~~

7. COMPLAINT AND DISCIPLINARY PROCESS ..... 30~~29~~

DECIDING TO ADOPT OR REJECT A PROPOSED DECISION ..... 31~~30~~
REVIEWING THE RECORD AND PREPARING TO DISCUSS AND RENDER A DECISION AFTER REJECTION ..... 32~~31~~

8. CALIFORNIA'S LEGISLATIVE PROCESS ..... 34~~33~~

POSITIONS ON LEGISLATION ..... 35~~34~~

9. REGULATIONS ..... 38~~37~~

1. Introduction

Overview

The California State Board of Optometry (hereafter Board) was created by the California Legislature in 1913 under the Department of Professional and Vocational Standards to safeguard the public's health, safety, and welfare. In 1923, the Board promulgated the first rules for the practice of optometry and the State Legislature first required all applicants for licensure to be graduates of an accredited school or colleges of optometry. The Board is responsible for accrediting these schools. To assure competent and ethical practitioners and protect the public from harm, no person may engage in the practice of optometry in California unless he or she possesses a valid and unrevoked license from the Board.

~~Today, t~~The Board is one of the ~~B~~boards, bureaus, commissions, and committees within the Department of Consumer Affairs (DCA), part of the Business, Consumer Services and Housing Agency under the aegis of the Governor. DCA is responsible for consumer protection and representation through the regulation of licensed professions and the provision of consumer services. While the DCA provides administrative oversight and support services, the Board has policy autonomy and sets its own policies, procedures, and initiates its own regulations.

Protection of the public shall be the highest priority for the Board in exercising its licensing, regulatory and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount (Business and Professions Code (BPC) § 3010.1).

The Board consists of 11 members, five of whom shall be public members and six are professional members (licensed optometrists of the State of California actually engaged in the practice of optometry at the time of appointment or faculty members of a school or college of optometry). No more than two faculty members may be on the Board at any one time and they may not serve as public members. No member of the Board shall have a financial interest in any purchase or contract under Board purview nor shall he/she have financial interest in the sale of any property or optical supplies to any prospective candidate for examination before the Board. The public members shall not be licensees of the Board or of any other Healing Arts Board. The Governor appoints three public members and the six professional members. The Senate Rules Committee and the Speaker of the Assembly each appoint one public member. Board Members may serve up to two, four-year terms. Board Members are paid $100 for each day actually spent in the discharge of official duties and are reimbursed travel expenses.

The purpose of this handbook is to provide guidance to Board Members regarding general processes and procedures involved with their position on the Board. It also serves as a useful source of information for new Board Members as part of the induction process. Board Members are typically asked to create and review policy and administrative changes, make disciplinary decisions, and preside over regular and special meetings. This handbook is additive to the Bagley-Keene Open Meeting Act and the Administrative Procedures Act which provide public meeting laws.

Mission Statement

To protect the health and safety of California consumers through licensing, education and regulation of the practice of Optometry.

Vision Statement

To ensure excellent optometric care for every Californian.

Values Statement

Consumer protection – We make effective and informed decisions in the best interest and for the safety of Californians.

Integrity – We are committed to honesty, ethical conduct, and responsibility.

Transparency – We hold ourselves accountable to the people of California. We operate openly so that stakeholders can trust that we are fair and honest.

Professionalism – We ensure qualified, proficient, and skilled staff provide excellent service to the State of California.

Excellence – We have a passion for quality and strive for continuous improvement of our programs, services, and processes through employee empowerment and professional development.

Board Responsibilities

With approximately 8,800 licensed optometrists, the largest population of optometrists in the United States, 3,000 branch office licenses, statements of licensure, and fictitious name permits, and 24,000 practice certifications, the Board is charged with the following duties and responsibilities:

- Accrediting the schools and colleges providing optometric education.
- Establishing educational requirements for admission to the examination for a license to practice optometry in ~~certificates of registration as~~ California ~~licensed optometrists~~.
- Establishing examination requirements to ensure the competence of individuals licensed to practice optometry in California and administering the examination.
- Setting and enforcing standards for continued competency of existing licensees.
- Establishing educational and examination requirements for licensed optometrists seeking certification to use and prescribe authorized pharmaceutical agents.
- Issuing certifications to diagnose and treat glaucoma for patients over the age of 18.
- Licensing branch offices and issuing fictitious name permits.
    - Effective January 1, 2007, the Board no longer registers Optometric Corporations. However, the Board has maintained the authority to regulate those in existence.

- Promulgating regulations governing:
  - Procedures of the Board
  - Admission of applicants for examination for licensure as optometrists
  - Minimum standards governing the optometric services offered or performed, the equipment, or the sanitary conditions
- ~~Providing for redress of grievances against licensees by i~~Investigating allegations of substance and patient abuse, unprofessional conduct, incompetence, fraudulent action, or unlawful activity.
- Instituting disciplinary action for violations of laws and regulations governing the practice of optometry when warranted.

This procedures manual is provided to Board Members as a ready reference of important laws, regulations, DCA policies, and Board policies in order to guide the actions of the Board Members and ensure Board effectiveness and efficiency.

Definitions

Term	Acronym	Definition
Administrative Law Judge	ALJ	A judge from the Office of Administrative Hearings (OAH) who presides over license denial and discipline cases (the trier of fact) and makes a Proposed Decision to the Board that includes findings of fact, conclusions of law, and a recommended ~~penalty~~level of discipline.
Administrative Procedure Act	APA	The law that sets out the procedure for license denial and license discipline, to meet constitutional requirements for due process of law.
Bagley-Keene Open Meeting Act.	-	Provisions of the public meetings law governing state agencies
Business and Professions Code	BPC	~~A series of statutes passed by the legislature~~California Law related to business and professions. The majority of DCA entities fall under this code.
Department of Consumer Affairs	DCA	The DCA protects and serves California consumers while ensuring a competent and fair marketplace. The DCA issues licenses in more than 100 business and 200 professional categories, including doctors, dentists, contractors, cosmetologists and automotive repair facilities. The DCA includes 41 regulatory entities (25 boards, nine bureaus, four committees, two programs, and one commission). These entities establish minimum qualifications and levels of competency for licensure. They also license, register, or certify practitioners, investigate complaints and discipline violators. The

		committees, commission and boards are semiautonomous bodies whose members are appointed by the Governor and the Legislature. DCA provides them administrative support. DCA's operations are funded exclusively by license fees.
Executive Officer	EO	An individual who serves at the pleasure of, and receives direction from the Board ~~Members who provides direction to the EO~~ in the areas of program administration, ~~budget~~, strategic planning, and coordination of meetings
Office of Administrative Hearings	OAH	The state agency that provides neutral (unaffiliated with either party) judges to preside over administrative cases.
Office of Administrative Law	OAL	The state agency that reviews regulation changes for compliance with the process and standards set out in law and either approves or disapproves those regulation changes.
Regulation	-	A standard that implements, interprets, or makes specific a statute enacted by ~~a state agency~~the legislature. It is enforceable the same way as a statute.
State Administrative Manual	SAM	A reference source for statewide policies, procedures, requirements and information developed and issued by authoring agencies. In order to provide a uniform approach to statewide management policy, the contents have the approval of and are published by the authority of the Department of Finance Director and the Department of General Services Director.
Statute	-	A law passed by the legislature.
Stipulation	STIP	~~A form of plea bargaining~~The matter in which a disciplinary or licensing case is settled by negotiated agreement prior to a hearing. The Board's Uniform Standards Related to Substance Abuse and Disciplinary Guidelines ~~is~~ are used to guide these negotiated settlements.

Licenses and Certification Issued by the Board

The following chart provides an overview of the various licenses and certifications issued by the Board.

TYPE	DESCRIPTION	Authority
Optometric License (OPT)	Required to practice optometry in California.	BPC § 3040, BPC § 3041
Statement of Licensure (SOL)	Required for each practice location other than the licensee's principal place	BPC § 3070 CCR § 1506(d).

	of practice and other than any Branch Office License Location.	
Branch Office License (BOL)	Required for each location for the practice of optometry and owned by a licensee that is in addition to the licensee's principal place of practice location.	BPC § 3077
Fictitious Name Permit (FNP)	Required if a fictitious name is used in conjunction with the practice of optometry.	BPC § 3078, CCR § 1518
Diagnostic Pharmaceutical Agents (DPA)	Certified to use diagnostic pharmaceutical agents for examination purposes only. **Not certified** to treat diseases of the eye or its appendages.	BPC § 3041.2, CCR §1561
Therapeutic Pharmaceutical Agents (TPA) Certification	Certified to use therapeutic pharmaceutical agents to treat certain conditions of the human eye or any of its appendages. May also perform certain procedures on the eye as listed in California Business and Professions Code Section 3041. TPA is the minimum certification **required** in order to obtain licensure in California. ~~Required for optometrists who wish to treat patients with pharmaceutical agents as authorized by this category.~~	BPC § 3041.3, CCR § 1568
Lacrimal Irrigation and Dilation Certification	TPA certified with additional certification to perform lacrimal irrigation and dilation procedures for patients over the age of 12 years.~~Required to perform lacrimal irrigation and dilation, an optometrist must be TPA certified.~~	BPC § 3041(e)(6), BPC § 3041.3
Glaucoma Certification	TPA certified with additional certification to diagnose and treat primary open angle glaucoma in patients over the age of 18 years.~~Required to diagnose and treat Glaucoma, an optometrist must be TPA certified.~~	BPC § 3041(f)(5), CCR § 1571

General Rules of Conduct

The following rules of conduct detail expectations of Board Members. The Board is comprised of both public and professional members with the intention that, together, the Board can collectively protect the public and regulate the Optometry profession.

- Board Members' actions shall serve to uphold the principle that the Board's primary mission is to protect the public.
- Board Members shall recognize the equal role and responsibilities of all Board Members.
- Board Members shall adequately prepare for Board responsibilities.

- Board Members shall not speak or act for the Board without proper authorization.
- Board Members shall maintain the confidentiality of non-public documents and information.
- Board Members shall act fairly, be nonpartisan, impartial and unbiased in their role of protecting the public.
- Board Members shall treat all applicants and licensees in a fair and impartial manner.
- Board Members shall not use their positions on the Board for personal, familial or financial gain.

2. Board Meeting Procedures

All ~~Healing Arts~~ Boards, Bureaus and Programs under the Department of Consumer Affairs, including the Board must meet in accordance with the provisions set forth by the Bagley-Keene Open Meeting Act. The Board will use Robert's Rules of Order, to the extent that it does not conflict with state law (e.g., Bagley-Keene Open Meeting Act), as a guide when conducting the meetings.

Open Meetings

The Bagley-Keene Act of 1967, officially known as the Bagley-Keene Open Meeting Act, implements a provision of the California Constitution which declares that "the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny", and explicitly mandates open meetings for California State agencies, Board~~-~~s, and commissions. The act facilitates accountability and transparency of government activities and protects the rights of citizens to participate in State government deliberations. This is similar to California's Brown Act of 1963, which provides open meeting provisions for county and local government agencies. ~~Similarly, California's Brown Act of 1953 protects citizen rights with regard to open meetings at the county and local government level.~~

The Bagley-Keene ~~a~~Act ~~stipulates~~ requires that the Board is to provide adequate notice of meetings to be held to the public as well as provide an opportunity for public comment. The meeting is to be conducted in an open session, except where closed session is specifically noted.

Closed Session
(GC § 11126 et seq.)

The Bagley-Keene Act of 1967 also contains specific exceptions from the open meeting requirements where government has a demonstrated need for confidentiality.

Should a ~~c~~Closed ~~s~~Session be ~~required~~authorized by law, the Board must disclose in the open meeting a general statement about the closed session items (i.e. by mentioning it on the agenda). Additionally, all closed sessions must take place ~~in~~ at a regularly scheduled or special meeting.

All ~~material~~ matters discussed in ~~c~~Closed ~~s~~Sessions must remain confidential. ~~When such a session takes place, a staff person will be present to record and make available to Board Members the discussion topics and decisions made.~~

All ~~c~~Closed ~~s~~Sessions must be held during a regular or ~~s~~Special ~~m~~Meeting (§ 11128). A staff person shall be designated to attend the closed session and record the ~~discussion topics and decisions made, which will be available only to members.~~ votes taken and matters discussed.

Closed Sessions may take place in the following instances:

- Personnel matters (i.e. appointments, employment, performance evaluations, etc.) of the Executive Officer.
- Administrative disciplinary and licensing proceedings.
- Examination matters, such as when the Board administers or approves an exam.
- Pending litigation.
- Confidential audit reports.
- Protection of privacy when matters discussed would be an invasion of privacy if conducted in open session.
- Response to a threat of criminal or terrorist activity against personnel, property, buildings, facilities, or equipment.

All information discussed in the closed session is confidential and must not be disclosed to outside parties.

Special Meetings

(GC § 11125 et seq.)

A ~~s~~Special ~~m~~Meeting may be held where compliance with a 10-day meeting notice would impose a hardship or when an immediate action would be required to protect the public interest.

Notice for a ~~s~~Special ~~m~~Meeting must be posted on the Internet at least 48 hours prior to the meeting. Upon commencement, the Board must state the specific facts that necessitate special meeting as a finding. This finding must be adopted by a two-thirds vote; failure to adopt the finding terminates the meeting.

The purpose and instructions for ~~s~~Special ~~m~~Meetings are detailed in GC § 11125.4. The notice needs to specify the time, place and purpose of the Special Meeting.

Emergency Meetings

(GC § 11125.5)

An ~~e~~Emergency ~~m~~Meeting may be held for an emergency situation involving matters upon which prompt action is necessary due to the disruption or threatened disruption of public facilities. An emergency situation is where work stoppage, crippling disaster, or other activity severely impairs the public health or safety. A determination of an emergency situation must be made by a majority of the board members.

Media outlets on the board's interested parties list must be given at least one hour's notice of the emergency meeting by telephone, if telephone services are functioning. The minutes of a meeting called pursuant to this section, a list of persons who the president or designee notified or attempted to notify, a copy of the roll call vote, and any action taken at the meeting shall be posted for a minimum of 10 days in a public place, and also made available on the Internet for a minimum of 10 days, as soon after the meeting as possible.

Committee Meeting Requirements

Committee Meetings consist of less than a quorum of the members of the full Board. Subcommittee and ~~t~~Task ~~f~~Force ~~m~~Meetings are variations of Committee Meetings.

Board ~~m~~Meetings have historically been required to be noticed and open to the public, except where a ~~c~~Closed ~~s~~Session is authorized. Committee and Subcommittee Meetings, where less than a quorum of the Board is present, are also required to be noticed and open to the public. The only exception is for a committee that consists of fewer than three persons and does not exercise any authority of a state body delegated to it by that state body. (Note: It is the number of persons on the committee [not the number of Board Members] that is determinative.)

Where a committee of fewer than three persons is to meet, and the meeting is not noticed, other members of the Board should not attend the meeting, as such attendance would clearly be perceived as a Bagley-Keene Open Meeting Act violation. Board staff is not precluded from attending such a meeting.

The law allows attendance by a majority of members at an open and noticed meeting of a standing committee of the Board provided the members of the Board who are not members of the committee attend only as observers. (GC §11122.5(c)(6)) The Office of the Attorney General has addressed in a formal opinion a provision in the Brown Act relating to the attendance of "observers" at a Committee Meeting. The Attorney General concluded that "[m]embers of the legislative body of a local public agency may not ask questions or make statements while attending a meeting of a standing committee of the legislative body as observers.'" The opinion further concluded that such members of the legislative body may not sit in special chairs on the dais with the committee. (81 Ops.Cal.Atty.Gen. 156)

Thus, under the provisions of GC §11122.5 (c)(6), and the opinion of the California Attorney General, if a majority of members of the full Board are present at a Committee Meeting, members who are not members of the committee that is meeting may attend that meeting only as observers. The Board Members who are not Committee Members may not sit on the dais with the committee, and may not participate in the meeting by making statements or asking questions.

If a Board schedules its Committee Meetings seriatim, and other Board Members are typically present to ultimately be available for their own Committee Meeting, the notice of the Committee Meeting should contain a statement to the effect that “Members of the board who are not members of this committee may be attending the meeting only as observers.”

Subcommittees may be appointed to study and report back to a committee or the board on a particular issue or issues. If the subcommittee consists of three or more persons, the same provisions apply to its meetings as apply to meetings of committees.

Board chairpersons may occasionally appoint a task force to study and report on a particular issue. One or two board members typically serve as task force members, along with a number of other non-board members. When this is the case, the same Open Meeting Act rules that apply to committee meetings apply to task force meetings. Such a formally appointed task force falls under the definition of “state body in Section 11121(c).”

Making a Motion at Meetings

When ~~new business is to be introduced or~~ a decision or action is to be ~~proposed~~considered, a Board Member should make a motion ~~to introduce a new piece of business or~~ to propose a

decision or course of action. ~~All motions must reflect the content of the meeting's agenda – the Board cannot act on business that is not listed on the agenda.~~

Upon making a motion, Board Members must speak slowly and clearly as the motion is being voice and/or video recorded. Members who opt to second a motion must remember to repeat the motion in question. Additionally, it is important to remember that once a motion has been made and seconded, it is inappropriate to make a second motion until the initial one has been resolved.

The basic process of a motion is as follows:

- An agenda item has been thoroughly discussed and reviewed. ~~If it is a new piece of business, see step 2.~~
- The Board President opens a forum for a Member to make a motion to adopt or reject the discussed item.
- A Member makes a motion before the Board.
- Another Member seconds this motion.
- The Board President puts forth the motion to a vote.
- The Board President solicits additional comment from the Board and then the public.
- ~~If it is a voice vote, those in favor of the motions say "aye" and those opposed say "no". Members may also vote to "abstain", meaning a non-vote or "recuse" meaning to disqualify from participation in a decision on grounds such as prejudice or personal involvement. Recusal is the proper response to a conflict of interest.~~
- The vote of each Board Member shall be recorded via roll call vote.
- Upon completion of the voting, the President will announce the result of the vote (e.g. "the ayes have it and the motion is adopted" or "the no's have it and the motion fails").

The adjournment of each meeting is done via motion, seconded motion, and majority vote.

Meeting Frequency
(BPC § 3017)

The Board shall hold regular meetings every calendar quarter. Notice of each meeting and the time and place thereof shall be given to each member in the manner provided by the Bagley-Keene Open Meeting Act.

Board Member Attendance at Board Meetings
(Board Policy)

Board Members shall attend each Board Meeting. If a member is unable to attend a meeting, it is the responsibility of the Board Member to contact the President and the Executive Officer with their request for an excused absence.

Quorum
(BPC § 3010.1)

Six Board Members constitute a quorum of the Board for the transaction of business. Either having members in attendance or by teleconference, with proper notice, can meet the

requirement for a quorum. The concurrence of a majority of those members of the Board present and voting at a meeting duly held at which a quorum is present shall be necessary to constitute an act or decision of the Board.

Agenda Items

(Board Policy and GC § 11125 et seq.)

Agenda items are to align with the Board's mandate to protect the health and safety of California consumers. Any Board Member may submit items for a Board Meeting agenda to the Board President with a copy to the Executive Officer 30 days prior to the meeting, where possible. Members may also recommend agenda items during the meeting under Suggestions for Future Agenda Items. A motion and vote may be taken but is not necessary. The Board President will confer with the Executive Officer and Legal Counsel regarding the future agenda items. It will be a standing item to review the status of future agenda items that have been recommended by Board Members that may not have made the current Board Meeting agenda. An item may be placed on the Board's agenda by the President, the Executive Officer, or by a vote of a majority of the members of the Board

Staff maintains a list of items to research and bring back to a future Board Meeting. Staff may recommend the issue be referred to a Committee first to be vetted. Prior to items being placed on the agenda, staff conducts research to determine if an item is appropriate for Board discussion. This research starts with identifying how the item meets our mandate to protect the health and safety of California consumers. In addition, staff researches potential benefits to the State, identifies the current professional trends and what other states are doing. For items requiring legislative and/or regulatory changes, staff identifies potential concerns by anticipating who would be in support of or in opposition to the bill/rulemaking.

No item shall be added to the agenda subsequent to the provision of the meeting notice. However, an agenda item may be amended and then posted on the Internet at least 10 calendar days prior to the meeting.

If the agenda contains matters that are appropriate for closed session, the agenda shall cite the particular statutory section and subdivision authorizing the closed session.

Items not included on the agenda may not be discussed.

Notice of Meeting

(GC § 11120 et seq.)

Regularly scheduled quarterly meeting generally occur throughout the year and address the usual business of the Board. There are no restrictions on the purposes for which a regularly scheduled meeting may be held.

Per the Bagley-Keene Open Meeting Act, the Board is required to give at least ten (10) calendar days for written notice of each Board Meeting to be held.

The meeting notice must include the agenda with a brief description of the item. No changes can be made to the agenda unless the notice is amended accordingly. If this occurs, it must be posted for ten (10) calendar days prior to the meeting.

Notice of Meetings to be posted on the Internet

(GC § 11125 et seq.)

Notice shall be given and also made available on the Internet at least ten (10) calendar days in advance of the meeting and shall include the name, address, and telephone number of any person who can provide information prior to the meeting. However, it need not include a list of witnesses expected to appear at the meeting.

Written notices shall include the address of the Internet site where notices required by this article are available.

Record of Meetings

(Board Policy)

Board action, public comment, and any presenters are recorded by Action Minutes unless the meeting is not audio recorded or webcast. If no recording is available, detailed summary minutes will be recorded. ~~The minutes are a summary, not a transcript, of each Board Meeting.~~ The~~y~~ minutes shall be prepared by Board staff and submitted for review by Board Members before the next Board Meeting. Board Minutes shall be approved at the next scheduled meeting of the Board. When approved, the minutes shall serve as the official record of the meeting.

Tape Recording

(Board Policy)

The meetings may be tape-recorded if determined necessary for staff purposes. Tape recordings may be disposed of upon Board approval of the minutes.

Meeting by Teleconferencing

(GC § 11123 et seq.)

Board Meetings held by a teleconference must comply with requirements applicable to all meetings.

The portion of the meeting that is open session must be made audible to the public present at the location specified in the meeting notice. Each teleconference meeting location must be identified in the meeting agenda. The location must be open to the public and ADA accessible. Additionally, each Board Member participating via teleconference must post appropriate signage for the public and ensure public materials are available to the public, either printed or electronic.

Board Policy does not allow Board Members to participate in petition hearings via teleconference. Thus, Board Members would not be able to participate in the petition deliberations and voting during closed session. However, after petition proceedings are final, the Board Member should be contacted to participate in all other closed session deliberations.

Unless it is during a petition hearing, if a Board Member is participating via teleconference, and the call is disconnected, an effort should be made to reconnect the call.

All votes taken during ~~this~~ a teleconference meeting shall be by roll call.

Use of Electronic Devices During Meetings

Members should not text or email each other during an open meeting on any matter within the Board's jurisdiction.

Use of electronic devices, including laptops, during the meetings is solely limited to ~~access the~~ Board Meeting ~~materials that are in electronic format~~purposes.

3. Travel & Salary Policies & Procedures

Travel Approval
(DCA Memorandum 96-01)

Board Members shall have Board President approval for travel except for regularly scheduled Board and Committee Meetings to which the Board Member is assigned.

Travel Arrangements
(Board Policy)

Board staff will make travel arrangements for each Board Member as required.

Out-of-State Travel
(State Administrative Manual § 700 et seq.)

For out-of-state travel, Board Members will be reimbursed for actual lodging expenses, supported by vouchers, and will be reimbursed for meal and supplemental expenses. Out-of-state travel for all persons representing the ~~s~~State of California is controlled and must be approved by the Governor's Office.

Travel Claims
(State Administrative Manual § 700 et seq. and DCA Travel Guidelines)

Rules governing reimbursement of travel expenses for Board Members are the same as for management-level state staff. All expenses shall be claimed on the appropriate travel expense claim forms. Board Members will be provided with completed travel claim forms submitted on their behalf. The Executive Officer's Assistant maintains these forms and completes them as needed. It is advisable for Board Members to submit their travel expense forms immediately after returning from a trip and not later than two weeks following the trip.

In order for the expenses to be reimbursed, Board Members shall follow the procedures contained in DCA Departmental Memoranda which are periodically disseminated by the DCA Director and are provided to Board Members.

Salary Per Diem
(BPC § 103)

Compensation in the form of salary per diem and reimbursement of travel and other related expenses for Board Members is regulated by BPC § 103.

In relevant part, this section provides for the payment of salary per diem for Board Members "for each day actually spent in the discharge of official duties," and provides that the Board Member "shall be reimbursed for traveling and other expenses necessarily incurred in the performance of official duties."

Accordingly, the following general guidelines shall be adhered to in the payment of salary per diem or reimbursement for travel:

1. No salary per diem or reimbursement for travel-related expenses shall be paid to Board Members, except for attendance at official Board or Committee Meetings and unless a substantial official service is performed by the Board Member. Attendance at gatherings, events, hearings, conferences or meetings, other than official Board or Committee Meetings, in which a substantial official service is performed, shall be approved in advance by the Board President. The Executive Officer shall be notified of the event and approval shall be obtained from the Board President prior to the Board Member's attendance.

2. The term "day actually spent in the discharge of official duties" shall mean such time as is expended from the commencement of a Board Meeting or Committee Meeting to the conclusion of that meeting. Where it is necessary for a Board Member to leave early from a meeting, the Board President shall determine if the member has provided a substantial service during the meeting and, if so, shall authorize payment of salary per diem and reimbursement for travel-related expenses.

3. Board Members will be provided with a copy of the salary per diem form submitted on their behalf.

For Board -specified work, Board Members will be compensated for actual time spent performing work authorized by the Board President. That work includes, but is not limited to, authorized attendance at other gatherings, events, meetings, hearings, or conferences, and committee work. That work does not include preparation time for Board or Committee Meetings. Board Members cannot claim salary per diem for time spent traveling to and from a Board or Committee Meeting.

Per Diem Expenses: Meals, lodging, and all appropriate incidental expenses incurred may be claimed when conducting State business while on travel status.

Per Diem Process for Board Members:
Each member must report their days worked on a timesheet and are compensated for each day worked $100 (per diem).

Board Member timesheet needs to include:

- Month claiming per diem
- Dates claiming
- Place: Name of city where per diem is being claimed
- Time: start and end times Board Member conducted board business on that specific date
- Total hours: Total number of hours he/she conducted board business on that date*
- Service performed: committee meeting(s) attended, Board Meeting(s), etc

The EO must sign-off on the timesheet prior to submission to DCA's Office of Human Resources (OHR). OHR keys in the time and the check is issued (2-3 weeks) after it is keyed in by OHR

Board members are paid the $100 per diem, in addition to their travel expenses reimbursements.

4. Selection of Officers and Committees

Officers of the Board
(BPC § 3014)

The Board shall elect from its members a President, Vice-President, and a Secretary to hold office for one year or until their successors are duly elected and qualified.

Roles and Responsibilities of Board Officers
(Board Policy)

President

- **Board Business:** Conducts the Board's business in a professional manner and with appropriate transparency, adhering to the highest ethical standards. Shall use Roberts Rules of Order as a guide and shall use the Bagley-Keene Act during all Board Meetings.
- **Board Vote:** Conducts roll call vote.
- **Board Affairs:** Ensures that Board matters are handled properly, including preparation of pre-meeting materials, committee functioning and orientation of new Board Members.
- **Governance:** Ensures the prevalence of Board governance policies and practices, acting as a representative of the Board as a whole.
- **Board Meeting Agendas:** Develops agendas for meetings with the Executive Officer and Legal Counsel. Presides at Board Meetings.
- **Executive Officer:** Establishes search and selection committee for hiring an Executive Officer. The committee will work with the DCA on the search. Convenes Board discussions for evaluating Executive Officer each fiscal year.
- **Board Committees:** Seeks volunteers for committees and coordinates individual Board Member assignments. Makes sure each committee has a chairperson, and stays in touch with chairpersons to be sure that their work is carried out. Obtains debrief from each Board Committee chairperson and reports committee progress and actions to Board at the Board Meeting.
- **Yearly Elections:** Solicits nominees not less than 45 days prior to open elections at Board Meeting.
- **Community and Professional Representation:** Represents the Board in the community on behalf of the organization (as does the Executive Officer and Public Outreach Committee).

Vice President

- **Board Business:** Performs the duties and responsibilities of the President when the President is absent.
- **Board Budget:** Serves as the Board's budget liaison with staff and shall assist staff in the monitoring and reporting of the budget to the Board. Review budget change orders with staff.
- **Strategic Plan:** Serves as the Board's strategic planning liaison with staff and shall assist staff in the monitoring and reporting of the strategic plan to the Board.
- **Board Member On-Boarding:** Welcomes new members to the Board, ~~.~~ ~~I~~is available to answer questions, and assist new Board Members with understanding their role and responsibilities. May participate in on-Boarding meeting with staff and new members.

Secretary

- **Attendance:** Calls roll to establish quorum
- **Board Motions:** Restates the motion prior to discussion.
- **Board Business:** Reviews draft minutes for accuracy.
- **Board Minutes:** Ensures accuracy and availability, including but not limited to date, time and location of meeting; list of those present and absent; list of items discussed; list of reports presented; and text of motions presented and description of their disposition. Reviews and provides edits to draft minutes which have been transcribed by staff following recorded webcasts, note taking and other methods to record public meetings.
- **Yearly Elections:** Reviews template for nominee statements and oversees the compilation of statements for inclusion in Board Meeting Materials.
- **Board Documents**: Maintains copies of administrative documents, e.g., Board Member Handbook, Administrative Law Book, Bagley-Keene Open Meeting Act for reference during Board Meeting.

Election of Officers
(Board Policy)

The Board elects the officers at the last meeting of the fiscal year. Officers serve a term of one-year, beginning July 1 of the next fiscal year. All officers may be elected on one motion or ballot as a slate of officers unless more than one Board Member is running per office. An officer may be re-elected and serve for more than one term.

Officer Vacancies
(Board Policy)

If an office becomes vacant during the year, an election shall be held at the next meeting. If the office of the President becomes vacant, the Vice President shall assume the office of the President until the election for President is held. Elected officers shall then serve the remainder of the term.

Committee Appointments
(Board Policy)

The President shall establish committees, whether standing or special, as necessary. The composition of the committees and the appointment of the members shall be determined by the Board President in consultation with the Vice President, Secretary and the Executive Officer. In determining the composition of each committee, the president shall solicit interest from the Board Members during a public meeting. The President shall strive to give each Board Member an opportunity to serve on at least one committee. Appointment of non-Board Members to a committee is subject to the approval of the Board.

Attendance of Committee Meetings
(GC § 11122.5 (c)(6))

(a) As used in this article, "meeting" includes any congregation of a majority of the members of a state body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the state body to which it pertains.

(b) Except as authorized pursuant to § 11123, any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the state body to develop a collective concurrence as to action to be taken on an item by the members of the state body is prohibited.

(c) The prohibitions of this article do not apply to any of the following:

(1) Individual contacts or conversations between a member of a state body and any other person.

(2) The attendance of a majority of the members of a state body at a conference or similar gathering open to the public that involves a discussion of issues of general interest to the public or to public agencies of the type represented by the state body, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled program, business of a specified nature that is within the subject matter jurisdiction of the state body. This paragraph is not intended to allow members of the public free admission to a conference or similar gathering at which the organizers have required other participants or registrants to pay fees or charges as a condition of attendance.

(3) The attendance of a majority of the members of a state body at an open and publicized meeting organized to address a topic of state concern by a person or organization other than the state body, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within the subject matter jurisdiction of the state body.

(4) The attendance of a majority of the members of a state body at an open and noticed meeting of another state body or of a legislative body of a local agency as defined by § 54951, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled meeting, business of a specific nature that is within the subject matter jurisdiction of the other state body.

(5) The attendance of a majority of the members of a state body at a purely social or ceremonial occasion, provided that a majority of the members do not discuss among themselves business of a specific nature that is within the subject matter jurisdiction of the state body.

(6) The attendance of a majority of the members of a state body at an open and noticed meeting of a standing committee of that body, provided that the members of the state body who are not members of the standing committee attend only as observers.

5. Board Administration and Staff

Board Administration

(DCA Reference Manual)

Board Members should be concerned primarily with formulating decisions on Board policies rather than decisions concerning the means for carrying out a specific course of action. It is inappropriate for Board Members to become involved in the details of program delivery. Strategies for the day-to-day management of programs, operations and staff shall be the responsibility of the Executive Officer. Board Members should not interfere with day-to-day operations, which are under the authority of the Executive Officer.

Board Staff

The Board's essential functions are comprised of ensuring Optometrists licensed in the State of California meet professional examination requirements and follow legal, legislative and regulatory mandates. The Board is also responsible for enforcement of State of California requirements and regulations as they pertain to the Optometry profession.

- Licensing: Staff is responsible for evaluating applications for initial licensure, license renewals, providing certifications, issuing Fictitious Name Permits, monitoring continuing education, and providing license verifications to consumers and customer service to licensees accordingly.
- Examinations: Staff ~~regulates~~ assists in the development of the law ~~and licensing~~ exam~~s~~, which are necessary to ensure proficiency to practice. Staff also develops examination procedures.
- Legislative and Regulatory: Administrative staff is responsible for ~~implementing administrative changes, primarily by revising or introducing regulations and statutes~~monitoring pending legislation impacting the practice of optometry, proposing legislative and regulatory amendments/additions for Board consideration, and assisting in implementing legislative/regulatory changes.
- Enforcement: Staff is responsible for ensuring consumer protection predominantly by processing consumer complaints, monitoring probationers, and providing customer service to licensees and consumers by providing information related to Board law.

Employees of the Board with the exception of the Executive Officer, are civil service employees. Their employment, pay, benefits, discipline, termination, and conditions of employment are governed by a myriad of civil service laws and regulations and often by collective bargaining labor agreements. Because of this complexity, it is most appropriate that the Board delegate all authority and responsibility for management of the civil service staff to the Executive Officer. Board Members shall not intervene or become involved in specific day-to-day personnel transactions or matters.

Appointment of Executive Officer
(BPC § 3027)

The Board shall employ an Executive Officer and other necessary assistance in the carrying out of the provisions of the BPC, Chapter 7.

The Executive Officer serves at the pleasure of the Board Members who provide policy direction to the Executive Officer in the areas of program administration, legislative and regulatory development, ~~budget~~, strategic planning, and coordination of meetings. The Executive Officer shall not be a member of the Board. With the approval of the Director of Finance, the Board shall determine the salary of the Executive Officer. The Executive Officer shall be entitled to traveling and other necessary expenses in the performance of his/her duties as approved by the Board.

Executive Officer Evaluation
(Board Policy)

Board Members shall evaluate the performance of the Executive Officer on an annual basis.

Legal Counsel

Generally, ~~T~~the ~~Board's legal counsel~~Office of the Attorney General represents the Board for litigation and represents complainant (the Executive Officer) for licensing and discipline cases. ~~accordingly for services rendered by the Office of the Attorney General.~~ The ~~Board's~~ DCA legal counsel assigned to the Board provides "in-house" counsel, ~~and impartial (or nonparty) counsel~~assistance on closed session discipline and licensing matters. It is the Board's policy to have DCA counsel present in closed sessions held pursuant to government code section 11126(c)(3), including deliberations on petition hearings.

Strategic Planning
(Board Policy)

The Executive Committee shall have overall responsibility for the Board's strategic planning process. The Vice President shall serve as the Board's strategic planning liaison with staff and shall assist staff in the monitoring and reporting of the strategic plan to the Board. The Board will update the strategic plan every three years, with the option to use a facilitator to conduct the plan update. At the end of the fiscal year, an annual review conducted by the Board will evaluate the progress toward goal achievement as stated in the strategic plan and identify any areas that may require amending. ~~.~~

Board Budget
(Board Policy)

The Vice President shall serve as the Board's budget liaison with staff and shall assist staff in the monitoring and reporting of the budget to the Board. Staff will conduct an annual budget briefing with the Board with the assistance of the Vice President.

The Executive Officer or the Executive Officer's designee will attend and testify at legislative budget hearings and shall communicate all budget issues to the Administration and Legislation.

Press Releases
(Board Policy)

The Executive Officer, in coordination with the DCA's Public Information Office, may issue press releases with the approval of the Board President.

Legislation
(Board Policy)

In the event time constraints preclude Board action, the Board delegates to the Executive Officer and the Board President and Vice President the authority to take action on legislation that would affect the practice of optometry or responsibilities of the Board. The Board shall be notified of such action as soon as possible.

6. Other Policies and Procedures

Board Member Orientation and Training

(BPC § 453)

Newly appointed members shall complete a training and orientation program provided by DCA within one year of assuming office. This one-day class will discuss Board Member obligations and responsibilities.

~~Newly appointed Board Members shall complete provided by the Department of Consumer Affairs (complete within one (1) year of assuming office).~~

(GC § 11121.9, GC § 12950.1)

All Board Members shall complete all required training and submit compliance documentation, including but not limited to, the documents specified below:

- Board Member Orientation Training provided by the DCA (complete within one (1) year of assuming office).
- Ethics Orientation Training (complete within first six (6) months of assuming office) and every two (2) years thereafter.
- Conflict of Interest, Form 700 (submit annually) and within 30 days of assuming office.
- Sexual Harassment Prevention Training (complete within first six (6) months of assuming office) and every two (2) years thereafter.
- Defensive Drive Training (if driving state vehicles, vehicles rented by the state or drive personal vehicles for state business) required once every four years

Upon assuming office, members will also receive a copy of the Bagley-Keene Open Meeting Act, which lists public meeting laws that provide the guidelines for Board Meetings. The current version of this Act can also be found at the following:

http://www.dca.ca.gov/publications/bagleykeene_meetingact.pdf

Additional Board Member resources can be found at www.dcaBoard members.ca.gov. Business cards will be provided to each Board Member with the Board's name, address, telephone and fax number, and website address. A Board Member's business address, telephone and fax number, and email address may be listed on the card at the member's request.

Board Member Disciplinary Actions

(Board Policy)

The Board may censure a member if, after a hearing before the Board, the Board determines that the member has acted in an inappropriate manner. The President of the Board shall sit as chair of the hearing unless the censure involves the President's own actions, in which case the

Vice President of the Board shall sit as chair. In accordance with the ~~Public~~ Open Meeting~~s~~ Act, the censure hearing shall be conducted in open session.

Removal of Board Members
(BPC §§ 106 and 106.5)

The Governor has the power to remove from office at any time any member of any Board appointed by him or her for continued neglect of duties required by law or for incompetence or unprofessional or dishonorable conduct. The Governor may also remove from office a Board Member who directly or indirectly discloses examination questions to an applicant for examination for licensure.

Resignation of Board Members
(GC § 1750)

In the event that it becomes necessary for a Board Member to resign, a letter shall be sent to the appropriate appointing authority (Governor, Senate Rules Committee, or Speaker of the Assembly) with the effective date of the resignation. State law requires written notification. A copy of this letter shall also be sent to the ~~d~~Director of DCA, the Board President, and the Executive Officer.

Conflict of Interest
(GC § 87100)

No Board Member may make, participate in making, or in any way attempt to use his or her official position to influence a governmental decision in which he or she knows or has reason to know he or she has a financial interest. Any Board Member who has a financial interest shall disqualify him or herself from making or attempting to use his or her official position to influence the decision. Any Board Member who feels he or she is entering into a situation where there is a potential for a conflict of interest should immediately consult the Executive Officer or the Board's legal counsel.

Contact with Candidates, Applicants and Licensees
(Board Policy)

Board Members shall not intervene on behalf of a candidate or an applicant for licensure for any reason. Nor shall they intervene on behalf of a licensee. All inquiries regarding licenses, applications and enforcement matters should be referred to the Executive Officer.

Communication with Other Organizations and Individuals
(Board Policy)

Any and all representations made on behalf of the Board or Board Policy must be made by the Executive Officer or Board President, unless approved otherwise. All correspondence shall be issued on the Board's standard letterhead and will be created and disseminated by the Executive Officer's Office.

Gifts from Candidates
(Board Policy)

Gifts of any kind to Board Members or the staff from candidates for licensure with the Board shall not be permitted.

Request for Records Access

(Board Policy)

No Board Member may access the file of a licensee or candidate without the Executive Officer's knowledge and approval of the conditions of access. Records or copies of records shall not be removed from the Office of the Board.

Ex Parte Communications

(GC § 11430.10 et seq.)

The Government Code contains provisions prohibiting *ex parte* communications. An *ex parte* communication is a communication to the decision-maker made by one party to an enforcement action without participation by the other party. While there are specified exceptions to the general prohibition, the key provision is found in subdivision (a) of § 11430.10, which states:

"While the proceeding is pending, there shall be no communication, direct or indirect, regarding any issue in the proceeding to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and an opportunity for all parties to participate in the communication."

Board Members are prohibited from an *ex parte* communication with Board enforcement staff while a proceeding is pending. Occasionally an applicant who is being formally denied licensure, or a licensee against whom disciplinary action is being taken, will attempt to directly contact Board Members.

If the communication is written, the person should read only far enough to determine the nature of the communication. Once he or she realizes it is from a person against whom an action is pending, they should reseal the documents and send them to the Executive Officer.

If a Board Member receives a telephone call form an applicant or licensee against whom an action is pending, he or she should immediately tell the person they cannot speak to them about the matter. If the person insists on discussing the case, he or she should be told that the Board Member will be required to recuse him or herself from any participation in the matter. Therefore, continued discussion is of no benefit to the applicant or licensee.

If a Board Member believes that he or she has received an unlawful *ex parte* communication, he or she should contact the Executive Officer promptly.

7. Complaint and Disciplinary Process

The Board conducts disciplinary proceedings in accordance with the Administrative Procedure Act, GC § 11370, and those sections that follow. The Board conducts investigations and hearings pursuant to Government Code §§ 11180 through 11191. The Board also uses its Uniform Standards Related to Substance Abuse and Disciplinary Guidelines, in regulation, as a guide when determining appropriate levels of discipline.

Typically, the disciplinary process begins with a complaint ~~case~~. Complaints can come to the Board via consumers, optometrists, and other agencies. Under Business and Professions Code 800 et seq., civil judgments or settlement against a licensee that exceeds three thousand dollars ($3,000) must be reported to the Board by an insurer or licensee. These will result in an enforcement investigation.

To begin an investigation, the Board's enforcement staff determines jurisdiction over a complaint case. If jurisdiction has been established, enforcement staff begins its investigation by requesting permission to review the patient's medical file (if ~~this is~~ pertinent to the complaint) and notifies the optometrist that a complaint has been made.

Enforcement staff determines if a violation of the Optometry Practice Act has occurred by verifying facts to validate a complaint allegation. This is generally accomplished by gathering statements, patient records, billings, and insurance claims, etc. The Board may also submit the case to the Division of Investigation (DOI) for further investigation as DOI investigators are given authority of peace officers by the Business and Professions Code while engaged in their duties. Therefore, these investigators are authorized more investigative privileges than Board staff.

The Board may also seek the aid of an expert witness when the enforcement team needs an expert opinion to determine if the licensee in question breached the standard of care.

If it is determined ~~by enforcement staff, expert opinion, DOI, etc.~~ that the subject's acts constitute a violation of law, the completed investigative report is submitted to the California Office of the Attorney General. The assigned Deputy Attorney General will review the case to determine if the evidence supports filing of an accusation against the subject for a violation of the law. If it is determined appropriate, an accusation is prepared and served upon the subject and he or she is given the opportunity to request a hearing to contest the charges.

~~Acts subject to disciplinary action – such as revocation, suspension, or probationary status of a license – include but are not limited to~~The following is a lists of actions for which the Board may take:

- Unprofessional conduct;
- Gross negligence;
- Sexual misconduct;
- Conviction of a substantially related crime;
- Substance abuse; and
- Insurance fraud.

After the Board files an accusation, the case may be resolved by a stipulated settlement: a written agreement between parties to which the person is charged admits to certain violations and agrees that a particular disciplinary order may be imposed.

Stipulations are subject to adoption by the Board If a stipulated settlement cannot be negotiated, the Board holds a hearing before an Administrative Law Judge (ALJ) of the Office of Administrative Hearings. The hearing may last anywhere from one day to several months, depending on the complexity of the case and the defense. During the hearing, both sides may call expert witnesses to support their views. After both sides have argued their case, the judge issues a proposed decision,~~. This written proposal~~ which is then submitted to the Board for ~~adoption as its decision in the matter~~consideration.

If the Board does not adopt the proposed decision, Board Members obtain a transcript of the hearing, review the decision and decide the matter based upon the administrative record. If dissatisfied with the Board's decision, the respondent may petition for reconsideration or he or she may contest it by filing a writ of mandate in the appropriate superior court.

~~**Reviewing Disciplinary Decisions**~~

~~Board Members participate in disciplinary hearings with an ALJ who presides over the hearing. At the conclusion of the hearing, Board Members are required to make a disciplinary decision.~~

Deciding to Adopt or Reject a Proposed Decision

Upon being presented with a proposed disciplinary or licensing decision from an ALJ, each Board Member is asked to either adopt or Reject the action. Accordingly, the following should be considered when making a decision:

- Factors for consideration when deciding to adopt an ALJ's proposed decision
    - The summary of the evidence supports the findings of fact, and the findings support the conclusions of law.
    - The law and standards of practice are interpreted correctly.
    - In those cases in which witness credibility is crucial to the decision, the findings of fact include a determination based substantially on a witness' credibility, and the determination identifies specific evidence of the observed demeanor, manner, or attitude of the witness that supports the credibility determination.
    - The penalty fits within the disciplinary guidelines or any deviation from those guidelines has been adequately explained.
    - If probation is granted, the terms and conditions of probation provide the necessary public protection.
    - The costs of proceeding with Rejection far exceed the severity of the offense and the probability is high that respondent will be successful on appeal.
- Factors for consideration when deciding to Reject an ALJ's proposed decision
    - The proposed decision reflects the ALJ clearly abused his/her discretion.

- The ALJ made an error in applying the relevant standard of practice for the issues in controversy at the hearing.
- The witness's credibility is crucial to the decision and the findings of fact include a determination based substantially on a witness' credibility; but the determination does not identify specific evidence of the observed demeanor, manner, or attitude, of the witness that supports the credibility determination.
- The ALJ made an error in interpreting the licensing law and/or regulations.
- The ALJ made correct conclusions of law and properly applied the standards of practice but the ~~penalty~~ level of discipline proposed is substantially less than is appropriate to protect the public.

Note: The Board may not increase a cost recovery reward.

Reviewing the Record and Preparing to Discuss and Render a Decision after Rejection

Should the Board reject a proposed decision by the ALJ must review the factual and legal findings to render a determination. The following guidance is provided to Board Members when reviewing the case record:

- Reviewing the Administrative Record
  - The Accusation
    - Make note of the code §s charged and brief description of the §s (e.g. B&P 3110(b) – gross negligence; B&P 3110 (d) – incompetence).
    - Read the facts that are alleged as they stand to prove or disprove the code violations. The burden to prove the violations by "clear and convincing evidence to a reasonable certainty" rests on the Board.
  - The Proposed Decision
    - Factual Findings. Review the factual findings and determine if they and/or testimony prove violations. Note that expert testimony may be necessary to prove the violations.
    - Legal conclusions (determination of issues). Determine if any proven facts constitute a violation of the code §.
    - Order. Review the order and determine if the penalty is appropriate per the violations found and if it is consistent with the Disciplinary Guidelines. If not, determine if there is a basis for which the record deviated from the guidelines.
  - The Transcript
    - Sufficiency of the Evidence. Determine if the evidence introduced is clear and convincing to a reasonable certainty to prove *each* factual allegation.
    - Lay Witnesses. Determine if the testimony provided by witnesses prove factual allegations. Refer back to the ALJ's credibility findings.

        - Expert Witnesses. Which expert's testimony was given the most weight by the ALJ? If a Board Member does not agree with the ALJ's findings, the Board Member must determine which evidence in the record supports their conclusion.
    - Written Arguments received from parties after rejection of a proposed decision.
        - Is the written argument from each party persuasive?
        - Do the parties cite to the administrative record/transcript? This is not required, but may bear on the persuasiveness of a party's argument.

- ~~Preparing for an Oral Argument Hearing~~
    - ~~Review written arguments and determine if the burden of proof has been met.~~
        - ~~The Deputy Attorney General's (DAG) argument will contend the facts are clearly proven and constitute a violation of the law.~~
        - ~~The Respondent's argument will likely focus on the weaknesses of the Board's case and strength of the Respondent's case. Consider if (a) facts are proven, (b) the law was violated, and (c) the penalty is appropriate.~~
    - ~~Review the proposed decision~~
        - ~~Note in the proposed decision areas of agreement and disagreement with the ALJ in regards to factual findings, the legal conclusion, and proposed penalty. Also note the specific evidential findings that support this independent conclusion.~~
    - ~~Summary and Conclusion~~
        - ~~Maintain focus on the code sections alleged to have been violated and the facts that were alleged to have occurred. Using the guidance above will assist the Board Member in making a decision that will withstand judicial scrutiny.~~

8. California's Legislative Process

The California State Legislature consists of two houses: the Senate and the Assembly. The Senate has 40 members and the Assembly has 80 members.

All legislation begins as an idea or concept. Should the Board take an idea to legislation, it will act as its sponsor.

In order to move an idea or concept toward legislation the Board must attain a Senator or Assembly Member to author it as a bill. Once a legislator has been identified as an author, the legislation~~or~~ will proceed to the Legislative ~~Council~~ Counsel where a bill is drafted. The legislator will introduce the bill in a house (if a Senator authors a bill, it will be introduced to the Senate; if an Assembly Member authors a bill, it will be introduced to the Assembly). This house is called the House of Origin.

Once a bill is introduced on the floor of its house, it is sent to the Office of State Printing. At this time, it may not be acted upon until 30 days after the date that it was introduced. After the allotted time has lapsed, the bill moves to the Rules Committee of its house to be assigned to a corresponding Policy Committee for hearing.

During committee hearing, the author presents the bill to the committee and witnesses provide testimony in support or opposition of the bill. At this time, amendments may be proposed and/or taken. Bills can be amended multiple times. Additionally, during these hearings, a Board representative (Board Chair, Executive Officer, and/or staffer) may be called upon to testify in favor of (or in opposition to) the bill.

Following these proceedings, the committee votes to pass the bill, pass it as amended, or defeat it. The bill may also be held in the committee without a vote, if it appears likely that it will not pass. In the case of the Appropriations (or "Fiscal") Committee, the bill may be held in the "Suspense File" if the committee members determine that the bill's fiscal impact is too great, as weighed against the priorities of other bills that also impact the state's finances. A bill is passed in committee by a majority vote.

If the bill is passed by committee, it returns to the floor of its House of Origin and is read a second time. Next, the bill is placed on third reading and is eligible for consideration by the full house in a floor vote. Bill analyses are prepared prior to this reading. During the third reading, the author explains the bill and members discuss and cast their vote. Bills that ~~require~~ make an appropriation of state funds (except for the annual Budget Bill) or, that take effect immediately, generally require 27 votes in the Senate and ~~41~~ 54 votes (two-thirds vote) in the Assembly to be passed. Other bills require majority vote. If a bill is defeated, its author may seek reconsiderations and another vote.

Once a bill has been approved by the House of Origin, it is submitted to the second house where the aforementioned process is repeated. Here, if an agreement is not reached, the bill dies or is sent to a two-house committee where members can come to a compromise. However, if an agreement is made, the bill is returned to both houses as a conference report to be voted upon.

Should both houses approve a bill, it proceeds to the ~~g~~Governor who can either sign the bill to law, allow it to become law without signature, or veto it. If the legislation is passed during the course of the regular ~~in~~ session, the ~~g~~Governor must act within 12 days.~~; otherwise, he has 30 days to do so.~~ However, the Governor has 30 days to sign bills that are passed during the final days of the legislative year, usually in August or early September. A two-thirds vote from both houses can override the ~~g~~Governor's decision to veto a bill.

Bills that are passed by the legislature and approved by the ~~g~~Governor are assigned a chapter number by the Secretary of State. Chaptered bills typically become part of the California Codes and the Board may enforce it as statute once it becomes effective. Most bills are effective on the first day of January the following year; however, matters of urgency take effect immediately.

For a graphic overview of California's legislative process, see the attached diagram at the end of this section.

Positions on Legislation

As a regulatory body, the Board can issue its own legislative proposals or take a position on a current piece of legislation.

At Board Meetings, staff may present current legislation that is of potential interest to the Board and/or which may directly impact the Board and the practice of optometry. When the Board attains research on legislation, it can take a position on the matter.

Possible positions include:

- **No Position:** The Board may decide that the bill is outside the Board's jurisdiction or that it has other reasons to not have any position on the bill. The Board would not generally testify on such a bill.
- **Neutral**: If a bill poses no problems or concerns to the Board,~~ or its provisions fall outside of the Board's jurisdiction,~~ the Board may ~~opt to remain~~choose to adopt a neutral position. ~~Should the Board take this stance, it cannot testify against the bill.~~
- **Neutral if Amended:** The Board may take this position if there are minor problems with the bill but, providing they are amended, the intent of the legislation does not impede with Board processes.
- **Support:** This position may be taken if the Board supports the legislation and has no recommended changes.
- **Support if Amended:** This position may be taken if the Board has amendments and if accepted, the Board will support the legislation.
- **Oppose:** The Board may opt to oppose a bill if it negatively impacts consumers or is against the Board's own objectives.
- **Oppose Unless Amended:** The Board may take this position unless the objectionable language is removed. This is a more common and substantive stance than Neutral if Amended.

Board Members can access bill language, ~~analysis~~analyses, and vote history at http://leginfo.legislature.ca.gov/ and watch all legislative hearings online at www.calchannel.com.

Insert diagram The Life Cycle of Legislation

9. Regulations

Regulations and statutes~~,~~ govern the Board. Regulations interpret or make specific laws that are enforced or administered by the Board.

~~Should the Board wish to implement an administrative change, it may do so via statute or regulation. There are pros and cons to each of these routes. However, should the Board decide to implement a regulatory (also referred to as rulemaking) change or introduce a new regulation, it must follow detailed procedures.~~

In order to prepare a rulemaking action, the Board is required to: (1) express terms of proposed regulation (the proposed text), (2) determine fiscal impact, (3) create a statement of reasons for that regulation, and (4) post notice of proposed rulemaking.

The issuance of a notice of proposed regulation initiates a rule making action. To do this, the Board creates a notice to be published in the California Regulatory Notice Register and mailed to interested parties. It must also post the notice, proposed text, and statement of reasons for the rulemaking action on its website.

Once the notice has been posted, the Administrative Procedures Act (APA) requires a 45-day comment period from interested parties before the Board may proceed further with the proposed regulation. During this time the Board can also decide if it wants to hold a public hearing to discuss the proposed rulemaking action. However, if it opts against this, but an interested person requests a hearing at least 15 days prior to the end of the written comment period, the Board must offer notice of and hold a public hearing to satisfy public request.

Following the initial comment period, the Board will often decide to revise its proposal. If it chooses to do so, APA procedures require that the agency assess each change and categorize them as (a) non-substantial, (b) substantial and sufficiently related, or (c) substantial and not sufficiently related. Any change that has been categorized as substantial and sufficiently related must be available for public comment for at least 15 days before the change is adopted in the proposal. All comments must then be considered by the Board.

Additionally, if the Board cites new material that has not been available to the public while revising the proposal, these new references must be presented to the public for 15 days.

The Board is also responsible for summarizing and responding on record to public comments submitted during each allotted period. These are to be included as part of the final statement of reasons. By doing so, the agency demonstrates that it has understood and considered all relevant material presented to it before adopting, amending, or repealing a regulation.

After the Board has fulfilled this process, it must adopt a final version of the proposed rulemaking decision. Once this has been accomplished, the rulemaking action must be submitted to the Office of Administrative Law (OAL) for review within a year from the date the notice was published. OAL has 30 days to review the action.

During its review, OAL must determine if the rulemaking action satisfies the standards set forth by APA. These standards are: necessity, authority, consistency, clarity, non-duplication, and reference. It must also have satisfied all procedural requirements governed by the APA.

If OAL deems that the rulemaking action satisfies the aforementioned standards, it files the regulation with the Secretary of State and it is generally effective within 30 days. The regulation is also printed in the California Code of Regulations.

If OAL, however, determines that the action does not satisfy these standards, it returns the regulation to the Board which can revise the text, post notice of change for another comment period, and, finally, resubmit the proposed regulation to OAL for review; or, the Board may appeal to the governor.

Diagrams on the next two pages provide a graphical overview of the rulemaking process.

Insert Diagram The Rulemaking Process

Insert Diagram OAL Review

CALIFORNIA STATE BOARD OF OPTOMETRY

Memo

2450 Del Paso Road, Suite 105
Sacramento, CA 95834
(916) 575-7170, (916) 575-7292 Fax
www.optometry.ca.gov

To: Board Members **Date:** November 20, 2015

From: Cheree Kimball
Enforcement Analyst **Telephone:** (916) 575-7173

Subject: **Agenda Item 8 – Update and Consideration of Potential Board Action Related to Online Refractions and the Laws Governing Optometry in the State of California**

Background

At its April 2015 Board Meeting, the California State Board of Optometry (Board) heard and discussed information relating to online refractions – or the process of obtaining a corrective lens prescription through an automated means using dedicated technology that does not require direct, physical examination by an Optometrist or Ophthalmologist. The Board heard information relating to the legality of online refractions in the state of California, and discussed options for addressing the protection of consumer health in light of this emerging technology. The potential options as presented at the Board meeting were as follows:

1. Issue a Policy Statement similar to the one issued by the Ohio State Board of Optometry

It was agreed that a Policy Statement would be inappropriate for the Board to issue, as Policy Statements are unenforceable, would not stand up to a legal challenge, and would be considered an underground regulation. Despite the Board's decision to not issue a Policy Statement, several individuals have expressed concerns to Board staff or to the Board directly, and have requested that the Board issue a formal statement regarding online refractions.

During the August 2015 Board meeting, Dr. Pamela Miller, OD, spoke on this topic during public comment. Dr. Miller has urged the Board to make a strong policy statement against online refractions. Since then, Dr. Miller has requested the Board Members be provided with several documents supporting her request. Several of those documents referenced specific subjects/companies who appear to be providing online refraction services. In order to keep the Board Members impartial for any potential adjudication, those documents have not been provided. Attached are the remaining documents (Attachment 1).

Board staff still recommends that the Board not issue a formal statement for the reasons previously stated, as well as Government Code section 11340.5, which states:

> (a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

During the April meeting, the Board did direct staff to do the following:

2. Direct staff to look into updating regulations to more specifically address how a refractive eye examination is conducted.

3. Direct staff to look into updating regulations to more specifically address the requirements for corrective lens prescriptions.

4. Direct staff to look into conducting a consumer outreach campaign to educate the public on the importance of regular eye health examinations for maintaining eye health for life.

Board staff has researched current laws and regulations and discussed options for updating regulations to address how a refractive eye examination is conducted, as well as specifying requirements for corrective lens prescriptions. Board staff feels that the Board's current laws and regulations adequately cover the requirements regarding refractive eye examinations and corrective lens prescriptions. Board staff is concerned that specifically detailing what a refractive eye examination should consist of will infringe upon the professional discretion of optometrists to use the tools and techniques best suited to the individual patient.

Additionally, Board staff is unclear as to what information could be included in a corrective lens prescription that will differentiate a prescription written at the end of a full eye health examination from a prescription written as the result of a refractive eye examination. Further, Board staff has confirmed that prescriptions written to consumers in California based on an online refraction are issued by Ophthalmologists licensed to practice in the state of California and, therefore, not under the jurisdiction of the Board. Board staff has shared this information with the Medical Board of California.

In September, 2014, the State of Michigan, with Senate Bill No. 853, added Part 55A to the Public Health Code (Attachment 2), codifying into the law the definition of an "examination and evaluation" (Section 5551(4)) and a "valid prescription"(Section 5557), as well as specifically calling out as a violation the "use an automated refractor or other automated testing device to generate objective refractive data unless that use is by a licensee or under the supervision of a licensee" (Section 5561(1)(d)). While the bill was passed almost unanimously, one of the dissenters felt that the bill was anti-free market, and stated "A person can make the choice. They can understand the difference between this and a full-fledged eye health exam."

Robert McNamara, an attorney with The Institute for Justice, a nonprofit public interest law firm, stated "Too often, we see government regulation that is designed to protect an established business's profit margins instead of the public safety… The government can't pass laws just to protect favored businesses from economic competition. Regulations should protect the public from genuinely dangerous things; it shouldn't protect business from other businesses who want to give consumers a better deal or a better product." (Attachment 3)

In 2014, the Florida Senate considered a bill (SB70) that would address Telemedicine, allowing and providing direction for the provision of health care by licensees using technology in a way that does not require a face-to-face interaction with patients. SB70 died in committee, and similar bills have also been unsuccessful. (Attachment 4) California law already allows and provides direction for Telemedicine. (Attachment 5)

Board staff has begun revising consumer publications the Board already has, as well as discussing ideas for additional publications addressing eye health for consumers, and an article to be published in the Board's next newsletter regarding online refractions and the Board's current laws. Board staff is also discussing ideas for the best ways of getting this information directly to consumers. While the Board maintains active social media accounts, they are largely followed by

industry stakeholders, making them less effective at getting the information to consumers. Board staff is researching other avenues of outreach to consumers that may be more effective with a similar price point.

Action Requested

Please discuss the information presented and consider any additional actions the Board may want to make pertaining to online refractions.

Attachments

1. Documents provided by Dr. Pamela Miller, O.D.
2. State of Michigan, Senate Bill No. 853
3. "Legislators Block Low-Cost Eye Exams in Michigan" an Article in CapCon – Michigan Capitol Confidential, written by Anne Schieber
4. Bill information for Florida Senate Bill SB 70: Telemedicine
5. California Statutes and Regulations specific to Telehealth

Dr. Pamela Miller

Subject: FW: On Line Refraction---Needs to go off Line.

From: Dave Carlton [mailto:davecarltonodati@hotmail.com]
Sent: Thursday, September 10, 2015 12:18 PM
To: Dave Carlton <davecarltonodati@hotmail.com>; Michael Santarlas <drsantarlas@yahoo.com>; Bryan Wolynsky <bryanwolynski@gmail.com>; Pam Miller OD <drpam@omnivision.com>
Subject: FW: On Line Refraction---Needs to go off Line.

To the COA Trustees.

I find it amazing, along with many other ODs I talk to here in California, that On Line Refraction seems to be currently able to be preformed and is being preformed, by non licensed individuals, remotely located from the doctor here in in California. According to the California Optometry Law it is illegal for anyone other than an optometrist or MD to determine the refractive state of the eye.

The problem is not with the technology, but with how it is being used. The various companies have their own business plans they have devised to use the On Line Refractive technology in a certain way. They have chosen not to go to the doctors and have them use the technology in their offices, but to have non licensed individuals preform the technology on others in their homes or in a kiosk, then sending the refractive results to an OD or MD in a remote location for his or her signature. This misses totally the health care evaluation of the patient's eyes. We all know the refraction is a part of the eye health exam for a patient. They should not be separated as the refraction very often points to disease processes of the eye and visa versa.

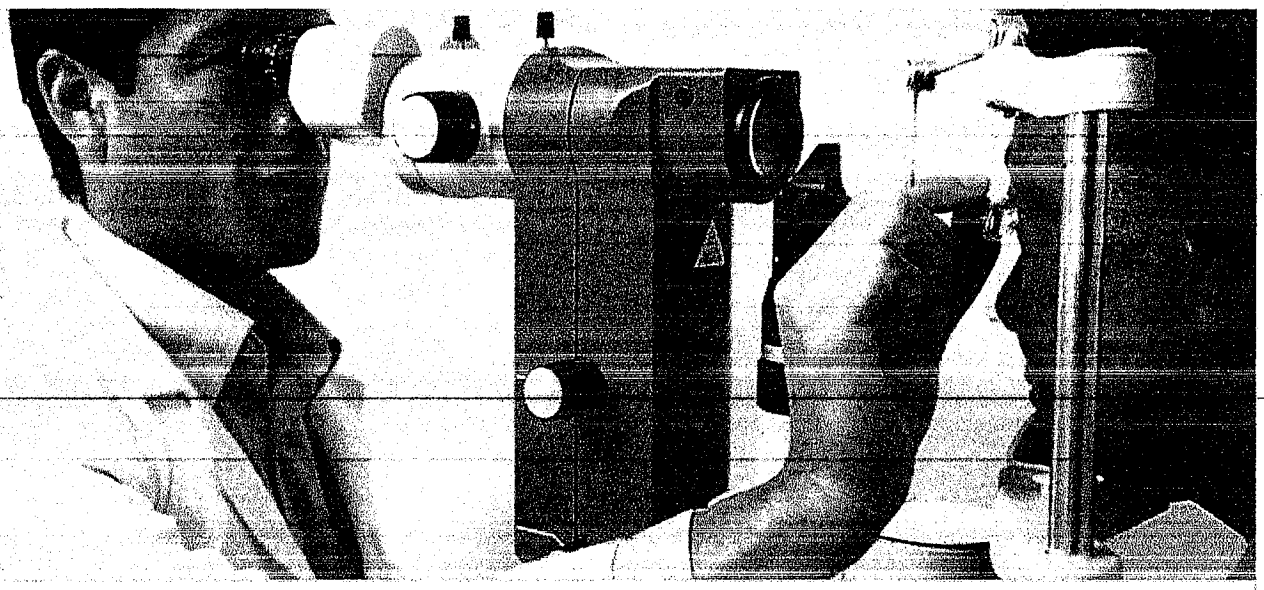
Should not certain technologies be used by the individuals who are specifically trained to use them and not anyone else.? I am not able, as an optometrist to preform, legally or ethically, cataract surgery or use a laser for any procedure to preform Lasik, and other type of refractive surgery unless I become a licensed ophthalmologist.

Even with a car or semi truck, that type of technology, one has to have a license to drive it. So what if we just had anyone driving, licensed or not, safe or not, knowledgeable or not, of the proper age or not. The other day there was a news story about a kid who was 9 or 10 who was driving a semi down one of the interstates. Everyone got all whacked and weirded out about about it. Clearly that is against the law. But yet some non educated person is apparently free at this point, in spite of what California Optometry Law says, to preform on line retractions on others or himself in the State of California. The enforcement of any California State Optometry Laws at this point is zero. In fact no one seem to know if it is in fact illegal.

If anyone thinks no patient harm will occur they are sadly mistaken. In addition to that there will be great harm to the profession of optometry as well, if this is not stopped, as if there are not enough people outside the profession working against the profession already.

David Carlton OD
Glendora, Ca
Advisory Board Member to the TOS

CLINICAL EYE CARE



Tweet 0 Like 195

How ODs detect chronic conditions—and save lives

In his 22 years of practice, Harvey Richman, O.D., has detected countless hypertension cases, inflammatory conditions, undiagnosed strokes, and even some tumors and cancers—just through a routine eye exam.

As eye care practitioners do more systemic evaluations, "we are actually becoming the primary care professionals for eye care," says Dr. Richman, a member of the AOA Third Party Center's Executive Committee.

A new study released by UnitedHealthcare (UHC) supports this role. The results show a "significant correlation between an eye examination and the early detection and subsequent intervention for certain systemic diseases," says Richard Soden, O.D., a member of the AOA's Third Party Center Executive Committee and vice president for clinical affairs at the SUNY College of Optometry.

What the study shows

Health services company Optum—working on behalf of UHC—evaluated how often eye care practitioners played a role in identifying eight chronic conditions. The results, released on Feb. 20, represented 820,000 UHC members with continuous medical and vision coverage.

Among the study population, practitioners detected more than 4,000 cases of chronic conditions. The most common were multiple sclerosis, diabetes, Crohn's disease and juvenile rheumatoid arthritis.

On average, UHC members were diagnosed a little over two weeks after a comprehensive eye exam.

Hypertension and high cholesterol also were common, which matches Dr. Richman's practice experience. He notes that he and his partners have found many patients with uncontrolled, undiagnosed hypertension and made referrals to primary care physicians and—when needed—emergency rooms. These patients all had high blood pressure, but they never knew they had a problem until they had their eyes examined.

The AOA would like to see more studies investigate this issue, Dr. Soden says.

Study reinforces AOA eye care campaign

Dr. Richman, who reviewed the UHC study, says its findings mesh with the AOA's "rethink eyecare" campaign.

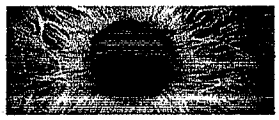
This initiative was launched to encourage insurance plans to recognize the advantages of using ODs for all primary eye and vision care. The campaign supports an integrated approach for health and vision plans.

If marketed appropriately, the hope is the UHC study will incentivize other third party payers to encourage patients to get their eyes examined more frequently.

Optometrists have helped heart attacks, strokes and other medical emergencies simply by providing comprehensive eye examinations. "We have saved lives," Dr. Richman says.

They also could help save money. Integrating eye care into medical plans would result in significant cost savings for insurance carriers, patients and the country as a whole, he adds. "Health care costs will go down if we're able to treat [conditions] at an earlier stage."

MARCH 3, 2014



Optometry Times Click here
eNews Sign up

AOA cautions consumers about claims from online eye exams

March 18, 2014

St. Louis, MO—To protect consumers' eye and vision health, the American Optometric Association is warning the public about the false claims that they provide an online "eye exam," stating that these claims are confusing and misleading.

"To help safeguard consumers, the AOA is closely monitoring Internet-linked assertions about eye exams without doctors," says Mitchell T. Munson, OD, president of the AOA. "And, we'll play an even more active role in fact-checking false claims."

According to the AOA, consumers should understand that only an in-person exam by an optometrist or an ophthalmologist can determine how well they see and whether or not they need corrective lenses. In addition, every day, in patients seen for routine examinations optometrists diagnose and manage diabetes, hypertension, glaucoma, macular degeneration, or cataracts.

According to the AOA, a person or company claiming to perform an eye exam without physically examining a patient is offering insufficient, ambiguous information and is contributing to a patient believing—incorrectly—that his eye health needs have been met. The organization also says the claims of those who market online eye testing should be thoroughly scrutinized and evaluated; these claims may harm patients and hinder care needed to diagnose important underlying, and often asymptomatic, health problems. Any delay in intervention will result in progressive damage to vision, and more costly and intensive treatments later in life.

POLL

What is the interest level from patients in cosmetic lenses?

- I have to mention them
- Very little
- Moderate
- Lots of patients asking

ANSWER

TAGS: American Optometric Association | American Optometric Association (AOA) | AOA | eye examination | Modern Medicine Cases | Modern Medicine Feature Articles | Modern Medicine News | online

The New York Times

International New York Times

Retail Clinics, Apps Change Doctor-Patient Relationship

By THE ASSOCIATED PRESS

September 9, 2015

Tom Coote suspected the stabbing pain in his abdomen was serious, but the harried doctor at the urgent care center suggested it was merely indigestion.

Coote also suspected that his recently retired family physician would have taken more time to diagnose what turned out to be appendicitis.

"Even when he was busy, he took his time," the 40-year-old Staten Island man recalled. "There was a relationship there ... he was very thorough."

Coote's experience reflects a wider change in American medicine: A shortage of primary care physicians and emerging alternatives such as retail clinics and smartphone apps are clouding the once-simple doctor-patient relationship, which for generations has served as the gateway to the U.S. health care system.

Doctors say primary care is growing fragmented and turning into more of a commodity, with physician access based on what consumers will pay.

"I think the role of primary care has diminished ... and I don't see encouraging signs that it is having a renaissance," said Dr. Robert Berenson, a researcher at the nonpartisan Urban Institute, which studies health care issues.

The shift began more than a decade ago and has accelerated in recent years, the result of technology and competition creating more convenient options for care that does not require an in-person doctor visit. Insurance reforms have also contributed by pushing patients to shop around for the best price.

These changes have helped make basic care more accessible to patients and lowered the cost per visit for many consumers. But the new options also make the doctor-patient bond seem like a throwback to another era.

Patients are opting for drugstore clinics over doctor's offices, and many will soon start wondering why they even need to leave the house when smartphone apps let them chat live with a physician.

Long gone are the days when patients had to either wait for a doctor's appointment or visit an emergency room if they wanted help with a sprained ankle or a minor illness. Drugstores across the country have added clinics that specialize in non-emergency care.

Grocery stores and other retailers such as Target Corp. have done the same, offering visits for $10 to $30 less than the bill of around $100 that a person without insurance might pay at a doctor's office. The world's largest retailer, Wal-Mart, also is developing its own in-store clinics that charge only $40 per visit.

The latest option is telemedicine, which lets patients use a smartphone, tablet or computer to connect virtually with a doctor and get treatment for conditions such as bronchitis or bladder infections. Those visits can cost as little as $49.

By next year, a doctor visit will be just an app click away for millions of patients after two huge health insurers — UnitedHealth Group Inc. and Blue Cross-Blue Shield coverage provider Anthem Inc. — and the drugstore giant Walgreens expand their telemedicine programs.

Primary care has become the fastest growth area for telemedicine in part because of the convenience it offers — a chance to seek help without leaving home or work and to avoid sitting in a waiting room filled with other sick people.

"It's the reason why we use ATM machines now instead of going to get our checks cashed by a teller," said Jon Linkous, CEO of the American Telemedicine Association.

Retail clinics will host nearly 19 million primary care visits this year, or 76 percent more than they did in 2010, according to an estimate from the consulting firm Accenture. Likewise, visits to urgent care centers, which offer more extensive care than their retail counterparts, are up 19 percent to nearly 177 million since the start of the decade.

Those treatment options still make up only 20 percent of primary care visits, but telemedicine is also starting to nibble at that patient base.

About 450,000 patients will see a doctor through the Internet this year for a primary care consultation, according to the telemedicine association. That total that has roughly doubled over the last couple of years.

Doctors say a lack of primary care physicians has changed the traditional doctor-patient relationship and invited all this competition. Money also plays a role.

Insurers and employers who cover their workers have been hiking deductibles for years. Many people must now pay more than $1,000 toward their care before most of their coverage starts. That can motivates them to shop around even for basic care.

Meanwhile, insurers and other payers also are pushing to reimburse doctors based more on the quality of care, rather than by paying a set fee for each time they provide care.

That's sparking a shift toward team-based care that includes a health coach who helps patients lose weight, a social worker who screens for depression and a case manager to make sure diabetics keep taking their insulin. The idea is to attack problems such as obesity before they turn into major medical expenses such as diabetes or a heart attack.

During a routine visit, many patients might see a physician's assistant or a nurse practitioner instead of a physician. That helps doctors focus more on patients with complex problems.

"It's not to say you won't see a doctor, but you're not going to have that old-school model where you see the same doctor every time for everything," said Dr. John Schumann, a primary care doctor who teaches at the University of Oklahoma School of Community Medicine.

Those who want an old-fashioned relationship with a family doctor may have to pay extra, Schumann noted.

Markets like Washington, D.C., have seen rapid growth in a practice known as concierge care, which involves a patient paying an annual retainer that often tops $1,000 for some perks not generally covered by insurance. Those can include an in-depth annual physical, more face-to-face time with the doctor and after-hours access.

Some doctors say all the changes in family medicine only highlight the need for patients to keep a primary care provider who tracks all their care, monitors their overall health and knows their medical history. That's especially true for patients with chronic conditions or illnesses that make it harder for them to coordinate their own care.

"It's really important that the doctor or the person taking care of them ... sees them as a human being rather than a disease," said Dr. Thomas Bodenheimer, a professor of family and community medicine at the University of California, San Francisco.

However, it may become more difficult to find that provider over the next decade. As millions of people gain insurance through the health care overhaul, they will enter a system already struggling to meet demand. Older primary care doctors are retiring, and young physicians are being drawn to other specialties, in part because of better pay.

Coote felt lost without having someone to guide him through the system. After his appendix was removed, he wound up breaking his arm and four ribs in a car accident. A case of pneumonia then followed.

He grew tired of introducing himself to new care providers as he shuffled through a surgeon and a series of doctors while he recovered.

"You just feel like you're part of the system," Coote said. "You're a customer, not a patient."

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

PUBLIC LAW 108–164—DEC. 6, 2003

FAIRNESS TO CONTACT LENS CONSUMERS ACT

Public Law 108–164
108th Congress

An Act

Dec. 6, 2003
[H.R. 3140]

To provide for availability of contact lens prescriptions to patients, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Fairness to Contact Lens Consumers Act. 15 USC 7601 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fairness to Contact Lens Consumers Act".

15 USC 7601.

SEC. 2. AVAILABILITY OF CONTACT LENS PRESCRIPTIONS TO PATIENTS.

(a) IN GENERAL.—When a prescriber completes a contact lens fitting, the prescriber—

(1) whether or not requested by the patient, shall provide to the patient a copy of the contact lens prescription; and

(2) shall, as directed by any person designated to act on behalf of the patient, provide or verify the contact lens prescription by electronic or other means.

(b) LIMITATIONS.—A prescriber may not—

(1) require purchase of contact lenses from the prescriber or from another person as a condition of providing a copy of a prescription under subsection (a)(1) or (a)(2) or verification of a prescription under subsection (a)(2);

(2) require payment in addition to, or as part of, the fee for an eye examination, fitting, and evaluation as a condition of providing a copy of a prescription under subsection (a)(1) or (a)(2) or verification of a prescription under subsection (a)(2); or

(3) require the patient to sign a waiver or release as a condition of verifying or releasing a prescription.

15 USC 7602.

SEC. 3. IMMEDIATE PAYMENT OF FEES IN LIMITED CIRCUMSTANCES.

A prescriber may require payment of fees for an eye examination, fitting, and evaluation before the release of a contact lens prescription, but only if the prescriber requires immediate payment in the case of an examination that reveals no requirement for ophthalmic goods. For purposes of the preceding sentence, presentation of proof of insurance coverage for that service shall be deemed to be a payment.

15 USC 7603.

SEC. 4. PRESCRIBER VERIFICATION.

(a) PRESCRIPTION REQUIREMENT.—A seller may sell contact lenses only in accordance with a contact lens prescription for the patient that is—

(1) presented to the seller by the patient or prescriber directly or by facsimile; or

(2) verified by direct communication.

(b) RECORD REQUIREMENT.—A seller shall maintain a record of all direct communications referred to in subsection (a).

(c) INFORMATION.—When seeking verification of a contact lens prescription, a seller shall provide the prescriber with the following information:

(1) Patient's full name and address.

(2) Contact lens power, manufacturer, base curve or appropriate designation, and diameter when appropriate.

(3) Quantity of lenses ordered.

(4) Date of patient request.

(5) Date and time of verification request.

(6) Name of contact person at seller's company, including facsimile and telephone number.

(d) VERIFICATION EVENTS.—A prescription is verified under this Act only if one of the following occurs:

(1) The prescriber confirms the prescription is accurate by direct communication with the seller.

(2) The prescriber informs the seller that the prescription is inaccurate and provides the accurate prescription.

(3) The prescriber fails to communicate with the seller within 8 business hours, or a similar time as defined by the Federal Trade Commission, after receiving from the seller the information described in subsection (c).

(e) INVALID PRESCRIPTION.—If a prescriber informs a seller before the deadline under subsection (d)(3) that the contact lens prescription is inaccurate, expired, or otherwise invalid, the seller shall not fill the prescription. The prescriber shall specify the basis for the inaccuracy or invalidity of the prescription. If the prescription communicated by the seller to the prescriber is inaccurate, the prescriber shall correct it.

(f) NO ALTERATION.—A seller may not alter a contact lens prescription. Notwithstanding the preceding sentence, if the same contact lens is manufactured by the same company and sold under multiple labels to individual providers, the seller may fill the prescription with a contact lens manufactured by that company under another label.

(g) DIRECT COMMUNICATION.—As used in this section, the term "direct communication" includes communication by telephone, facsimile, or electronic mail.

SEC. 5. EXPIRATION OF CONTACT LENS PRESCRIPTIONS. 15 USC 7604.

(a) IN GENERAL.—A contact lens prescription shall expire—

(1) on the date specified by the law of the State in which the prescription was written, if that date is one year or more after the issue date of the prescription;

(2) not less than one year after the issue date of the prescription if such State law specifies no date or a date that is less than one year after the issue date of the prescription; or

(3) notwithstanding paragraphs (1) and (2), on the date specified by the prescriber, if that date is based on the medical judgment of the prescriber with respect to the ocular health of the patient.

(b) SPECIAL RULES FOR PRESCRIPTIONS OF LESS THAN 1 YEAR.—If a prescription expires in less than 1 year, the reasons for the judgment referred to in subsection (a)(3) shall be documented in the patient's medical record. In no circumstance shall the prescription expiration date be less than the period of time recommended by the prescriber for a reexamination of the patient that is medically necessary.

(c) DEFINITION.—As used in this section, the term "issue date" means the date on which the patient receives a copy of the prescription.

15 USC 7605.

SEC. 6. CONTENT OF ADVERTISEMENTS AND OTHER REPRESENTATIONS.

Any person that engages in the manufacture, processing, assembly, sale, offering for sale, or distribution of contact lenses may not represent, by advertisement, sales presentation, or otherwise, that contact lenses may be obtained without a prescription.

15 USC 7606.

SEC. 7. PROHIBITION OF CERTAIN WAIVERS.

A prescriber may not place on the prescription, or require the patient to sign, or deliver to the patient a form or notice waiving or disclaiming the liability or responsibility of the prescriber for the accuracy of the eye examination. The preceding sentence does not impose liability on a prescriber for the ophthalmic goods and services dispensed by another seller pursuant to the prescriber's correctly verified prescription.

15 USC 7607.

SEC. 8. RULEMAKING BY FEDERAL TRADE COMMISSION.

The Federal Trade Commission shall prescribe rules pursuant to section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) to carry out this Act. Rules so prescribed shall be exempt from the requirements of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (15 U.S.C. 2301 et seq.). Any such regulations shall be issued in accordance with section 553 of title 5, United States Code. The first rules under this section shall take effect not later than 180 days after the effective date of this Act.

Deadline.

15 USC 7608.

SEC. 9. VIOLATIONS.

(a) IN GENERAL.—Any violation of this Act or the rules required under section 8 shall be treated as a violation of a rule under section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices.

(b) ACTIONS BY THE COMMISSION.—The Federal Trade Commission shall enforce this Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of this Act.

15 USC 7609.

SEC. 10. STUDY AND REPORT.

(a) STUDY.—The Federal Trade Commission shall undertake a study to examine the strength of competition in the sale of prescription contact lenses. The study shall include an examination of the following issues:

(1) Incidence of exclusive relationships between prescribers or sellers and contact lens manufacturers and the impact of such relationships on competition.

(2) Difference between online and offline sellers of contact lenses, including price, access, and availability.

(3) Incidence, if any, of contact lens prescriptions that specify brand name or custom labeled contact lenses, the reasons for the incidence, and the effect on consumers and competition.

(4) The impact of the Federal Trade Commission eyeglasses rule (16 CFR 456 et seq.) on competition, the nature of the enforcement of the rule, and how such enforcement has impacted competition.

(5) Any other issue that has an impact on competition in the sale of prescription contact lenses.

(b) REPORT.—Not later than 12 months after the effective date of this Act, the Chairman of the Federal Trade Commission shall submit to the Congress a report of the study required by subsection (a). Deadline.

SEC. 11. DEFINITIONS. 15 USC 7610.

As used in this Act:

(1) CONTACT LENS FITTING.—The term "contact lens fitting" means the process that begins after the initial eye examination and ends when a successful fit has been achieved or, in the case of a renewal prescription, ends when the prescriber determines that no change in prescription is required, and such term may include—

(A) an examination to determine lens specifications;

(B) except in the case of a renewal of a prescription, an initial evaluation of the fit of the lens on the eye; and

(C) medically necessary follow up examinations.

(2) PRESCRIBER.—The term "prescriber" means, with respect to contact lens prescriptions, an ophthalmologist, optometrist, or other person permitted under State law to issue prescriptions for contact lenses in compliance with any applicable requirements established by the Food and Drug Administration.

(3) CONTACT LENS PRESCRIPTION.—The term "contact lens prescription" means a prescription, issued in accordance with State and Federal law, that contains sufficient information for the complete and accurate filling of a prescription, including the following:

(A) Name of the patient.

(B) Date of examination.

(C) Issue date and expiration date of prescription.

(D) Name, postal address, telephone number, and facsimile telephone number of prescriber.

(E) Power, material or manufacturer or both.

(F) Base curve or appropriate designation.

(G) Diameter, when appropriate.

(H) In the case of a private label contact lens, name of manufacturer, trade name of private label brand, and, if applicable, trade name of equivalent brand name.

15 USC 7601 note.

SEC. 12. EFFECTIVE DATE.

This Act shall take effect 60 days after the date of the enactment of this Act.

Approved December 6, 2003.

LEGISLATIVE HISTORY—H.R. 3140:

HOUSE REPORTS: No. 108–318 (Comm. on Energy and Commerce).
CONGRESSIONAL RECORD, Vol. 149 (2003):
Nov. 19, considered and passed House.
Nov. 20, considered and passed Senate.

POLICY STATEMENT REGARDING ONLINE REFRACTIONS

The Ohio State Board of Optometry's first and foremost charge is protection of the public's health and wellness. The Board recognizes that online refractive technology has potential as a visual screening and refractive device in a medical setting or as an online visual screening program. However, the Board does not support the use of online questionnaires to give a glasses or contact lens prescription, without an immediate, accompanying physical examination of ocular health by an Ohio licensed optometrist.

One company is currently on the internet advising they are launching these services. Their policy states; "No one under 18, over 40, or with specific medical conditions such as diabetes, hypertension, known eye diseases, will qualify to receive a prescription." However, **the use of online questionnaires is inadequate to establish the patient's age and medical/ocular history.** The patient record established by the online eye questionnaire should be consistent with existing laws and regulations governing patient health care records. Age and location of the patient must be verified by acceptable means of identification. Records of past care, with laboratory and test results, are necessary to establish pre-existing medical conditions. We would expect that medical history be verified with a dated copy of a completed physical examination and ocular history be verified with a dated copy of a completed eye examination.

The risk with all telemedicine is substandard professional services. With the promise to save people the commute, the wait, the time, and the money, **standards of care can be significantly compromised**. It is expected that all optometrists who provide telemedicine place the welfare and health of the patients first. An online eye refraction shall not be given after an online questionnaire, unless a dated copy of a recent eye health examination (within 6 months) is part of the patient's record.

Telemedicine is the way of the future and the Board agrees that it is a powerful tool in medical practice, but not a separate form of medicine. We would expect that optometrists who provide eye care, whether in-person or via telemedicine, comply with **acceptable, appropriate, and professional standards of care**. While we support technology, increased access to care, and patient choice, we do not support the use of online questionnaire to give prescriptions without an accompanying, ocular health exam. This does not adhere to current standards of care and therefore represents a compromise to the health and safety of the public.

1. Glasses prescriptions: It is the well-established and accepted standard of care, that a refraction is not to be independent from an ocular health exam. This is vital for the detection of eye diseases that result in permanent vision loss as well as serious systemic diseases. Many times those diseases first present themselves in a change in the quality of vision. Therefore, **we do not support the use of any company to give a prescription apart from the ocular health exam.**

2. Contact lens prescriptions: Under the Fairness to Contact Lens Consumers Act, the expiration date of a contact lens prescription must be specified based on the medical judgment of the prescriber, **with respect to the ocular health of the patient**. This important component of the prescription can be determined only with the use of a slit lamp. Skype interactions, a self-photo, and a web cam photo are not a substitute for this binocular microscope examination, which gives a stereoscopic, highly magnified view of ocular structures. Only a slit lamp examination can detect the presence of corneal neovascularization and infiltrates below the corneal epithelium; both indicate that ocular health is compromised by the use of contact lenses. Additional testing, such as corneal topography, may be necessary to determine whether contact lens wear is causing corneal pathology. Neither a prior contact lens prescription nor a close-up photo of the patient's eyes can confirm ocular health for established contact lens wearers.

Telemedicine is the way of the future and we support technology as a powerful tool in health care. However, The Ohio State Board of Optometry agrees that there are too many unanswered questions regarding this technology, as well as serious concerns for liability and risk involved. **Therefore, we do not advocate participation by Ohio licensed optometrists in these practices. You should notify the Board if you become aware of online refractions being conducted in the State of Ohio.**

Approved 12-10-14

POLICY STATEMENT REGARDING ONLINE REFRACTIONS

Please refer to the following excerpts from our Laws, Rules and Policies:

4725.19 Disciplinary actions.

(9) Departing from or failing to conform to acceptable and prevailing standards of care in the practice of optometry as followed by similar practitioners under the same or similar circumstances, regardless of whether actual injury to a patient is established;

(15) Soliciting patients from door to door or establishing temporary offices, in which case the board shall suspend all certificates held by the optometrist;

4725.01 Optometry definitions.

As used in this chapter:

(A)(1) The "practice of optometry" means the application of optical principles, through technical methods and devices, in the examination of human eyes for the purpose of ascertaining departures from the normal, measuring their functional powers, adapting optical accessories for the aid thereof, and detecting ocular abnormalities that may be evidence of disease, pathology, or injury.

4725-5-16 Display of name and office requirements.

An optometrist has the responsibility to establish and maintain a safe and hygienic office adequately equipped to provide full optometric services within the scope of the licensure of the practitioner. The board requires the following minimum equipment needed to provide a full scope examination which shall include, but not be limited to, tonometer, slit lamp, and instrumentation to examine the retina and to perform visual fields. All optometric examination locations shall be equipped with adequate hand washing facilities on location for use by optometrists and patients.

Dr. Pamela Miller

To: 'Dr. Pamela Miller'
Subject: Ohio On LINE Refraction

Ohio Board of Optometry opposes online refraction

February 17, 2015
By Colleen E. McCarthy
Columbus, OH—The Ohio State Board of Optometry recently released an official policy statement against online refraction, stating that the practice can significantly compromise standards of care.

"The Board's first and foremost charge is the protection of the public's health and wellness," says Ohio State Board of Optometry Executive Director Jeff Greene, speaking exclusively with *Optometry Times*. "The members of the Ohio State Board of Optometry felt it was important enough to enact a policy statement regarding online refractions to remind our licensees how this activity would risk the public's eye health, and to explain that an Ohio optometrist would be in violation of our current laws and rules if he/she were to participate."

The concerns with online refraction

Among the Board's concerns with companies that offer online refraction is the use of online questionnaires which do not adequately establish a patient's age or medical/ocular history. While one company specifically states that no one under the age of 18 or over the age of 40, or anyone with certain medical conditions, such as diabetes, hypertension, or known eye diseases, may participate, but these policies are not enough to verify the patient's age and medical history, according to the Ohio State Board of Optometry.
The Board also states that it is a well-established standard of care that a refraction not be separated from an ocular health exam, which is vital to detect eye disease and a number of systemic diseases.

With regard to providing a prescription for contact lenses, the Board cites the Fairness to Contact Lens Consumers Act, which calls for the specified expiration date of a contact lens prescription. The Board maintains that a vital part of the prescription can be determined only by slit lamp examination, for which Skype or webcam photos cannot be a substitute.
In the statement, the Ohio Board recognizes that telemedicine is a powerful tool in health care but states there are too many unanswered questions and too many risks involved. The Board does not advocate Ohio ODs participate in online refraction and asks that anyone who becomes aware of online refractions conducted in the state contact the Board.
Next: Ohio ODs speak out on the policy

Ohio ODs speak out on the policy
"Ohio Optometric Association (OOA) fully supports the Ohio State Board of Optometry's position regarding online refractions," says OOA President Terri Gossard, OD, MS. "To provide a prescription for either glasses or contact lenses without an accompanying physical examination of ocular health puts the public at risk for undetected eye disease, undetected systemic disease, and permanent vision loss. It is critical that, as new technology emerges, professional standards of eye care not be compromised for the welfare and safety of the citizens of Ohio."
Dr. Bowling: The future of eye care?

Optometry Times Editorial Advisory Board Member Mile Brujic, OD, FAAO, based in Bowling Green, OH, says the Board places the visual welfare of Ohio citizens above all else.

"As such, its policies support the citizens of Ohio receive comprehensive care which requires not only assessing the refractive status but also maintaining the well-being of the patient's ocular health," he says. "Cutting corners in this arena doesn't help those who we have committed to serve and would ultimately be a disservice to those patients receiving substandard care.

Related: Are you ready for online refraction?

"With all of the reform in health care, an unfortunate victim of 'efficiencies' and 'cost cutting' seems to be the patients covered by the insurance plans that vowed to provide them coverage," says Dr. Brujic. "The healthcare provider is their advocate and above all else, needs to continue to be at the core of their care."

Next: Following Ohio's lead

Following Ohio's lead

Optometry Times Chief Optometric Advisor Ernie Bowling, OD, FAAO, says the Board is justified in its position and should be commended for publicizing its concerns.

"Online refraction technology has potential as a screening device only, and to propose its use as anything other than for screening raises serious public health concerns," he says. "A refraction is only one component of an ocular exam, and to offer this without an accompanying ocular health evaluation significantly compromises accepted standards of care."

Related: AOA cautions consumers about claims from online eye exams

While Ohio is among the first states to make such a proclamation on online refraction, Dr. Bowling says he'd like to see more state boards make similar statements.

"I feel certain other state boards will likewise follow the Ohio Board in recommending their state's optometrists not participate in online refractions and notify their state board should they become aware of this activity in their state," he says.

Optometry Times Click here
eNews Sign up

Ohio Board of Optometry opposes online refraction

February 17, 2015 By Colleen E. McCarthy

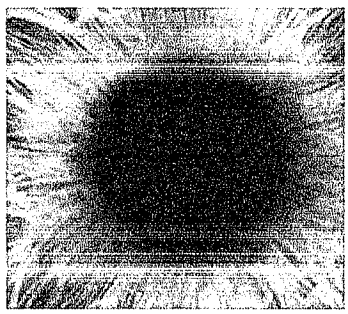
Columbus, OH—The Ohio State Board of Optometry recently released an official policy statement against online refraction, stating that the practice can significantly compromise standards of care.

"The Board's first and foremost charge is the protection of the public's health and wellness," says Ohio State Board of Optometry Executive Director Jeff Greene, speaking exclusively with *Optometry Times*. "The members of the Ohio State Board of Optometry felt it was important enough to enact a policy statement regarding online refractions to remind our licensees how this activity would risk the public's eye health, and to explain that an Ohio optometrist would be in violation of our current laws and rules if he/she were to participate."

Related: AOA fights back against 1-800 CONTACTS-backed legislation

The concerns with online refraction

Among the Board's concerns with companies that offer online refraction is the use of online questionnaires which do not adequately establish a patient's age or medical/ocular history. While one company specifically states that no one under the age of 18 or over the age of 40, or anyone with certain medical conditions, such as diabetes, hypertension, or known eye diseases, may participate, but these policies are not enough to verify the patient's age and medical history, according to the Ohio State Board of Optometry.



POLL

What is the interest level from patients in cosmetic lenses?

- I have to mention them
- Very little
- Moderate
- Lots of patients asking

ANSWER

The Board also states that it is a well-established standard of care that a refraction not be separated from an ocular health exam, which is vital to detect eye disease and a number of systemic diseases.

Attending SECO? Check out this complimentary dinner even on diabetic eye disease!

With regard to providing a prescription for contact lenses, the Board cites the Fairness to Contact Lens Consumers Act, which calls for the specified expiration date of a contact lens prescription. The Board maintains that a vital part of the prescription can be determined only by slit lamp examination, for which Skype or webcam photos cannot be a substitute.

In the statement, the Ohio Board recognizes that telemedicine is a powerful tool in health care but states there are too many unanswered questions and too many risks involved. The Board does not advocate Ohio ODs participate in online refraction and asks that anyone who becomes aware of online refractions conducted in the state contact the Board.

Announcing the new
Ophthalmic Diagnostic Center

➤ How-to videos
➤ Related articles
➤ ...and more!
brought to you by
Ophthalmology Times and Optometry Tim

Next: Ohio ODs speak out on the policy

1 2 3

TAGS eye health Modern Medicine Cases Modern Medicine Feature Articles Modern Medicine News Ohio State Board of Optometry online eye exam policy statement Optometry

Colleen E. McCarthy

Colleen McCarthy is the content specialist for Optometry Times. She is a 2010 graduate of the University of Dayton with a degree in ...

MORE

Optometry Times eNews

Sign up here

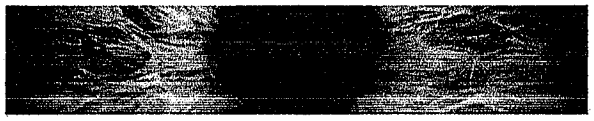
0 COMMENTS

You must be signed in to leave a comment. Registering is fast and free!

SIGN IN / REGISTER

All comments must follow the ModernMedicine Network community rules and terms of use, and will be moderated. ModernMedicine reserves the right to use the comments we receive, in whole or in part,in any medium. See also the Terms of Use, Privacy Policy and Community FAQ.

No comments available



Optometry Times Click here
eNews Sign up

Ohio Board of Optometry opposes online refraction

February 17, 2015 By Colleen E. McCarthy

Ohio ODs speak out on the policy

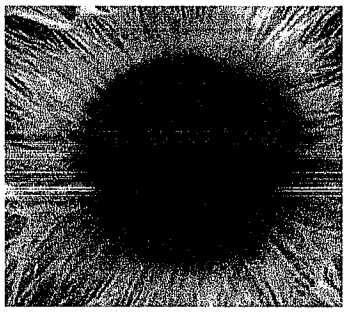
"Ohio Optometric Association (OOA) fully supports the Ohio State Board of Optometry's position regarding online refractions," says OOA President Terri Gossard, OD, MS. "To provide a prescription for either glasses or contact lenses without an accompanying physical examination of ocular health puts the public at risk for undetected eye disease, undetected systemic disease, and permanent vision loss. It is critical that, as new technology emerges, professional standards of eye care not be compromised for the welfare and safety of the citizens of Ohio."

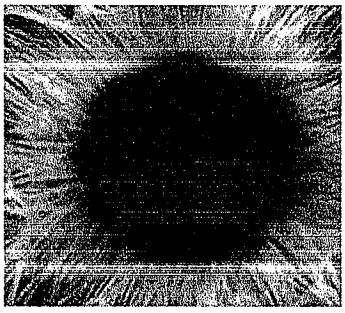
Dr. Bowling: The future of eye care?

Optometry Times Editorial Advisory Board Member Mile Brujic, OD, FAAO, based in Bowling Green, OH, says the Board places the visual welfare of Ohio citizens above all else.

"As such, its policies support the citizens of Ohio receive comprehensive care which requires not only assessing the refractive status but also maintaining the well-being of the patient's ocular health," he says. "Cutting corners in this arena doesn't help those who we have committed to serve and would ultimately be a disservice to those patients receiving substandard care.

Related: Are you ready for online refraction?





POLL

What is the interest level from patients in cosmetic lenses?

- I have to mention them
- Very little
- Moderate
- Lots of patients asking

ANSWER

Optometry Times Click here
eNews Sign up

Ohio Board of Optometry opposes online refraction

February 17, 2015 By Colleen E. McCarthy

Following Ohio's lead

Optometry Times Chief Optometric Advisor Ernie Bowling, OD, FAAO, says the Board is justified in its position and should be commended for publicizing its concerns.

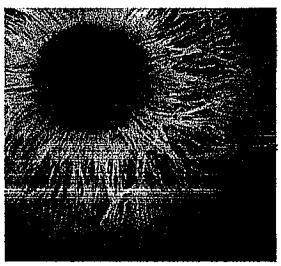
"Online refraction technology has potential as a screening device only, and to propose its use as anything other than for screening raises serious public health concerns," he says. "A refraction is only one component of an ocular exam, and to offer this without an accompanying ocular health evaluation significantly compromises accepted standards of care."

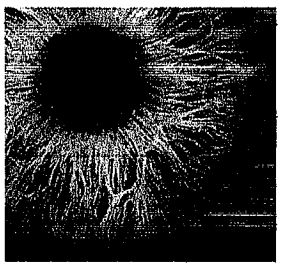
Related: AOA cautions consumers about claims from online eye exams

While Ohio is among the first states to make such a proclamation on online refraction, Dr. Bowling says he'd like to see more state boards make similar statements.

"I feel certain other state boards will likewise follow the Ohio Board in recommending their state's optometrists not participate in online refractions and notify their state board should they become aware of this activity in their state," he says.

1 2 3





POLL

What is the interest level from patients in cosmetic lenses?

- I have to mention them
- Very little
- Moderate
- Lots of patients asking

ANSWER

Florida Telemedicine Law: Time to Embrace Advances in Telemedicine and Address Legal Barriers

By Elizabeth P. Perez, Esq.

The use of technology and telecommunications in healthcare seems to evolve at a fast pace, but telemedicine laws and regulations are slow to catch up. Most would agree that telemedicine provides invaluable benefits to providers and their patients, such as increased access to healthcare. But there are still some ambiguities that are not fully addressed in Florida's laws, which may have the unintended effect of hindering the progress of the use of telemedicine. As well, there are no laws that mandate insurance coverage or reimbursement for telemedicine services. The time seems right for an expansion of telemedicine laws and regulations in Florida.

The American Telemedicine Association tracks recent changes to State telemedicine legislation (ATA 2013 State Telemedicine Legislation Tracking chart is available on their website). For example, ATA reports that there are currently 21 states that have enacted legislation mandating private insurance coverage for telemedicine services. Florida is not one of them.

Presently, Florida laws provide no statutory definition of "telemedicine" and there are only two regulations that provide guidelines for the use of telemedicine. The Board of Medicine and Board of Osteopathic Medicine have promulgated standards for the practice of telemedicine, respectively. Under the Board of Medicine regulation, telemedicine includes prescribing legend drugs to patients via Internet, telephone, and/or facsimile. And, the regulation provides the parameters for treatment recommendations and prescribing legend drugs.

However, there are few reported cases that provide guidance to address certain ambiguities in the regulations. Recently, the Board of Medicine considered the issue of telemedicine in a request for declaratory statement, In Re: Petition for Declaratory Statement of Jack Daubert, M.D., F.A.C.S. (08/13/2013). Dr. Daubert, a Florida ophthalmologist, petitioned the Board to consider whether his proposed usage of technology to perform remote eye exams would be in compliance with applicable state regulations. His petition noted that "[t]he Florida Department of Health has issued standards for prescribing in connection with the provision of remote care (telemedicine), but no specific guidelines or standards for the general use of technology in connection with the remote provision of healthcare services." The Board's final order indicated that it was presented with insufficient information to make an informed determination and declined to issue a declaratory statement at this time. While the Board has been supportive of the concept of telemedicine, there remains a paucity of cases interpreting or analyzing current telemedicine regulations.

There may be some welcomed changes to Florida's telemedicine laws in the near future, as Florida lawmakers revisit the issue in the 2014 Legislative Session. A new bill has been filed (SB 70), which may expand Florida's current telemedicine laws, particularly in the area of insurance coverage for telemedicine; an area that seems ripe for new legislation. The bill's proposed language could provide the desired clarity with respect to the ambiguities and broaden the scope and use of telemedicine. The bill contains, among other things, the following proposed provisions: (a) enacting a statutory definition of "telemedicine"; (b) mandating private health plans and Medicaid to provide coverage and reimbursement for services without the prerequisite of the face-to-face contact between a health care provider and patient; (c) clarifying that the use of telemedicine technology under the supervision of another health care practitioner may not be interpreted as practicing medicine without a license; (d) authorizing the Department of Health to adopt rules and requiring the department to repeal any rules that prohibit the use of telemedicine; and (e) requiring the Department to conduct a study on options for implementing telemedicine for certain services.

Technology and telecommunication in healthcare continues to evolve at a rapid pace and the time seems right for the Florida healthcare industry and lawmakers to embrace these advances in telemedicine and address the legal barriers that may hinder its progress.

Elizabeth Perez is a health law attorney, Of Counsel, with the Fort Lauderdale office of the statewide law firm Broad and Cassel. She can be reached at (954) 764-7060 or epperez@broadandcassel.com

Dr. Pamela Miller

Subject: Florida

Presently, Florida laws provide no statutory definition of "telemedicine" and there are only two regulations that provide guidelines for the use of telemedicine. The Board of Medicine and Board of Osteopathic Medicine have promulgated standards for the practice of telemedicine, respectively. Under the Board of Medicine regulation, telemedicine includes prescribing legend drugs to patients via Internet, telephone, and/or facsimile. And, the regulation provides the parameters for treatment recommendations and prescribing legend drugs.

However, there are few reported cases that provide guidance to address certain ambiguities in the regulations. Recently, the Board of Medicine considered the issue of telemedicine in a request for declaratory statement, In Re: Petition for Declaratory Statement of Jack Daubert, M.D., F.A.C.S. (08/13/2013). Dr. Daubert, a Florida ophthalmologist, petitioned the Board to consider whether his proposed usage of technology to perform remote eye exams would be in compliance with applicable state regulations. His petition noted that "[t]he Florida Department of Health has issued standards for prescribing in connection with the provision of remote care (telemedicine), but no specific guidelines or standards for the general use of technology in connection with the remote provision of healthcare services." The Board's final order indicated that it was presented with insufficient information to make an informed determination and declined to issue a declaratory statement at this time. While the Board has been supportive of the concept of telemedicine, there remains a paucity of cases interpreting or analyzing current telemedicine regulations.

See whole article here:
http://southfloridahospitalnews.com/page/Florida_Telemedicine_Law_Time_to_Embrace_Advances_in_Telemedicine_and_Address_Legal_Barriers/8652/1/

Final Order No. DOH-13-1550-05 - MQA

FILED DATE - AUG 13 2013
Department of Health
By: Angel Sanders
Deputy Agency Clerk

STATE OF FLORIDA
BOARD OF MEDICINE

IN RE: PETITION FOR DECLARATORY STATEMENT OF

JACK DAUBERT, M.D., F.A.C.S.

/

FINAL ORDER

This matter came before the Board of Medicine (hereinafter the Board) on June 7, 2013, in Tampa, Florida, for consideration of the above-referenced Petition for Declaratory Statement. The Notice of Petition for Declaratory Statement was published on May 7, 2013, in Vol. 39, No. 89, in the Florida Administrative Register. Petitioner made a personal appearance before the Board and was represented by Alexis Gilroy Esq., who appeared on behalf of the Petitioner as his qualified representative.

Dr. Daubert, a Florida licensed physician and ophthalmologist, inquires as to whether his proposed usage of technology to conduct remote eye exams to increase access to refractions and eye exams for Florida residents would be in compliance with Section 458.3485, Florida Statutes, Rule 64B8-9.014, Florida Administrative Code, and Rule 64B8-9.003, Florida Administrative Code.

FINDINGS OF FACTS

1. The facts set forth in Petitioner Daubert's petition and attachments are hereby adopted and incorporated herein by reference as the findings of fact by the Board.

CONCLUSIONS OF LAW

1. The Board of Medicine has authority to issue this Final Order pursuant to Section 120.565, Florida Statutes, and Rule 28-105, Florida Administrative Code.

2. The Petition filed in this cause is in substantial compliance with the provisions of 120.565, Florida Statutes, and Rule 28-105.002, Florida Administrative Code.

3. Section 120.565, Florida Statutes, reads as follows:

> 120.565. Declaratory statement by agencies
> (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.
> (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.
> (3) The agency shall give notice of the filing of each petition in the next available issue of the Florida Administrative Weekly and transmit copies of each petition to the committee. The agency shall issue a declaratory statement or deny the petition within 90 days after the filing of the petition. The declaratory statement or denial of the petition shall be noticed in the next available issue of the Florida Administrative Weekly. Agency disposition of petitions shall be final agency action

4. Rule 28-105.001, Florida Administrative Code, reads as follows:

> A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used only to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person or for obtaining a policy statement of general applicability from an agency.

5. The Board declines to issue a declaratory statement in response to Dr. Daubert's petition on the basis that the Board was presented with insufficient information to make an informed determination.

6. The issuance of this order does not preclude the Petitioner from filing an amended or new petition providing additional or more detailed data and information.

DONE AND ORDERED this 14th day of August, 2013.

BOARD OF MEDICINE

Allison M. Dudley, J.D., Executive Director
For Zachariah P. Zachariah, M.D., Chair

28355

NOTICE OF APPEAL RIGHTS

Pursuant to Section 120.569, Florida Statutes, Respondents are hereby notified that they may appeal this Final Order by filing one copy of a notice of appeal with the Clerk of the Department of Health and the filing fee and one copy of a notice of appeal with the District Court of Appeal within 30 days of the date this Final Order is filed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to: Jack Daubert, M.D., 1050 SE Monterey Road, Suite 104, Stuart, Florida 34994; by email to: Edward A. Tellechea, Chief Assistant Attorney General, PL-01 The Capitol, Tallahassee, Florida 3239-1050, ed.tellechea@myfloridalegal.com; Jennifer Tschetter, General Counsel, Department of Health, 4052 Bald Cypress Way, BIN A02, Tallahassee, Florida 32399-1703, Jennifer_Tschetter@doh.state.fl.us; and Alexis Gilroy, Esq., Nelson Mullins Riley & Scarborough LLP, 101 Constitution Avenue, NW, Suite 900, Washington, DC, 20001, Alexis.Gilroy@nelsonmullins.com on this 13th day of August, 2013.

Angel Sanders

Deputy Agency Clerk

7012 3050 0002 3881 5001

28356

FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK
CLERK Angel Sanders
DATE MAY 0 6 2013

PETITION FOR DECLARATORY STATEMENT
BEFORE FLORIDA DEPARTMENT OF HEALTH BOARD OF MEDICINE

April 22, 2013

VIA OVERNIGHT CARRIER

Florida Department of Health
Office of Agency Clerk
ATTN: Crystal Sanford
4052 Bald Cypress Way
Bin# A02
Tallahassee, FL 32399-1703

IN RE: PETITION FOR DECLARATORY STATEMENT OF JACK DAUBERT, M.D., F.A.C.S.

1. Petitioner Jack Daubert, M.D., F.A.C.S., a Florida-licensed ophthalmologist with an address of 1050 SE Monterey Rd. Suite 104, Stuart, FL 34994, (772) 283-2020 (telephone), plans, as a method of increasing access to refractions and eye exams for Florida residents, to perform examinations (A) from a location remote to an eye patient located in Florida, (B) using automated refraction and eye imaging technology operated by a technician specially trained in the use of the automated technology (each an "**Automated Technology Technician**"), (C) deployed in a real-time (synchronous) manner, while the eye patient located in Florida receives on-site disclosures, consent materials, and general assistance from an attendant trained in the use of the automated technology (the "**Remote Exams**").

2. The Petitioner is assisted in the preparation of this Petition for Declaratory Statement by Nelson Mullins Riley & Scarborough LLP, ATTN: Alexis Slagle Gilroy, 101 Constitution Ave, NW, Suite 900, Washington, DC 20001, (202) 712-2893 (telephone), (202) 712-2849 (facsimile). Kindly copy Ms. Gilroy on all correspondence related to this Petition for Declaratory Statement.

3. Petitioner seeks a declaratory statement from the Florida Department of Health, Board of Medicine, with regard to Section 458.3485 of the Florida Statutes and Section 64B8-9.014 of the Florida Administrative Code, as they pertain to the proposed Remote Exams. The term "Petitioner," as used below to describe the Remote Exams includes Petitioner, Jack Daubert, M.D., F.A.C.S., individually, and/or, as applicable, Petitioner's employed or contracted ophthalmologists working in collaboration with or at the direction of Petitioner regarding the Remote Exams.

4. Petitioner intends to conduct the Remote Exams using technology specially designed for refractions and eye health examinations, including (1) for the refraction portion of the Remote Exam, an automated objective and subjective refraction technology developed by Eyelogic System, Inc. and (2) as to the eye health evaluation, applicable FDA-approved instruments such as Optovue's anterior and posterior ocular coherence tomography instruments paired with fundus photography for the real-time capture of digital images.

5. Each Remote Exam will include a vision test to determine optical or refractive eye aberrations for evaluating the refraction error of the eye and to provide for a prescription (power formula specifications) of refractive lenses, as applicable, to adjust for the refractive error given applicable results. As requested by the patient, certain Remote Exams would also involve a non-invasive (e.g. no use of eye drops) comprehensive eye health exam whereby state of the art auto-focus, auto-tracking, auto-imaging and other FDA approved technology and instruments are used to test eye tissue health, intraocular pressure, depth perception, color vision, pupil reflexes, muscle balance, and visual fields of the patient's eyes. The results of all tests will be transmitted instantaneously to Petitioner for immediate review. The patient then receives the results of the assessments in real-time.

6. Petitioner plans to implement the Remote Exams by placing equipment for conducting the Remote Exams, in a separately designated and exclusive exam area, within other health care and medical related facilities such as optical dispensaries, primary care offices, and ophthalmology practices. The exam area will contain the equipment described above for the Remote Exams and will include real-time audio and video technology enabling simultaneous connection with the Petitioner and the Automated Technology Technicians.

7. The exam room will be attended by an onsite attendant trained and supervised by Petitioner in the use, function, and patient care practices related to the Remote Exams. Such on-site attendant will obtain signed forms such as HIPAA authorizations and informed patient consents for inclusion in the medical chart of the patient, direct the patient to the equipment and clean the equipment after each use.

8. Upon entering the exam room, the patient will view an instructional and informational video developed by Petitioner explaining the Remote Exams, including the risks and benefits of such exams and related prescriptions for refractive lenses. This video will be pre-recorded by Petitioner.

9. Following the video, the patient will be greeted by the Automated Technology Technician via real-time audio and video technology in order to obtain appropriate patient history data and guide and instruct the patient through the Remote Exam. The video and audio in the exam room will be transmitted between the patient and the Automated Technology Technician through synchronous video and audio feed. In the event that the Remote Exam also involves a comprehensive eye health exam, the captured measurements and images will be transmitted and reviewed in real-time by Petitioner. The results of that assessment (i.e. whether the eyes are healthy, clear and normal or require further evaluation by an in-person ophthalmologist or other professional) will be conveyed to the patient via pre-recorded real-time audio and video messages from Petitioner. In the event a patient has any questions or other concerns to address with Petitioner, at any time, before, during, and after the Remote Exam, the Petitioner will be made available for a live, synchronous, audio and/or video conversation.

10. The Petitioner intends to maintain an office in the State of Florida that will house the Automated Technology Technicians, as well as a call center to facilitate the performance of the Remote Exams, thus the Petitioner and the Automated Technology Technicians will be physically located in the same facility (the "**Petitioner Location**"). As such, Petitioner will provide real-time direct supervision of the Automated Technology Technicians during the performance of each Remote Exam.

11. Petitioner will only issue prescriptions for refractive lenses, as needed, based on the results of the Remote Exam. Petitioner would not dispense or fit eyeglasses or contact lenses. No prescriptions would be issued for any treatments, legend drugs or devices based on the eye health portion of the Remote Exam. Should the eye health portion of the Remote Exam result in a finding that is adverse for the patient, the Petitioner will refer such patient to the applicable local ophthalmologist, primary care physician or other local physician of their choice for further evaluation.

12. Under F.S. §458.3485, medical assistants may perform certain duties under the direct supervision of a licensed physician, including, for example, assisting with patient care management, executing administrative and clinical procedures, and performing managerial and supervisory functions. Direct supervision is defined as requiring "the physical presence of the supervising licensee on the premises so that the supervising licensee is reasonably available as needed ..." *See*, Florida Administrative Code §64B8-2.001. Petitioner believes that the proposed model for the Remote Exams meets the direct supervision requirement because all of the functions performed by the Automated Technology Technician will be taken under the direct supervision of Petitioner while the Automated Technology Technician is located on the same premises as Petitioner.

13. Because the attendant on-site with the patient undergoing the Remote Exam will not be a licensee and will not act as a medical assistant, Petitioner believes that such individual would not be subject to the "direct supervision" of Petitioner. Notwithstanding, Petitioner will provide a general level of supervision as Petitioner will be available via real-time technology to answer any questions that the on-site attendant may have and to direct the duties and tasks performed by the on-site attendant, as necessary.

14. The Florida Department of Health has issued standards for prescribing in connection with the provision of remote care (telemedicine), but no specific guidelines or standards for the general use of technology in connection with the remote provision of healthcare services. *See*, Florida Administrative Code §64B8-9.014(2). The subject guidance only appears to contemplate the prescribing of legend drugs via electronic means, which Petitioner believes to be inapplicable to the proposed activities conducted in connection with the Remote Exams. Notwithstanding, contemporaneous with the performance of the Remote Exams, Petitioner plans to ensure that: (1) a documented patient evaluation, including history and physical examination necessary for the Remote Exam will be performed by the Automated Technology Technician under the direct supervision of the Petitioner, (2) Petitioner will be available for direct patient questions at all times throughout the Remote Exam; and (3) contemporaneous medical records are maintained in compliance with 64B8-9.003 F.A.C. Further, Petitioner expects that the equipment for the performance of the Remote Exams will be proximately located within other healthcare facilities such as optical dispensaries, primary care offices, and ophthalmology practices to provide overall ease of access to additional on-site professionals and licensees as needed.

15. Petitioner believes that the proposed Remote Exams are appropriately and narrowly structured to comply with applicable Florida laws and regulations. Given the innovative and novel use of technology to provide access to refractive and eye health examinations, Petitioner seeks the guidance of the Board of Medicine in connection with the implementation of the proposed business model.

16. Petitioner would be happy to further discuss or make available a demonstration of the proposed Remote Exams to the Board of Medicine at its next available meeting should the Board so desire. A copy of Petitioner's Curriculum Vitae is also attached for the Board's reference.

PETITIONER:

Jack Dauben, M.D., F.A.C.S.

Jack Steven Daubert, M.D., F.A.C.S.

Curriculum Vitae

Medical Offices

1050 SE Monterey Rd.	550 Heritage Drive	1515 N. Flagler Drive	1715 SE Tiffany Ave.
Suite 104	Suite 105	Suite 500	Port St. Lucie FL. 33458
Stuart, FL. 34994	Jupiter, FL. 33458	West Palm Beach, FL. 33401	(561) 839-2780
(772) 283-2020	(561) 839-2780	(561) 659-9700	

Board Certifications

July 1991 — Diplomat, American Board of Ophthalmology
July 1996 — Diplomat, National Board of Medical Examiners

Education

1981 – 1985 — Jefferson Medical College
Philadelphia, PA
Degree: M.D.

1977 – 1981 — Pennsylvania State University, Pennsylvania
Graduate: Summa Cum Laude
Phi Beta Kappa
Degree: Bachelor of Science

Post Doctoral Training

1991 – 1992 — **Vitreo-Retinal Fellow**
Retina Associates
Boston, Massachusetts

1986 – 1989 — **Ophthalmology Residency**
Washington Hospital Center
Washington National Eye Center
Washington, D.C.

1988 – 1989 — **Chief Ophthalmology Resident**
Washington Hospital Center
Washington National Eye Center
Washington, D.C.

1985 – 1986 — **Surgical Internship**
Washington Hospital Center
Washington, D.C.

1989 – 1990 — Palm Beach Eye Clinic
130 Butler Street
West Palm Beach, FL

1992 – Present — Florida Vision Institute
Self-employed

Awards and Honors

2012 Top Doctor Award – Castle Connolly Medical, Ltd.
2011 Top Doctor Award – Castle Connolly Medical, Ltd.
2010 Top Doctor Award – Castle Connolly Medical, Ltd.
2009 Top Doctor Award – Castle Connolly Medical, Ltd.
2008 Top Doctor Award – Castle Connolly Medical, Ltd.
2007 Top Doctor Award – Castle Connolly Medical, Ltd.
1989 Davis Cup Recipient for outstanding Scientific Research & Presentation
Washington National Eye Center
1988 Davis Cup Recipient for outstanding Scientific Research and Presentation
Washington National Eye Center

- Muller Memorial Award in Ophthalmology
- Graduated Summa Cum Laude
- Phi Beta Kappa
- Who's Who Among Students in American Universities?

Professional Membership

Fellow American Academy of Ophthalmology
Fellow American College of Surgeons
American College of Surgeons
Florida Society of Ophthalmology
Florida Medical Society
Palm Beach Ophthalmology Society
Palm Beach Medical Society
American Society of Cataract & Refractive Surgery

Medical Licensure

Florida
Pennsylvania

Appointments

Attending Staff	Good Samaritan Hospital West Palm Beach, FL.
Attending Staff	Martin Memorial Medical Center Stuart, FL.
Attending Staff	Palm Beach Gardens Medical Center Palm Beach Gardens, FL.
Attending Staff	Jupiter Medical Center Jupiter, FL.

Publications and Original Reports

Daubert, J; El-choufi, L; Stephens, R:
Laser Treatment of Subfoveolar Choroidal
Neovascular Membranes
Ophthalmic Surgery 1991; 22: 665-669

Stephens, R; Daubert, J; El-choufi, L:
Visual improvement after Four Laser Treatments
To Foveola for Choroidal Neovascular Membrane
Ophthalmic Surgery 1991; 22: 470-474

Daubert, J; Nik, N; Chandeyssoun, PA.; El-choufi, L:
Tear Flow Analysis Through the Upper and Lower Systems
Ophthalmic Plastic Reconstructive Surgery 1990; 6(3): 193-196

Daubert, J; Bernanrdino, V
Conjunctival Nevi, Review of 350 cases
Wills Eye Hospital 1985

Clinical Trials

2009/10 Sub-Investigator, Genentech, FVF4168g, A Phase III, Double-Masked, Multi-Center, Randomized, Sham-Controlled Study of the Efficacy and Safety of Ranibizumab Injection in Subjects with Clinically Significant Macular Edema with Center Involvement Secondary to Diabetes Mellitus

2009/10 Sub-Investigator, Regeneron Pharmaceuticals, Study VGFT-OD-0605 Version VGFT-OD-0605.1 A Randomized, Double Masked, Active Controlled Phase III Study of the Efficacy, Safety, and Tolerability of repeated Doses of Intravitreal VEGF Trap in Subjects with Neovascular Age-Related Macular Degeneration.

2008/09 Sub-Investigator, Genentech, FVF4165g, A Phase III, Double-Masked, Multi-Center, Randomized, Sham-Controlled Study of the Efficacy and Safety of Ranibizumab Injection Compared with Sham in Subjects with Macular Edema Secondary to Branch Retinal Vein Occlusion.

2008/09 Sub-Investigator, Genentech, FVF4166g, A Phase III, Double-Masked, Multi-Center, Randomized, Sham-Controlled Study of the Efficacy and Safety of Ranibizumab Injection Compared with Sham in Subjects with Macular Edema Secondary to Central Retinal Vein Occlusion.

2008 Sub-Investigator, Allergan Protocol 206207-016: A 6-Month, Single-Masked, Multicenter, Randomized, Controlled Study to Assess the Safety and Efficacy of 700 µg Dexamethasone Posterior Segment Drug Delivery System Applicator System as Adjunctive Therapy to Lucentis® Compared with Lucentis® Alone in the Treatment of Patients with Choroidal Neovascularization.

Dr. Pamela Miller

Subject: Michigan - CL and Spectacle Rx

ODs score win on prescribing law

Purchasing contact lenses and eyeglasses in the state of Michigan now requires a prescription from a licensed optometrist or ophthalmologist.

> "We forever married the eye health portion of a comprehensive eye exam to the determination of refractive error in order to derive a legal prescription."

Optometry achieved this win in early July when Gov. Rick Snyder signed the Eye Care Consumer Protection Act into law. The new law prohibits the sale of eyewear without a valid prescription from a licensed eye care provider. It also prevents kiosks from conducting automated refractions and then issuing prescriptions.

"Perhaps the most significant accomplishment of this legislation is that we forever married the eye health portion of a comprehensive eye exam to the determination of refractive error in order to derive a legal prescription," says Paul A. Hodge, O.D., president of the Michigan Optometric Association (MOA). "One cannot be done without the other when establishing a prescription."

Prior to the law's passage, state law hadn't defined what constitutes a proper prescription for eyewear, Dr. Hodge says.

Advocacy on the part of the MOA and AOA helped spearhead legislation to tighten requirements on prescriptions. Prior to the bill's introduction, it was significant that optometry leaders educated key legislators and committees, "as well as meeting with potential allies to seek their support," Dr. Hodge says.

Backed by the state's medical community on the proposed legislation, the MOA's grassroots optometry team was able to get 24 lawmakers, including all nine members of the Senate Health Policy Committee, to sign on as bill co-sponsors prior to its introduction.

"Because of this effort, we were able to see strong support by lawmakers not only in each chamber of the Michigan House and Senate, but also bipartisan support among Democrats and Republicans," Dr. Hodge observes.

The law additionally gives the state Department of Licensing and Regulatory Affairs (DLARA) the power to protect the public from injuries, Dr. Hodge says. "By defining and regulating prescriptions for glasses and contact lenses, DLARA will be able to take action against sales made without a prescription and take legal action against nonlicensed eye care providers in order to protect the health and safety of state residents."

The Michigan law represents one of many state legislative wins for optometry in 2014. Read about more recent wins on page 13 of the July/Aug edition of *AOA Focus*.

Dr. Pamela Miller

Subject: FW: On Line in Michigan

Legislators Block Low-Cost Eye Exams in Michigan

State bans automated kiosks

By Anne Schieber | Nov. 10, 2014

Starting next month, consumers nationwide will be able to take a $30 online eyeglass exam and get a prescription from the convenience of their home – but Michigan residents will be left in the dark. That's because last spring the Michigan Legislature passed – and Gov. Rick Snyder signed into law – Senate Bill 853, which bans automated eye exam and eyeglass kiosks.

Although the company offering the online eye exams doesn't think the law applies to them, the founder said he doesn't want to take any chances by operating in Michigan.

"We're afraid that even if our lawyers give us the green light (to operate in Michigan), the entrenched industry would use this law against us to litigate us out of the state," says Aaron Dallek, founder of [redacted]

Dallek believes there is no other law like it in the country.

The bill passed unanimously in the state senate, and received only two "no" votes in the House, including one from Rep. Doug Geiss, D-Taylor. Rep. Tom McMillin, R-Rochester Hills, said he voted against it because he thought it was anti-free market.

"A person can make the choice. They can understand the difference between this and a full-fledged eye health exam," he said.

The Michigan Optometric Association declined to say how actively it lobbied against SB 853. According to state filings, it has spent between $19,179 and $25,998 in each of the past five years on lobbying.

[redacted] has developed a system of algorithms to perform a series of online eye tests that can measure nearsightedness, farsightedness and astigmatism. A group of licensed professionals review the data and provide a signed prescription by a licensed, board-certified eye care professional in the state where the user resides. The company says it will be in full FDA compliance by the time it goes live.

Currently, the primary way consumers get a pair of prescription glasses is to go to an optometrist's office where they would undergo several eye health exams, including a refractive eye exam to measure vision. The process can last 30 minutes or more and cost at least $50. Patients are often directed to in-office optician practices, where they could spend hundreds of dollars on designer frames and specialty lenses.

[redacted] markets itself as a timesaving, affordable alternative. Patients can now shop for frames and lenses using a variety of websites, some offering virtual try-on or free delivery of sample frames to try on at home.

Dallek believes on-line eye exams are the obvious next step.

"It is the way medicine is going," he said. "We are using technology to advance and improve the overall patient experience and laws like the one passed in Michigan prevent innovations that allow consumers to make their own choices."

Dallek said the service does not replace a comprehensive eye health exam and recommends users see a licensed eye professional every two years. Sen. Rick Jones, R-Grand Ledge, said he introduced the bill because an office eye exam revealed a debilitating eye disease in his wife.

"Thank God, because it could have caused blindness," he said. "She had no pain or symptoms."

Dallek said [redacted] is designed to shut down if it senses any eye health red flags, such as previous eye surgery or chronic diseases such as diabetes and hypertension.

Tele-medicine has been on the radar of investors. [redacted] has secured $1 million in venture capital funding and SB853 was introduced not long after.

"We believe the bill was directly correlated, that it was intended to stop us specifically by entrenched interests," Dallek said.

The Institute for Justice, a nonprofit public interest law firm that specializes in cases of economic freedom, says Michigan's law sounds like a case of protectionist legislation.

"Too often, we see government regulation that is designed to protect an established business's profit margins instead of the public safety," said IJ attorney Robert McNamara. "Whether it's established dentists trying to wall out independent teeth whiteners or established funeral directors trying to shut down independent casket sales, public power is frequently used simply to achieve private gain. That's unconstitutional.

"The government can't pass laws just to protect favored businesses from economic competition," McNamara continued. "Regulations should protect the public from genuinely dangerous things; it shouldn't protect businesses from other businesses who want to give consumers a better deal or a better product."

OptometryTimesOptometryBlinkLog in to save to my locker

Why you can't separate refraction from pathology

August 31, 2015
By Michael Brown, OD, FAAO

MICHAEL BROWN, OD has practiced medical optometry in a comanagement center and with the U.S. Department of Veterans Affairs Outpatient Clinic in Huntsville, AL, for over 20 years.

I've been thinking a lot about technology lately and how it's going to—um, scratch that—how it *already is* impacting eye care.

In particular, I've had refraction on my mind. Maybe it's that company in New York City that sends those young, earnest eye missionaries with the sleek portable equipment out to your airy, loft office in their cool little cars to refract you in the blink of an eye so you barely have to look up from your computer screen as you launch your second startup in the past three years.

Related: [redacted]

Or that Web-based refraction tool that touts itself as an "alternative" to Stone Age eye doctors who interrogate you senseless with a barrage of "Which is better, one, or two?" before getting all up in your grill with those horrible drops and blinding lights that make you totes late for your afternoon latte with your friends at the corner coffeehouse.

Related: [redacted]

The operating assumption it seems, is that refraction can somehow be separated from the "eye health" exam, everybody will see great, and we can just call it a day.

Next: Not so fast

Not so fast

As that wise old sage Coach Corso on ESPN would say: "Not so fast, my friend!"

But first, let me say up front that I love technology. My office is packed with it, including a wavefront aberrometer which daily saves my bacon, combined with an automated phoropter that my tech uses to refract the majority of our patients. I rarely have to touch his results—and our remake rate is lower than ever.

I also think there's a time and place for remote exams (they're especially good for initial evaluation and triage), and let's be honest, not everybody needs "the works" every time.

I recently assessed both an iris nevus and a subconjunctival hemorrhage via pictures sent through friends' text messages. And as if that weren't enough, within the past two months, I've also diagnosed both a sixth nerve palsy and a partial third nerve palsy in a relative of mine using FaceTime.

Improvising a subjective Parks-Bielschowsky three-step test on an iPhone isn't easy, but it is possible. I am extremely flexible, in mind if not body, and no Luddite.

Next: Can't separate pathology from refraction

Can't separate pathology from refraction

But I also recall my days as a resident and then an assistant director at a diagnostic and referral center way back in the last century. I was supposed to be focusing on ocular disease, but I quickly learned that I couldn't separate pathology from refraction any more than I could a definitive diagnosis from an "old fashioned" face-to-face exam.

Related: [redacted]

We had more than a few patients of all ages referred to us for "unexplained vision loss" that pinholed and then refracted to 20/20. Have you ever tried explaining to a referring optometrist or ophthalmologist that the patient he thought had some exotic, occult neurological disorder actually was a latent hyperope who also needed a diopter more cylinder? I not only learned a lot about disease during those three years, but I developed diplomacy skills on the level of a U.S. Secretary of State.

I've been told there was an old neuro-ophthalmogist somewhere who said, "It's amazing the number of cases of 'optic neuritis' that can be 'cured' with a meticulous refraction."

Next: Beat 'em and join 'em

Beat 'em and join 'em

While some young, healthy patients with mild-to-moderate refractive error might be able to obtain a decent glasses Rx by bypassing your office, there's going to be a far greater number of patients who won't. There will be false positives, false negatives, blurry vision—and hence, opportunity.

In fact, it may be possible to both "beat 'em *and* join 'em." One tactic might be to align yourself with mobile health (mHealth) companies (unofficially and from a distance, if you prefer) rather than trashing them in public statements. There you'll stand in the breach, with a nonjudgmental smile on your face and your arms open wide, prepared to catch the ~~patients~~ consumers who fall through the cracks.

Jetpacks and hover cars notwithstanding, "classic" comprehensive eye exams will always be needed and never go completely out of style.

Related: [redacted]

But make no mistake—these technologies will get better and more accurate and give birth to little baby "disruptors" that nobody's even dreamed up yet. Current trends as well as the proposed rules for Meaningful Use Stage 3 make it clear that "patient engagement" in their own health via apps and wearables is here to stay, for better and for worse.

My point is, don't just stand around railing against the disruptors and being known primarily for what you're against. That tactic alone will be regarded as old-school professional protectionism

by a growing demographic of patients for whom managing their lives online is as natural as breathing.

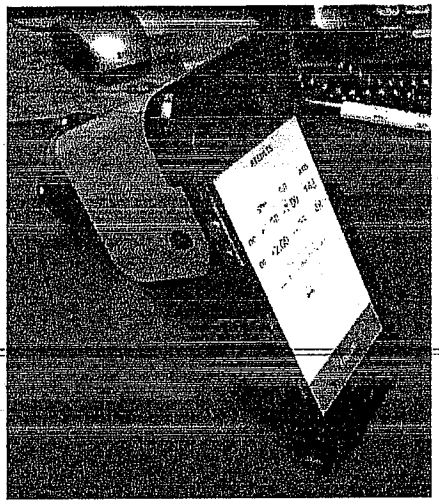
Instead, *be* the disruptor. Did I mention that my tech does the majority of my refractions, my patients still see great, and the world hasn't stopped spinning?

That's what I'm talking about.

Dr. Pamela Miller

Subject: FW: optometric physician today - smartphone

Sent: Saturday, September 12, 2015 9:42 AM
Subject: Re: optometric physician today - smartphone
This is similar to the smart phone auto refractor we are testing here at our practice. I'll bet it will look similar to this.



On Sep 12, 2015, at 7:51 AM, Dr. Pamela Miller <drpam@omnivision.com> wrote:

Smartphone-Based Fundus Camera: Imaging the Peripheral Retina

A fundus camera was designed as a device with slots to fit a smartphone (built-in camera and flash) and 20-D lens to demonstrate an inexpensive smartphone-based fundus camera device ([redacted]) and technique to capture peripheral retinal pictures. With the help of the device and an innovative imaging technique, high-quality fundus videos were taken with easy extraction of images.

The [redacted] and imaging technique captured high-quality images of the peripheral retina, such as ora serrata and pars plana, apart from central fundus pictures.

Researchers concluded that the smartphone-based fundus camera: can help clinicians monitor diseases affecting both central and peripheral retina; help patients understand their diseases, and clinicians needing to convince their patients of treatment, especially in cases of peripheral lesions; and can be an inexpensive tool for mass screening.

SOURCE: Sharma A, Subramaniam SD, Ramachandran KI, et al. Smartphone-based fundus camera device ([redacted]) and technique with ability to image peripheral retina. Eur J Ophthalmol. 2015 Aug 5:0. [Epub ahead of print].

Pamela J. Miller, OD, FAAO, JD, FNAP Executive Director, The Optometric Society
6836 Palm Ave
Highland, Ca 92346-2513
(909) 255-0464 phone; (603) 816-9547 (fax)

www.theoptometricsociety.org

Act No. 269
Public Acts of 2014
Approved by the Governor
June 26, 2014
Filed with the Secretary of State
July 2, 2014
EFFECTIVE DATE: September 30, 2014

STATE OF MICHIGAN
97TH LEGISLATURE
REGULAR SESSION OF 2014

Introduced by Senators Jones, Hune, Marleau, Schuitmaker, Bieda, Robertson, Hopgood, Jansen, Hildenbrand, Ananich, Smith, Booher, Emmons, Kowall, Green, Warren, Rocca, Meekhof, Young, Moolenaar, Hansen, Johnson, Brandenburg and Pappageorge

ENROLLED SENATE BILL No. 853

AN ACT to amend 1978 PA 368, entitled "An act to protect and promote the public health; to codify, revise, consolidate, classify, and add to the laws relating to public health; to provide for the prevention and control of diseases and disabilities; to provide for the classification, administration, regulation, financing, and maintenance of personal, environmental, and other health services and activities; to create or continue, and prescribe the powers and duties of, departments, boards, commissions, councils, committees, task forces, and other agencies; to prescribe the powers and duties of governmental entities and officials; to regulate occupations, facilities, and agencies affecting the public health; to regulate health maintenance organizations and certain third party administrators and insurers; to provide for the imposition of a regulatory fee; to provide for the levy of taxes against certain health facilities or agencies; to promote the efficient and economical delivery of health care services, to provide for the appropriate utilization of health care facilities and services, and to provide for the closure of hospitals or consolidation of hospitals or services; to provide for the collection and use of data and information; to provide for the transfer of property; to provide certain immunity from liability; to regulate and prohibit the sale and offering for sale of drug paraphernalia under certain circumstances; to provide for the implementation of federal law; to provide for penalties and remedies; to provide for sanctions for violations of this act and local ordinances; to provide for an appropriation and supplements; to repeal certain acts and parts of acts; to repeal certain parts of this act; and to repeal certain parts of this act on specific dates," (MCL 333.1101 to 333.25211) by adding part 55A.

The People of the State of Michigan enact:

PART 55A

EYE CARE CONSUMER PROTECTION

Sec. 5551. (1) This part may be referred to as the "eye care consumer protection law".

(2) As used in this part, the words and phrases defined in sections 5553 to 5557 have the meanings ascribed to them in those sections.

(3) In addition, article 1 contains general definitions and principles of construction applicable to all articles in this code.

Sec. 5553. (1) "Contact lens" means a lens placed directly on the surface of the eye, regardless of whether it is intended to correct a visual defect. Contact lens includes, but is not limited to, a cosmetic, therapeutic, or corrective lens.

(2) "Department" means the department of licensing and regulatory affairs.

(3) "Diagnostic contact lens" means a contact lens used to determine a proper contact lens fit.

(4) "Examination and evaluation", for the purpose of writing a valid prescription, means an assessment of the ocular health and visual status of a patient that does not consist solely of objective refractive data or information generated by an automated refracting device or other automated testing device.

Sec. 5555. (1) "Licensee" means any of the following:

(a) A physician who is licensed or otherwise authorized to engage in the practice of medicine under part 170 and who specializes in eye care.

(b) A physician who is licensed or otherwise authorized to engage in the practice of osteopathic medicine and surgery under part 175 and who specializes in eye care.

(c) An optometrist who is licensed or otherwise authorized to engage in the practice of optometry under part 174.

(2) "Spectacles" means an optical instrument or device worn or used by an individual that has 1 or more lenses designed to correct or enhance vision to address the visual needs of the individual wearer and commonly known as glasses, including spectacles that may be adjusted by the wearer to achieve different types or levels of visual correction or enhancement.

Sec. 5557. "Valid prescription" means 1 of the following, as applicable:

(a) For a contact lens, a written or electronic order by a licensee who has conducted an examination and evaluation of a patient and has determined a satisfactory fit for the contact lens based on an analysis of the physiological compatibility of the lens on the cornea and the physical fit and refractive functionality of the lens on the patient's eye. To be a valid prescription under this subdivision, it must include at least all of the following information:

(*i*) A statement that the prescription is for a contact lens.

(*ii*) The contact lens type or brand name, or for a private label contact lens, the name of the manufacturer, trade name of the private label brand, and, if applicable, trade name of the equivalent or similar brand.

(*iii*) All specifications necessary to order and fabricate the contact lens, including power, material, base curve or appropriate designation, and diameter, if applicable.

(*iv*) The quantity of contact lenses to be dispensed.

(*v*) The number of refills.

(*vi*) Specific wearing instructions and contact lens disposal parameters, if any.

(*vii*) The patient's name.

(*viii*) The date of the examination and evaluation.

(*ix*) The date the prescription is originated.

(*x*) The prescribing licensee's name, address, and telephone number.

(*xi*) The prescribing licensee's written or electronic signature, or other form of authentication.

(*xii*) An expiration date of not less than 1 year from the date of the examination and evaluation or a statement of the reasons why a shorter time is appropriate based on the medical needs of the patient.

(b) For spectacles, a written or electronic order by a licensee who has examined and evaluated a patient. To be a valid prescription under this subdivision, it must include at least all of the following information:

(*i*) A statement that the prescription is for spectacles.

(*ii*) As applicable and as specified for each eye, the lens power including the spherical power, cylindrical power including axis, prism, and power of the multifocal addition.

(*iii*) Any special requirements, the omission of which would, in the opinion of the prescribing licensee, adversely affect the vision or ocular health of the patient. As used in this subparagraph, "special requirements" includes, but is not limited to, type of lens design, lens material, tint, or lens treatments.

(*iv*) The patient's name.

(*v*) The date of the examination and evaluation.

(*vi*) The date the prescription is originated.

(*vii*) The prescribing licensee's name, address, and telephone number.

(*viii*) The prescribing licensee's written or electronic signature, or other form of authentication.

(*ix*) An expiration date of not less than 1 year from the date of the examination and evaluation or a statement of the reasons why a shorter time is appropriate based on the medical needs of the patient.

Sec. 5559. (1) Except as otherwise provided in subsection (2), spectacles and contact lenses are medical devices and are subject to the requirements of this part for the protection of consumers.

(2) This part does not apply to any of the following:

(a) A diagnostic contact lens that is used by a licensee during an examination and evaluation.

(b) An optical instrument or device that is not intended to correct or enhance vision.

(c) An optical instrument or device that is not made, designed, or sold specifically for a particular individual.

Sec. 5561. (1) A person shall not do any of the following:

(a) Employ objective or subjective physical means to determine the accommodative or refractive condition or range of power of vision or muscular equilibrium of the human eye unless that activity is performed by a licensee or under the supervision of a licensee.

(b) Prescribe spectacles or contact lenses based on a determination described in subdivision (a) unless that activity is performed by a licensee.

(c) Dispense, give, or sell spectacles or contact lenses unless dispensed, given, or sold pursuant to a valid prescription.

(d) Use an automated refractor or other automated testing device to generate objective refractive data unless that use is by a licensee or under the supervision of a licensee.

(2) As used in this section, "supervision" means that term as defined in section 16109.

Sec. 5563. (1) Except as otherwise provided in this part, the administration and enforcement of this part is the responsibility of the department.

(2) The department may promulgate rules under the administrative procedures act of 1969 that it determines necessary to implement, administer, and enforce this part.

Sec. 5565. (1) A person or governmental entity that believes that a violation of this part or a rule promulgated under this part has occurred or has been attempted may make an allegation of that fact to the department in writing.

(2) If, upon reviewing an allegation under subsection (1), the department determines there is a reasonable basis to believe the existence of a violation or attempted violation of this part or a rule promulgated under this part, the department shall investigate.

(3) The department may hold hearings, administer oaths, and order testimony to be taken at a hearing or by deposition conducted pursuant to the administrative procedures act of 1969.

(4) The department may proceed under section 5567 if it determines that a violation of this part or a rule promulgated under this part has occurred.

(5) This section does not require the department to wait until harm to human health has occurred to initiate an investigation under this section.

Sec. 5567. (1) After a determination as described in section 5565(4), the department may order a person to cease and desist from a violation of this part or a rule promulgated under this part.

(2) A person ordered to cease and desist under this section is entitled to a hearing before the department if a written request for a hearing is filed within 30 days after the effective date of the order.

(3) The department may assess costs related to the investigation of a violation of this part or rules promulgated under this part. The department may issue an order for costs assessed under this subsection after a hearing held in compliance with the administrative procedures act of 1969.

(4) The department may refer a case for further enforcement action under section 5569 or 5571 against a person that fails to comply with a cease and desist order that is not contested or that is upheld following a hearing.

(5) The department is not required to issue a cease and desist order before taking action under section 5569 or 5571.

Sec. 5569. (1) The department may file a civil action in a court of competent jurisdiction seeking an injunction or other appropriate relief to enforce this part or a rule promulgated under this part.

(2) In an action under subsection (1), the court may impose on a person that violates or attempts to violate this part or a rule promulgated under this part a civil fine of not less than $5,000.00 for each violation or attempted violation. The court may also award costs of an investigation and attorney fees from a person that violates or attempts to violate this part or a rule promulgated under this part.

Sec. 5571. A person that violates this part or a rule promulgated under this part or violates a cease and desist order issued under this part is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not less than $5,000.00 or more than $25,000.00, or both. If successful in obtaining a conviction, the agency prosecuting the case is entitled to actual costs and attorney fees from the defendant.

Enacting section 1. This amendatory act takes effect 90 days after the date it is enacted into law.

This act is ordered to take immediate effect.

Carol Morey Viventi

Secretary of the Senate

Gary E Randall

Clerk of the House of Representatives

Approved .....

.....

Governor

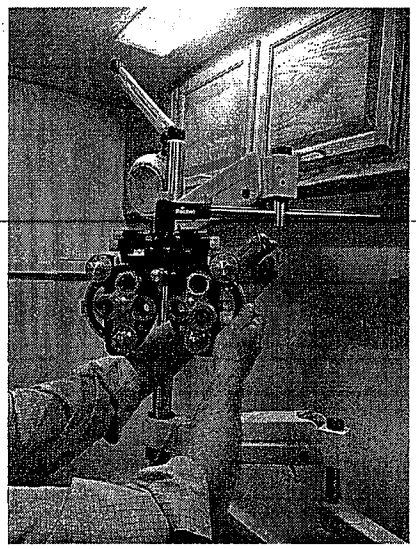
CAPCON MICHIGAN CAPITOL CONFIDENTIAL

A NEWS SERVICE FOR THE PEOPLE OF MICHIGAN FROM THE MACKINAC CENTER FOR PUBLIC POLICY

Legislators Block Low-Cost Eye Exams in Michigan

State bans automated kiosks

By ANNE SCHIEBER | Nov. 10, 2014 | Follow Anne Schieber on Twitter



Starting next month, consumers nationwide will be able to take a $30 online eyeglass exam and get a prescription from the convenience of their home – but Michigan residents will be left in the dark. That's because last spring the Michigan Legislature passed – and Gov. Rick Snyder signed into law – Senate Bill 853, which bans automated eye exam and eyeglass kiosks.

Although the company offering the online eye exams doesn't think the law applies to them, the founder said he doesn't want to take any chances by operating in Michigan.

[redacted]

The bill passed unanimously in the state senate, and received only two "no" votes in the House, including one from Rep. Doug Geiss, D-Taylor. Rep. Tom McMillin, R-Rochester Hills, said he voted against it because he thought it was anti-free market.

"A person can make the choice. They can understand the difference between this and a full-fledged eye health exam," he said.

The Michigan Optometric Association declined to say how actively it lobbied against SB 853. According to state filings, it has spent between $19,179 and $25,998 in each of the past five years on lobbying.

[redacted] has developed a system of algorithms to perform a series of online eye tests that can measure nearsightedness, farsightedness and astigmatism. A group of licensed professionals review the data and provide a signed prescription by a licensed, board-certified eye care professional in the state where the user resides. The company says it will be in full FDA compliance by the time it goes live.

Currently, the primary way consumers get a pair of prescription glasses is to go to an optometrist's office where they would undergo several eye health exams, including a refractive eye exam to measure vision. The process can last 30 minutes or more and cost at least $50. Patients are often directed to in-office optician practices, where they could spend hundreds of dollars on designer frames and specialty lenses.

[redacted] markets itself as a timesaving, affordable alternative. Patients can now shop for frames and lenses using a variety of websites, some offering virtual try-on or free delivery of sample frames to try on at home. [redacted] believes on-line eye exams are the obvious next step.

"It is the way medicine is going," he said. "We are using technology to advance and improve the overall patient experience and laws like the one passed in Michigan prevent innovations that allow consumers to make their own choices."

[redacted] said the service does not replace a comprehensive eye health exam and recommends users see a licensed eye professional every two years. Sen. Rick Jones, R-Grand Ledge, said he introduced the bill because an office eye exam revealed a debilitating eye disease in his wife.

"Thank God, because it could have caused blindness," he said. "She had no pain or symptoms."

[redacted] said [redacted] is designed to shut down if it senses any eye health red flags, such as previous eye surgery or chronic diseases such as diabetes and hypertension.

Tele-medicine has been on the radar of investors. [redacted] has secured $1 million in venture capital funding and SB853 was introduced not long after.

"We believe the bill was directly correlated, that it was intended to stop us specifically by entrenched interests," [redacted] said.

The Institute for Justice, a nonprofit public interest law firm that specializes in cases of economic freedom, says Michigan's law sounds like a case of protectionist legislation.

"Too often, we see government regulation that is designed to protect an established business's profit margins instead of the public safety," said IJ attorney Robert McNamara. "Whether it's established dentists trying to wall out independent teeth whiteners or established funeral directors trying to shut down independent casket sales, public power is frequently used simply to achieve private gain. That's unconstitutional.

"The government can't pass laws just to protect favored businesses from economic competition," McNamara continued. "Regulations should protect the public from genuinely dangerous things; it shouldn't protect businesses from other businesses who want to give consumers a better deal or a better product."

~~~~~

State and Federal Regulations Burying Businesses

Free the Food

Detroit's 'Operation Compliance' Shows the Dange of Too Many Regulations
~~~~~

The Florida Senate

SB 70: Telemedicine

GENERAL BILL by Joyner

Telemedicine; Providing that a health insurance policy or Medicaid may not require face-to-face contact between a health care provider and patient as a prerequisite to coverage or reimbursement for services; clarifying that the use of telemedicine technology under the supervision of another health care practitioner may not be interpreted as practicing medicine without a license; requiring the department to conduct a study, which includes the Department of Children and Families and the Agency for Health Care Administration, on options for implementing telemedicine for certain services, etc.

Effective Date: 7/1/2014
Last Action: 5/2/2014 Senate - Died in Health Policy
Location: In committee/council (HP)
Bill Text: Web Page | PDF

Senate Committee References:

1. Health Policy (HP)
2. Banking and Insurance (BI)
3. Appropriations Subcommittee on Health and Human Services (AHS)
4. Appropriations (AP)

Bill History

Date	Chamber	Action
8/9/2013	Senate	• Filed
8/27/2013	Senate	• Referred to Health Policy; Banking and Insurance; Appropriations Subcommittee on Health and Human Services; Appropriations -SJ 18
3/4/2014	Senate	• Introduced -SJ 18
5/2/2014	Senate	• Died in Health Policy

Related Bills

Bill Number	Subject	Filed By	Relationship	Last Action and Location	Track Bills
H 0167	Telemedicine	Jones	Similar	Last Action: 5/2/2014 H Died in Health Innovation Subcommittee Location: In committee/council (HIS)	
H 0751	Telehealth	Cummings,	Compare	Last Action: 5/2/2014 H Died in Health and	

(c1)	Jones		Human Services Committee Location: In committee/council (HHSC)
S 1646 (c1)	Telemedicine	Health Policy	Compare	Last Action: 5/2/2014 S Died in Appropriations Location: In committee/council (AP)

Bill Text

Version	Posted	Format
S 0070 Filed	8/9/2013 9:57 AM	Web Page | PDF

Committee Amendments

No Committee Amendments Available

Floor Amendments

No Floor Amendments Available

Bill Analyses

No Bill Analyses Available

Vote History - Committee

No Committee Vote History Available

Vote History - Floor

No Vote History Available

Citations - Statutes (0)

No Statute Citations Found for Senate Bill 0070

Citations - Constitution (0)

No Constitutional citations.

Citations - Chapter Law (0)

No Chapter Law citations.

Disclaimer: The information on this system is unverified. The journals or printed bills of the respective chambers should be consulted for

official purposes.

Copyright © 2000- 2015 State of Florida.

BUSINESS AND PROFESSIONS CODE §686.
PROVIDING SERVICES VIA TELEHEALTH

A health care practitioner licensed under Division 2 (commencing with Section 500) providing services via telehealth shall be subject to the requirements and definitions set forth in Section 2290.5, to the practice act relating to his or her licensed profession, and to the regulations adopted by a board pursuant to that practice act.

Added Stats 2012 ch 782 § 1 (AB 1733), effective January 1, 2013

BUSINESS AND PROFESSIONS CODE §2290.5.
TELEHEALTH; PATIENT CONSENT; HOSPITAL PRIVILEGES AND APPROVAL OF CREDENTIALS FOR PROVIDERS OF TELEHEALTH SERVICES

(a) For purposes of this division, the following definitions shall apply:

(1) "Asynchronous store and forward" means the transmission of a patient's medical information from an originating site to the health care provider at a distant site without the presence of the patient.

(2) "Distant site" means a site where a health care provider who provides health care services is located while providing these services via a telecommunications system.

(3) "Health care provider" means a person who is licensed under this division.

(4) "Originating site" means a site where a patient is located at the time health care services are provided via a telecommunications system or where the asynchronous store and forward service originates.

(5) "Synchronous interaction" means a real-time interaction between a patient and a health care provider located at a distant site.

(6) "Telehealth" means the mode of delivering health care services and public health via information and communication technologies to facilitate the diagnosis, consultation, treatment, education, care management, and self-management of a patient's health care while the patient is at the originating site and the health care provider is at a distant site. Telehealth facilitates patient self-management and caregiver support for patients and includes synchronous interactions and asynchronous store and forward transfers.

(b) Prior to the delivery of health care via telehealth, the health care provider initiating the use of telehealth shall inform the patient about the use of telehealth and obtain verbal or written consent from the patient for the use of telehealth as an acceptable mode of delivering health care services and public health. The consent shall be documented.

(c) Nothing in this section shall preclude a patient from receiving in-person health care delivery services during aspecified course of health care and treatment after agreeing to receive services via telehealth.

(d) The failure of a health care provider to comply with this section shall constitute unprofessional conduct. Section 2314 shall not apply to this section.

(e) This section shall not be construed to alter the scope of practice of any health care provider or authorize the delivery of health care services in a setting, or in a manner, not otherwise authorized by law.

(f) All laws regarding the confidentiality of health care information and a patient's rights to his or her medical information shall apply to telehealth interactions.

(g) This section shall not apply to a patient under the jurisdiction of the Department of Corrections and Rehabilitation or any other correctional facility.

(h) (1) Notwithstanding any other provision of law and for purposes of this section, the governing body of the hospital whose patients are receiving the telehealth services may grant privileges to, and verify and approve credentials for, providers of telehealth services based on

its medical staff recommendations that rely on information provided by the distant-site hospital or telehealth entity, as described in Sections 482.12, 482.22, and 485.616 of Title 42 of the Code of Federal Regulations.

(2) By enacting this subdivision, it is the intent of the Legislature to authorize a hospital to grant privileges to, and verify and approve credentials for, providers of telehealth services as described in paragraph (1).

(3) For the purposes of this subdivision, “telehealth” shall include “telemedicine” as the term is referenced in Sections 482.12, 482.22, and 485.616 of Title 42 of the Code of Federal Regulations.

Added Stats 2011 ch 547 § 4 (AB 415), effective January 1, 2012.
Amended by Stats. 2014, Ch. 404, Sec. 1. Effective September 18, 2014.

HEALTH AND SAFETY CODE §1367.
REQUIREMENTS FOR HEALTH CARE SERVICE PLANS

A health care service plan and, if applicable, a specialized health care service plan shall meet the following requirements:

(a) Facilities located in this state including, but not limited to, clinics, hospitals, and skilled nursing facilities to be utilized by the plan shall be licensed by the State Department of Public Health, where licensure is required by law. Facilities not located in this state shall conform to all licensing and other requirements of the jurisdiction in which they are located.

(b) Personnel employed by or under contract to the plan shall be licensed or certified by their respective board or agency, where licensure or certification is required by law.

(c) Equipment required to be licensed or registered by law shall be so licensed or registered, and the operating personnel for that equipment shall be licensed or certified as required by law.

(d) The plan shall furnish services in a manner providing continuity of care and ready referral of patients to other providers at times as may be appropriate consistent with good professional practice.

(e) (1) All services shall be readily available at reasonable times to each enrollee consistent with good professional practice. To the extent feasible, the plan shall make all services readily accessible to all enrollees consistent with Section 1367.03.

(2) To the extent that telehealth services are appropriately provided through telehealth, as defined in subdivision (a) of Section 2290.5 of the Business and Professions Code, these services shall be considered in determining compliance with Section 1300.67.2 of Title 28 of the California Code of Regulations.

(3) The plan shall make all services accessible and appropriate consistent with Section 1367.04.

(f) The plan shall employ and utilize allied health manpower for the furnishing of services to the extent permitted by law and consistent with good medical practice.

(g) The plan shall have the organizational and administrative capacity to provide services to subscribers and enrollees. The plan shall be able to demonstrate to the department that medical decisions are rendered by qualified medical providers, unhindered by fiscal and administrative management.

(h) (1) Contracts with subscribers and enrollees, including group contracts, and contracts with providers, and other persons furnishing services, equipment, or facilities to or in connection with the plan, shall be fair, reasonable, and consistent with the objectives of this chapter. All contracts with providers shall contain provisions requiring a fast, fair, and cost-effective dispute resolution mechanism under which providers may submit disputes to the plan, and requiring the plan to inform its providers upon contracting with the plan, or upon change to these provisions,

of the procedures for processing and resolving disputes, including the location and telephone number where information regarding disputes may be submitted.

(2) A health care service plan shall ensure that a dispute resolution mechanism is accessible to noncontracting providers for the purpose of resolving billing and claims disputes.

(3) On and after January 1, 2002, a health care service plan shall annually submit a report to the department regarding its dispute resolution mechanism. The report shall include information on the number of providers who utilized the dispute resolution mechanism and a summary of the disposition of those disputes.

(i) A health care service plan contract shall provide to subscribers and enrollees all of the basic health care services included in subdivision (b) of Section 1345, except that the director may, for good cause, by rule or order exempt a plan contract or any class of plan contracts from that requirement. The director shall by rule define the scope of each basic health care service that health care service plans are required to provide as a minimum for licensure under this chapter. Nothing in this chapter shall prohibit a health care service plan from charging subscribers or enrollees a copayment or a deductible for a basic health care service consistent with Section 1367.006 or 1367.007, provided that the copayments, deductibles, or other cost sharing are reported to the director and set forth to the subscriber or enrollee pursuant to the disclosure provisions of Section 1363. Nothing in this chapter shall prohibit a health care service plan from setting forth, by contract, limitations on maximum coverage of basic health care services, provided that the limitations are reported to, and held unobjectionable by, the director and set forth to the subscriber or enrollee pursuant to the disclosure provisions of Section 1363.

(j) A health care service plan shall not require registration under the federal Controlled Substances Act (21 U.S.C. Sec. 801 et seq.) as a condition for participation by an optometrist certified to use therapeutic pharmaceutical agents pursuant to Section 3041.3 of the Business and Professions Code. Nothing in this section shall be construed to permit the director to establish the rates charged subscribers and enrollees for contractual health care services. The director's enforcement of Article 3.1 (commencing with Section 1357) shall not be deemed to establish the rates charged subscribers and enrollees for contractual health care services. The obligation of the plan to comply with this chapter shall not be waived when the plan delegates any services that it is required to perform to its medical groups, independent practice associations, or other contracting entities.

Added Stats 1978 ch 285 § 4, effective June 23, 1978, operative July 1, 1978. Amended Stats 1992 ch 1128 § 7 (AB 1672), operative July 1, 1993; Stats 1995 ch 774 § 1 (AB 1840), ch 788 § 1 (SB 454); Stats 1996 ch 864 § 5 (SB 1665); Stats 1997 ch 17 § 60 (SB 947), ch 120 § 1 (SB 497) (ch 120 prevails); Stats 1999 ch 525 § 94 (AB 78), operative July 1, 2000; Stats 2000 ch 825 § 2 (SB 1177), ch 827 § 2 (AB 1455). Amended Stats 2002 ch 797 § 3 (AB 2179); Stats 2003 ch 713 § 1 (SB 853), effective January 1, 2004.
Amended by Stats. 2013, Ch. 316, Sec. 2. Effective January 1, 2014

CALIFORNIA CODE OF REGULATIONS § 1300.67.2.
ACCESSIBILITY OF SERVICES

Within each service area of a plan, basic health care services and specialized health care services shall be readily available and accessible to each of the plan's enrollees;

(a) The location of facilities providing the primary health care services of the plan shall be within reasonable proximity of the business or personal residences of enrollees, and so located as to not result in unreasonable barriers to accessibility.

(b) Hours of operation and provision for after-hour services shall be reasonable;

(c) Emergency health care services shall be available and accessible within the service area twenty-four hours a day, seven days a week;

(d) The ratio of enrollees to staff, including health professionals, administrative and other supporting staff, directly or through referrals, shall be such as to reasonably assure that all services offered by the plan will be accessible to enrollees on an appropriate basis without delays detrimental to the health of the enrollees. There shall be at least one full-time equivalent physician to each one thousand two hundred (1,200) enrollees and there shall be approximately one full-time equivalent primary care physician for each two thousand (2,000) enrollees, or an alternative mechanism shall be provided by the plan to demonstrate an adequate ratio of physicians to enrollees;

(e) A plan shall provide accessibility to medically required specialists who are certified or eligible for certification by the appropriate specialty board, through staffing, contracting, or referral;

(f) Each health care service plan shall have a documented system for monitoring and evaluating accessibility of care, including a system for addressing problems that develop, which shall include, but is not limited to, waiting time and appointments;

(g) A section of the health education program shall be designated to inform enrollees regarding accessibility of service in accordance with the needs of such enrollees for such information regarding that plan or area.

Subject to subsections (a) and (b) of this section, a plan may rely on the standards of accessibility set forth in Item H of Section 1300.51 and in Section 1300.67.2.

CALIFORNIA STATE BOARD OF OPTOMETRY

Memo

2450 Del Paso Road, Suite 105
Sacramento, CA 95834
(916) 575-7170, (916) 575-7292 Fax
www.optometry.ca.gov

To: Board Members **Date:** November 20, 2015

From: Jessica Sieferman
Executive Officer **Telephone:** (916) 575-7170

Subject: **Agenda Item 9 – Discussion and Possible Action Regarding Legislative Proposal Setting Enforcement Case Prioritization**

Background

During a previous Board meeting, it was requested that staff provide an overview of how enforcement cases are prioritized. Enforcement staff follows the Department of Consumer Affairs' (DCA) *Complaint Prioritization Guidelines for Health Care Agencies* (Attachment 1).

Legal counsel has suggested the Board discuss and consider setting its case prioritization in statute like some other DCA entities. The Medical Board of California, for example, sets their case priority for physicians and surgeons in Business and Professions Code Section 2220.05 (Attachment 2).

Action Requested:

Please review and discuss the attached documents and decide whether or not the Board should set enforcement case prioritization in statute.

Attachments:

1. DCA's *Complaint Prioritization Guidelines for Health Care Agencies*
2. Business and Professions Code Section 2220.05

STATE OF CALIFORNIA
dca
DEPARTMENT OF CONSUMER AFFAIRS

STATE AND CONSUMER SERVICES AGENCY • ARNOLD SCHWARZENEGGER, GOVERNOR

EXECUTIVE OFFICE
1625 N. Market Blvd., Suite S 308, Sacramento, CA 95834
P (916) 574-8200 F (916) 574-8613 |

MEMORANDUM

DATE: **August 31, 2009**

TO: **Executive Officers, Executive Directors, and Bureau Chiefs for DCA Health Care Agencies**

FROM: **BRIAN J. STIGER, Director**
Department of Consumer Affairs

SUBJECT: **Complaint Prioritization Guidelines for Heath Care Agencies**

The boards, bureaus and commissions in the department exist to protect the public health, safety, and welfare of the people of California. One way to protect consumers is to enhance enforcement processes through the use of guidelines for prioritizing complaints.

I encourage each health care agency to consider using the complaint prioritization guidelines that follow in the table below. Each category of complaint is given a priority of "Urgent" (requiring the most immediate resources), "High" (the next highest priority) or "Routine" (handled in the ordinary course of business). The department recognizes that each agency may have complaint categories unique to its subject area.

As complaints are received, each one should be immediately evaluated by someone in the agency with the knowledge of the complaint priorities so that the appropriate resources and attention can be directed toward that case. The table below is a guideline - depending on the facts, a different level of priority may be warranted. For example, a complaint based on a report from a health care practitioner data bank (normally routine) may be re-prioritized based on the nature of the underlying acts.

Agencies should continue to review complaints warranting urgent or high attention to determine whether to seek an Interim Suspension Order, a Penal Code section 23 request or other interim action as described in Deputy Director for Legal Affairs Doreathea Johnson's memorandum dated December 15, 2008.

Priority Level	Complaint Category
Urgent (Highest Priority)	(In general, any act resulting in death or serious injury) U1: Gross negligence, incompetence or repeated negligent acts that involve death or serious bodily injury U2: Drug or alcohol abuse by the licensee resulting in death or serious bodily injury U3: Repeated acts of clearly excessive prescribing, furnishing or administering of controlled substances, or repeated acts of prescribing w/o a good faith exam U4: Sexual misconduct with patient during course of treatment or examination U5: Practicing while under the influence of drugs or alcohol Physical or mental abuse with injury Unlicensed activity alleged to have resulted in patient injuries Aiding and abetting unlicensed activity alleged to have resulted in patient injuries Arrests or convictions substantially related to the area of practice (Note: may be re-categorized based on the nature of the underlying acts) Impairments (mental, physical or as a result of alcohol or drug abuse) Theft of prescription drugs Furnishing prescription drugs without a prescription *Note: Categories U1-U5 are mandatory priorities for the Medical Board (BPC s. 2220.05)*
High	Negligence or incompetence without serious bodily injury Physical or mental abuse (without injury) Diversion drop outs 805 Health Facility reports Complaints about licensees on probation (whether or not injury) Prescribing drugs without a "good faith" exam (where authority to prescribe exists) Prescribing or dispensing drugs without authority Multiple complaints of the same allegation Complaints with multiple prior complaints Unlicensed activities (with no apparent harm)

	Aiding and abetting unlicensed activity (with no apparent harm)
	Exam subversion (where exam may be compromised)
	When evidence will likely be destroyed or unavailable

Routine	False/misleading advertising
	Patient abandonment
	Fraud
	Failure to release medical records
	Record keeping violations
	Applicant misconduct
	National Practitioner Data Bank reports
	Workers Compensation Complaints
	Non-jurisdictional complaints (fee disputes, billing)
	Exam subversion (exam not compromised)
	Continuing Education
	Breach of confidentiality

cc: Patricia Harris, Acting Chief Deputy Director
Doreathea Johnson, Deputy Director for Legal Affairs

Business and Professions Code Section 2220.05

(a) In order to ensure that its resources are maximized for the protection of the public, the Medical Board of California shall prioritize its investigative and prosecutorial resources to ensure that physicians and surgeons representing the greatest threat of harm are identified and disciplined expeditiously. Cases involving any of the following allegations shall be handled on a priority basis, as follows, with the highest priority being given to cases in the first paragraph:
(1) Gross negligence, incompetence, or repeated negligent acts that involve death or serious bodily injury to one or more patients, such that the physician and surgeon represents a danger to the public.
(2) Drug or alcohol abuse by a physician and surgeon involving death or serious bodily injury to a patient.
(3) Repeated acts of clearly excessive prescribing, furnishing, or administering of controlled substances, or repeated acts of prescribing, dispensing, or furnishing of controlled substances without a good faith prior examination of the patient and medical reason therefor. However, in no event shall a physician and surgeon prescribing, furnishing, or administering controlled substances for intractable pain consistent with lawful prescribing, including, but not limited to, Sections 725, 2241.5, and 2241.6 of this code and Sections 11159.2 and 124961 of the Health and Safety Code, be prosecuted for excessive prescribing and prompt review of the applicability of these provisions shall be made in any complaint that may implicate these provisions.
(4) Sexual misconduct with one or more patients during a course of treatment or an examination.
(5) Practicing medicine while under the influence of drugs or alcohol.
(b) The board may by regulation prioritize cases involving an allegation of conduct that is not described in subdivision (a). Those cases prioritized by regulation shall not be assigned a priority equal to or higher than the priorities established in subdivision (a).
(c) The Medical Board of California shall indicate in its annual report mandated by Section 2312 the number of temporary restraining orders, interim suspension orders, and disciplinary actions that are taken in each priority category specified in subdivisions (a) and (b).
(Added by Stats. 2002, Ch. 1085, Sec. 17. Effective January 1, 2003.)

CALIFORNIA STATE BOARD OF OPTOMETRY

Memo

2450 Del Paso Road, Suite 105
Sacramento, CA 95834
(916) 575-7170, (916) 575-7292 Fax
www.optometry.ca.gov

To: Board Members **Date:** November 20, 2015

From: Jessica Sieferman
Executive Officer **Telephone:** (916) 575-7184

Subject: **Agenda Item 10 – Update on the Supreme Court Decision Regarding the North Carolina Board of Dental Examiners v. Federal Trade Commission**

Kurt Heppler, Supervising Attorney, will provide the Board an update on the Supreme Court Decision Regarding the North Carolina Board of Dental Examiners v. Federal Trade Commission.

Please review the attached related documents.

Attachments:

1. Supreme Court Opinion
2. Legislative Counsel Opinion
3. Attorney General Opinion
4. Federal Trade Commission Guidance
5. Center for Public Interest Law Handout

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS *v.* FEDERAL TRADE COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 13–534. Argued October 14, 2014—Decided February 25, 2015

North Carolina's Dental Practice Act (Act) provides that the North Carolina State Board of Dental Examiners (Board) is "the agency of the State for the regulation of the practice of dentistry." The Board's principal duty is to create, administer, and enforce a licensing system for dentists; and six of its eight members must be licensed, practicing dentists.

The Act does not specify that teeth whitening is "the practice of dentistry." Nonetheless, after dentists complained to the Board that nondentists were charging lower prices for such services than dentists did, the Board issued at least 47 official cease-and-desist letters to nondentist teeth whitening service providers and product manufacturers, often warning that the unlicensed practice of dentistry is a crime. This and other related Board actions led nondentists to cease offering teeth whitening services in North Carolina.

The Federal Trade Commission (FTC) filed an administrative complaint, alleging that the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition under the Federal Trade Commission Act. An Administrative Law Judge (ALJ) denied the Board's motion to dismiss on the ground of state-action immunity. The FTC sustained that ruling, reasoning that even if the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board must be actively supervised by the State to claim immunity, which it was not. After a hearing on the merits, the ALJ determined that the Board had unreasonably restrained trade in violation of antitrust law. The FTC again sustained the ALJ, and the Fourth Circuit affirmed the FTC in

all respects.

Held: Because a controlling number of the Board's decisionmakers are active market participants in the occupation the Board regulates, the Board can invoke state-action antitrust immunity only if it was subject to active supervision by the State, and here that requirement is not met. Pp. 5–18.

(a) Federal antitrust law is a central safeguard for the Nation's free market structures. However, requiring States to conform to the mandates of the Sherman Act at the expense of other values a State may deem fundamental would impose an impermissible burden on the States' power to regulate. Therefore, beginning with *Parker* v. *Brown*, 317 U. S. 341, this Court interpreted the antitrust laws to confer immunity on the anticompetitive conduct of States acting in their sovereign capacity. Pp. 5–6.

(b) The Board's actions are not cloaked with *Parker* immunity. A nonsovereign actor controlled by active market participants—such as the Board—enjoys *Parker* immunity only if "'the challenged restraint . . . [is] clearly articulated and affirmatively expressed as state policy,' and . . . 'the policy . . . [is] actively supervised by the State.'" *FTC* v. *Phoebe Putney Health System, Inc.*, 568 U. S. ___, ___ (quoting *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.,* 445 U. S. 97, 105). Here, the Board did not receive active supervision of its anticompetitive conduct. Pp. 6–17.

(1) An entity may not invoke *Parker* immunity unless its actions are an exercise of the State's sovereign power. See *Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U. S. 365, 374. Thus, where a State delegates control over a market to a nonsovereign actor the Sherman Act confers immunity only if the State accepts political accountability for the anticompetitive conduct it permits and controls. Limits on state-action immunity are most essential when a State seeks to delegate its regulatory power to active market participants, for dual allegiances are not always apparent to an actor and prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. Accordingly, *Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own. *Midcal*'s two-part test provides a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for entities purporting to act under state authority might diverge from the State's considered definition of the public good and engage in private self-dealing. The second *Midcal* requirement—active supervision—seeks to avoid this

harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity. Pp. 6–10.

(2) There are instances in which an actor can be excused from *Midcal*'s active supervision requirement. Municipalities, which are electorally accountable, have general regulatory powers, and have no private price-fixing agenda, are subject exclusively to the clear articulation requirement. See *Hallie* v. *Eau Claire*, 471 U. S. 34, 35. That *Hallie* excused municipalities from *Midcal*'s supervision rule for these reasons, however, all but confirms the rule's applicability to actors controlled by active market participants. Further, in light of *Omni*'s holding that an otherwise immune entity will not lose immunity based on ad hoc and *ex post* questioning of its motives for making particular decisions, 499 U. S., at 374, it is all the more necessary to ensure the conditions for granting immunity are met in the first place, see *FTC* v. *Ticor Title Ins. Co.*, 504 U. S. 621, 633, and *Phoebe Putney, supra,* at ___. The clear lesson of precedent is that *Midcal*'s active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private—controlled by active market participants. Pp. 10–12.

(3) The Board's argument that entities designated by the States as agencies are exempt from *Midcal*'s second requirement cannot be reconciled with the Court's repeated conclusion that the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade. State agencies controlled by active market participants pose the very risk of self-dealing *Midcal*'s supervision requirement was created to address. See *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 791. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals. While *Hallie* stated "it is likely that active state supervision would also not be required" for agencies, 471 U. S., at 46, n. 10, the entity there was more like prototypical state agencies, not specialized boards dominated by active market participants. The latter are similar to private trade associations vested by States with regulatory authority, which must satisfy *Midcal*'s active supervision standard. 445 U. S., at 105–106. The similarities between agencies controlled by active market participants and such associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See *Hallie*, *supra*, at 39. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. Thus,

the Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity. Pp. 12–14.

(4) The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. But this holding is not inconsistent with the idea that those who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State. Further, this case does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. Of course, States may provide for the defense and indemnification of agency members in the event of litigation, and they can also ensure *Parker* immunity is available by adopting clear policies to displace competition and providing active supervision. Arguments against the wisdom of applying the antitrust laws to professional regulation absent compliance with the prerequisites for invoking *Parker* immunity must be rejected, see *Patrick* v. *Burget*, 486 U. S. 94, 105–106, particularly in light of the risks licensing boards dominated by market participants may pose to the free market. Pp. 14–16.

(5) The Board does not contend in this Court that its anticompetitive conduct was actively supervised by the State or that it should receive *Parker* immunity on that basis. The Act delegates control over the practice of dentistry to the Board, but says nothing about teeth whitening. In acting to expel the dentists' competitors from the market, the Board relied on cease-and-desist letters threatening criminal liability, instead of other powers at its disposal that would have invoked oversight by a politically accountable official. Whether or not the Board exceeded its powers under North Carolina law, there is no evidence of any decision by the State to initiate or concur with the Board's actions against the nondentists. P. 17.

(c) Here, where there are no specific supervisory systems to be reviewed, it suffices to note that the inquiry regarding active supervision is flexible and context-dependent. The question is whether the State's review mechanisms provide "realistic assurance" that a nonsovereign actor's anticompetitive conduct "promotes state policy, rather than merely the party's individual interests." *Patrick*, 486 U. S., 100–101. The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, see *id.*, at 102–103; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see *ibid.*; and the "mere potential for state

supervision is not an adequate substitute for a decision by the State," *Ticor*, *supra*, at 638. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case. Pp. 17–18.

717 F. 3d 359, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 13–534

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, PETITIONER *v.* FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[February 25, 2015]

JUSTICE KENNEDY delivered the opinion of the Court.

This case arises from an antitrust challenge to the actions of a state regulatory board. A majority of the board's members are engaged in the active practice of the profession it regulates. The question is whether the board's actions are protected from Sherman Act regulation under the doctrine of state-action antitrust immunity, as defined and applied in this Court's decisions beginning with *Parker* v. *Brown*, 317 U. S. 341 (1943).

I

A

In its Dental Practice Act (Act), North Carolina has declared the practice of dentistry to be a matter of public concern requiring regulation. N. C. Gen. Stat. Ann. §90–22(a) (2013). Under the Act, the North Carolina State Board of Dental Examiners (Board) is "the agency of the State for the regulation of the practice of dentistry." §90–22(b).

The Board's principal duty is to create, administer, and enforce a licensing system for dentists. See §§90–29 to

90–41. To perform that function it has broad authority over licensees. See §90–41. The Board's authority with respect to unlicensed persons, however, is more restricted: like "any resident citizen," the Board may file suit to "perpetually enjoin any person from . . . unlawfully practicing dentistry." §90–40.1.

The Act provides that six of the Board's eight members must be licensed dentists engaged in the active practice of dentistry. §90–22. They are elected by other licensed dentists in North Carolina, who cast their ballots in elections conducted by the Board. *Ibid.* The seventh member must be a licensed and practicing dental hygienist, and he or she is elected by other licensed hygienists. *Ibid.* The final member is referred to by the Act as a "consumer" and is appointed by the Governor. *Ibid.* All members serve 3-year terms, and no person may serve more than two consecutive terms. *Ibid.* The Act does not create any mechanism for the removal of an elected member of the Board by a public official. See *ibid.*

Board members swear an oath of office, §138A–22(a), and the Board must comply with the State's Administrative Procedure Act, §150B–1 *et seq.*, Public Records Act, §132–1 *et seq.*, and open-meetings law, §143–318.9 *et seq.* The Board may promulgate rules and regulations governing the practice of dentistry within the State, provided those mandates are not inconsistent with the Act and are approved by the North Carolina Rules Review Commission, whose members are appointed by the state legislature. See §§90–48, 143B–30.1, 150B–21.9(a).

B

In the 1990's, dentists in North Carolina started whitening teeth. Many of those who did so, including 8 of the Board's 10 members during the period at issue in this case, earned substantial fees for that service. By 2003, nondentists arrived on the scene. They charged lower

prices for their services than the dentists did. Dentists soon began to complain to the Board about their new competitors. Few complaints warned of possible harm to consumers. Most expressed a principal concern with the low prices charged by nondentists.

Responding to these filings, the Board opened an investigation into nondentist teeth whitening. A dentist member was placed in charge of the inquiry. Neither the Board's hygienist member nor its consumer member participated in this undertaking. The Board's chief operations officer remarked that the Board was "going forth to do battle" with nondentists. App. to Pet. for Cert. 103a. The Board's concern did not result in a formal rule or regulation reviewable by the independent Rules Review Commission, even though the Act does not, by its terms, specify that teeth whitening is "the practice of dentistry."

Starting in 2006, the Board issued at least 47 cease-and-desist letters on its official letterhead to nondentist teeth whitening service providers and product manufacturers. Many of those letters directed the recipient to cease "all activity constituting the practice of dentistry"; warned that the unlicensed practice of dentistry is a crime; and strongly implied (or expressly stated) that teeth whitening constitutes "the practice of dentistry." App. 13, 15. In early 2007, the Board persuaded the North Carolina Board of Cosmetic Art Examiners to warn cosmetologists against providing teeth whitening services. Later that year, the Board sent letters to mall operators, stating that kiosk teeth whiteners were violating the Dental Practice Act and advising that the malls consider expelling violators from their premises.

These actions had the intended result. Nondentists ceased offering teeth whitening services in North Carolina.

C

In 2010, the Federal Trade Commission (FTC) filed an

administrative complaint charging the Board with violating §5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. §45. The FTC alleged that the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition. The Board moved to dismiss, alleging state-action immunity. An Administrative Law Judge (ALJ) denied the motion. On appeal, the FTC sustained the ALJ's ruling. It reasoned that, even assuming the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board is a "public/private hybrid" that must be actively supervised by the State to claim immunity. App. to Pet. for Cert. 49a. The FTC further concluded the Board could not make that showing.

Following other proceedings not relevant here, the ALJ conducted a hearing on the merits and determined the Board had unreasonably restrained trade in violation of antitrust law. On appeal, the FTC again sustained the ALJ. The FTC rejected the Board's public safety justification, noting, *inter alia*, "a wealth of evidence . . . suggesting that non-dentist provided teeth whitening is a safe cosmetic procedure." *Id.,* at 123a.

The FTC ordered the Board to stop sending the cease-and-desist letters or other communications that stated nondentists may not offer teeth whitening services and products. It further ordered the Board to issue notices to all earlier recipients of the Board's cease-and-desist orders advising them of the Board's proper sphere of authority and saying, among other options, that the notice recipients had a right to seek declaratory rulings in state court.

On petition for review, the Court of Appeals for the Fourth Circuit affirmed the FTC in all respects. 717 F. 3d 359, 370 (2013). This Court granted certiorari. 571 U. S. ___ (2014).

II

Federal antitrust law is a central safeguard for the Nation's free market structures. In this regard it is "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 610 (1972). The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market.

The Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §1 *et seq.*, serves to promote robust competition, which in turn empowers the States and provides their citizens with opportunities to pursue their own and the public's welfare. See *FTC* v. *Ticor Title Ins. Co.*, 504 U. S. 621, 632 (1992). The States, however, when acting in their respective realm, need not adhere in all contexts to a model of unfettered competition. While "the States regulate their economies in many ways not inconsistent with the antitrust laws," *id.,* at 635–636, in some spheres they impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives. If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States' power to regulate. See *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 133 (1978); see also Easterbrook, Antitrust and the Economics of Federalism, 26 J. Law & Econ. 23, 24 (1983).

For these reasons, the Court in *Parker* v. *Brown* interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity. See 317 U. S., at 350–351. That ruling

recognized Congress' purpose to respect the federal balance and to "embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution." *Community Communications Co.* v. *Boulder*, 455 U. S. 40, 53 (1982). Since 1943, the Court has reaffirmed the importance of *Parker*'s central holding. See, *e.g., Ticor*, *supra*, at 632–637; *Hoover* v. *Ronwin*, 466 U. S. 558, 568 (1984); *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 394–400 (1978).

III

In this case the Board argues its members were invested by North Carolina with the power of the State and that, as a result, the Board's actions are cloaked with *Parker* immunity. This argument fails, however. A nonsovereign actor controlled by active market participants—such as the Board—enjoys *Parker* immunity only if it satisfies two requirements: "first that 'the challenged restraint . . . be one clearly articulated and affirmatively expressed as state policy,' and second that 'the policy . . . be actively supervised by the State.'" *FTC* v. *Phoebe Putney Health System, Inc.*, 568 U. S. ___, ___ (2013) (slip op., at 7) (quoting *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.,* 445 U. S. 97, 105 (1980)). The parties have assumed that the clear articulation requirement is satisfied, and we do the same. While North Carolina prohibits the unauthorized practice of dentistry, however, its Act is silent on whether that broad prohibition covers teeth whitening. Here, the Board did not receive active supervision by the State when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to nondentist teeth whiteners.

A

Although state-action immunity exists to avoid conflicts

between state sovereignty and the Nation's commitment to a policy of robust competition, *Parker* immunity is not unbounded. "[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state action immunity is disfavored, much as are repeals by implication.'" *Phoebe Putney*, *supra*, at ___ (slip op., at 7) (quoting *Ticor*, *supra,* at 636).

An entity may not invoke *Parker* immunity unless the actions in question are an exercise of the State's sovereign power. See *Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U. S. 365, 374 (1991). State legislation and "decision[s] of a state supreme court, acting legislatively rather than judicially," will satisfy this standard, and "*ipso facto* are exempt from the operation of the antitrust laws" because they are an undoubted exercise of state sovereign authority. *Hoover*, *supra*, at 567–568.

But while the Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism, it does not always confer immunity where, as here, a State delegates control over a market to a nonsovereign actor. See *Parker*, *supra,* at 351 ("[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful"). For purposes of *Parker*, a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself. See *Hoover*, *supra*, at 567–568. State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity. See *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 791 (1975) ("The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members"). Immunity for state agencies, therefore, requires more than a mere facade of state involvement, for it is necessary in light of

Parker's rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control. See *Ticor*, 504 U. S., at 636.

Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability. See *Midcal*, *supra*, at 106 ("The national policy in favor of competition cannot be thwarted by casting [a] gauzy cloak of state involvement over what is essentially a private price-fixing arrangement"). Indeed, prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. See, *e.g., Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U. S. 492, 501 (1988); *Hoover*, *supra*, at 584 (Stevens, J., dissenting) ("The risk that private regulation of market entry, prices, or output may be designed to confer monopoly profits on members of an industry at the expense of the consuming public has been the central concern of . . . our antitrust jurisprudence"); see also Elhauge, The Scope of Antitrust Process, 104 Harv. L. Rev. 667, 672 (1991). So it follows that, under *Parker* and the Supremacy Clause, the States' greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act through unsupervised delegations to active market participants. See Garland, Antitrust and State Action: Economic Efficiency and the Political Process, 96 Yale L. J. 486, 500 (1986).

Parker immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own.

See *Goldfarb, supra*, at 790; see also 1A P. Areeda & H. Hovencamp, Antitrust Law ¶226, p. 180 (4th ed. 2013) (Areeda & Hovencamp). The question is not whether the challenged conduct is efficient, well-functioning, or wise. See *Ticor*, *supra*, at 634–635. Rather, it is "whether anticompetitive conduct engaged in by [nonsovereign actors] should be deemed state action and thus shielded from the antitrust laws." *Patrick* v. *Burget*, 486 U. S. 94, 100 (1988).

To answer this question, the Court applies the two-part test set forth in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, a case arising from California's delegation of price-fixing authority to wine merchants. Under *Midcal*, "[a] state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct." *Ticor*, *supra*, at 631 (citing *Midcal*, *supra*, at 105).

Midcal's clear articulation requirement is satisfied "where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Phoebe Putney*, 568 U. S., at ___ (slip op., at 11). The active supervision requirement demands, *inter alia*, "that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick*, *supra*, U. S., at 101.

The two requirements set forth in *Midcal* provide a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for a policy may

satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated. See *Ticor*, *supra*, at 636–637. Entities purporting to act under state authority might diverge from the State's considered definition of the public good. The resulting asymmetry between a state policy and its implementation can invite private self-dealing. The second *Midcal* requirement—active supervision—seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity.

Midcal's supervision rule "stems from the recognition that '[w]here a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.'" *Patrick*, *supra*, at 100. Concern about the private incentives of active market participants animates *Midcal*'s supervision mandate, which demands "realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick*, *supra*, at 101.

B

In determining whether anticompetitive policies and conduct are indeed the action of a State in its sovereign capacity, there are instances in which an actor can be excused from *Midcal*'s active supervision requirement. In *Hallie* v. *Eau Claire*, 471 U. S. 34, 45 (1985), the Court held municipalities are subject exclusively to *Midcal*'s "'clear articulation'" requirement. That rule, the Court observed, is consistent with the objective of ensuring that the policy at issue be one enacted by the State itself. *Hallie* explained that "[w]here the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the

expense of more overriding state goals." 471 U. S., at 47. *Hallie* further observed that municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market. See *id.,* at 45, n. 9. Critically, the municipality in *Hallie* exercised a wide range of governmental powers across different economic spheres, substantially reducing the risk that it would pursue private interests while regulating any single field. See *ibid.* That *Hallie* excused municipalities from *Midcal*'s supervision rule for these reasons all but confirms the rule's applicability to actors controlled by active market participants, who ordinarily have none of the features justifying the narrow exception *Hallie* identified. See 471 U. S., at 45.

Following *Goldfarb*, *Midcal*, and *Hallie*, which clarified the conditions under which *Parker* immunity attaches to the conduct of a nonsovereign actor, the Court in *Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U. S. 365, addressed whether an otherwise immune entity could lose immunity for conspiring with private parties. In *Omni*, an aspiring billboard merchant argued that the city of Columbia, South Carolina, had violated the Sherman Act—and forfeited its *Parker* immunity—by anticompetitively conspiring with an established local company in passing an ordinance restricting new billboard construction. 499 U. S., at 367–368. The Court disagreed, holding there is no "conspiracy exception" to *Parker*. *Omni, supra*, at 374.

Omni, like the cases before it, recognized the importance of drawing a line "relevant to the purposes of the Sherman Act and of *Parker*: prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest." 499 U. S., at 378. In the context of a municipal actor which, as in *Hallie*, exercised substantial governmental powers, *Omni* rejected a conspiracy exception for "corruption" as vague and unworkable, since "virtually all regulation benefits some

segments of the society and harms others" and may in that sense be seen as "'corrupt.'" 499 U. S., at 377. *Omni* also rejected subjective tests for corruption that would force a "deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid." *Ibid.* Thus, whereas the cases preceding it addressed the preconditions of *Parker* immunity and engaged in an objective, *ex ante* inquiry into nonsovereign actors' structure and incentives, *Omni* made clear that recipients of immunity will not lose it on the basis of ad hoc and *ex post* questioning of their motives for making particular decisions.

Omni's holding makes it all the more necessary to ensure the conditions for granting immunity are met in the first place. The Court's two state-action immunity cases decided after *Omni* reinforce this point. In *Ticor* the Court affirmed that *Midcal*'s limits on delegation must ensure that "[a]ctual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law." 504 U. S., at 633. And in *Phoebe Putney* the Court observed that *Midcal*'s active supervision requirement, in particular, is an essential condition of state-action immunity when a nonsovereign actor has "an incentive to pursue [its] own self-interest under the guise of implementing state policies." 568 U. S., at ___ (slip op., at 8) (quoting *Hallie*, *supra*, at 46–47). The lesson is clear: *Midcal*'s active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private—controlled by active market participants.

C

The Board argues entities designated by the States as agencies are exempt from *Midcal*'s second requirement. That premise, however, cannot be reconciled with the Court's repeated conclusion that the need for supervision

turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade.

State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal*'s supervision requirement was created to address. See Areeda & Hovencamp ¶227, at 226. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals. See *Patrick*, 486 U. S., at 100–101.

The Court applied this reasoning to a state agency in *Goldfarb*. There the Court denied immunity to a state agency (the Virginia State Bar) controlled by market participants (lawyers) because the agency had "joined in what is essentially a private anticompetitive activity" for "the benefit of its members." 421 U. S., at 791, 792. This emphasis on the Bar's private interests explains why *Goldfarb*, though it predates *Midcal*, considered the lack of supervision by the Virginia Supreme Court to be a principal reason for denying immunity. See 421 U. S., at 791; see also *Hoover*, 466 U. S., at 569 (emphasizing lack of active supervision in *Goldfarb*); *Bates* v. *State Bar of Ariz.*, 433 U. S. 350, 361–362 (1977) (granting the Arizona Bar state-action immunity partly because its "rules are subject to pointed re-examination by the policymaker").

While *Hallie* stated "it is likely that active state supervision would also not be required" for agencies, 471 U. S., at 46, n. 10, the entity there, as was later the case in *Omni*, was an electorally accountable municipality with general regulatory powers and no private price-fixing agenda. In that and other respects the municipality was more like prototypical state agencies, not specialized boards dominated by active market participants. In important regards, agencies controlled by market partici-

pants are more similar to private trade associations vested by States with regulatory authority than to the agencies *Hallie* considered. And as the Court observed three years after *Hallie*, "[t]here is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm." *Allied Tube*, 486 U. S., at 500. For that reason, those associations must satisfy *Midcal*'s active supervision standard. See *Midcal*, 445 U. S., at 105–106.

The similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See *Hallie*, *supra*, at 39 (rejecting "purely formalistic" analysis). *Parker* immunity does not derive from nomenclature alone. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. See Areeda & Hovencamp ¶227, at 226. The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity.

D

The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. If this were so—and, for reasons to be noted, it need not be so—there would be some cause for concern. The States have a sovereign interest in structuring their governments, see *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991), and may conclude there are substantial benefits to staffing their

agencies with experts in complex and technical subjects, see *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U. S. 48, 64 (1985). There is, moreover, a long tradition of citizens esteemed by their professional colleagues devoting time, energy, and talent to enhancing the dignity of their calling.

Adherence to the idea that those who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State reaches back at least to the Hippocratic Oath. See generally S. Miles, The Hippocratic Oath and the Ethics of Medicine (2004). In the United States, there is a strong tradition of professional self-regulation, particularly with respect to the development of ethical rules. See generally R. Rotunda & J. Dzienkowski, Legal Ethics: The Lawyer's Deskbook on Professional Responsibility (2014); R. Baker, Before Bioethics: A History of American Medical Ethics From the Colonial Period to the Bioethics Revolution (2013). Dentists are no exception. The American Dental Association, for example, in an exercise of "the privilege and obligation of self-government," has "call[ed] upon dentists to follow high ethical standards," including "honesty, compassion, kindness, integrity, fairness and charity." American Dental Association, Principles of Ethics and Code of Professional Conduct 3–4 (2012). State laws and institutions are sustained by this tradition when they draw upon the expertise and commitment of professionals.

Today's holding is not inconsistent with that idea. The Board argues, however, that the potential for money damages will discourage members of regulated occupations from participating in state government. Cf. *Filarsky* v. *Delia*, 566 U. S. ___, ___ (2012) (slip op., at 12) (warning in the context of civil rights suits that the "the most talented candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts"). But this case, which does not

present a claim for money damages, does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. See *Goldfarb*, 421 U. S., at 792, n. 22; see also Brief for Respondent 56. And, of course, the States may provide for the defense and indemnification of agency members in the event of litigation.

States, furthermore, can ensure *Parker* immunity is available to agencies by adopting clear policies to displace competition; and, if agencies controlled by active market participants interpret or enforce those policies, the States may provide active supervision. Precedent confirms this principle. The Court has rejected the argument that it would be unwise to apply the antitrust laws to professional regulation absent compliance with the prerequisites for invoking *Parker* immunity:

> "[Respondents] contend that effective peer review is essential to the provision of quality medical care and that any threat of antitrust liability will prevent physicians from participating openly and actively in peer-review proceedings. This argument, however, essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch. To the extent that Congress has declined to exempt medical peer review from the reach of the antitrust laws, peer review is immune from antitrust scrutiny only if the State effectively has made this conduct its own." *Patrick*, 486 U. S. at 105–106 (footnote omitted).

The reasoning of *Patrick* v. *Burget* applies to this case with full force, particularly in light of the risks licensing boards dominated by market participants may pose to the free market. See generally Edlin & Haw, Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny? 162 U. Pa. L. Rev. 1093 (2014).

E

The Board does not contend in this Court that its anticompetitive conduct was actively supervised by the State or that it should receive *Parker* immunity on that basis.

By statute, North Carolina delegates control over the practice of dentistry to the Board. The Act, however, says nothing about teeth whitening, a practice that did not exist when it was passed. After receiving complaints from other dentists about the nondentists' cheaper services, the Board's dentist members—some of whom offered whitening services—acted to expel the dentists' competitors from the market. In so doing the Board relied upon cease-and-desist letters threatening criminal liability, rather than any of the powers at its disposal that would invoke oversight by a politically accountable official. With no active supervision by the State, North Carolina officials may well have been unaware that the Board had decided teeth whitening constitutes "the practice of dentistry" and sought to prohibit those who competed against dentists from participating in the teeth whitening market. Whether or not the Board exceeded its powers under North Carolina law, cf. *Omni*, 499 U. S., at 371–372, there is no evidence here of any decision by the State to initiate or concur with the Board's actions against the nondentists.

IV

The Board does not claim that the State exercised active, or indeed any, supervision over its conduct regarding nondentist teeth whiteners; and, as a result, no specific supervisory systems can be reviewed here. It suffices to note that the inquiry regarding active supervision is flexible and context-dependent. Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide "realistic assurance" that a nonsovereign actor's anticom-

petitive conduct "promotes state policy, rather than merely the party's individual interests." *Patrick*, *supra,* at 100–101; see also *Ticor*, 504 U. S., at 639–640.

The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it, see *Patrick*, 486 U. S., at 102–103; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see *ibid.*; and the "mere potential for state supervision is not an adequate substitute for a decision by the State," *Ticor*, *supra*, at 638. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case.

* * *

The Sherman Act protects competition while also respecting federalism. It does not authorize the States to abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies. If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked.

The judgment of the Court of Appeals for the Fourth Circuit is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 13–534

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, PETITIONER *v.* FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[February 25, 2015]

JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

The Court's decision in this case is based on a serious misunderstanding of the doctrine of state-action antitrust immunity that this Court recognized more than 60 years ago in *Parker* v. *Brown*, 317 U. S. 341 (1943). In *Parker*, the Court held that the Sherman Act does not prevent the States from continuing their age-old practice of enacting measures, such as licensing requirements, that are designed to protect the public health and welfare. *Id.*, at 352. The case now before us involves precisely this type of state regulation—North Carolina's laws governing the practice of dentistry, which are administered by the North Carolina Board of Dental Examiners (Board).

Today, however, the Court takes the unprecedented step of holding that *Parker* does not apply to the North Carolina Board because the Board is not structured in a way that merits a good-government seal of approval; that is, it is made up of practicing dentists who have a financial incentive to use the licensing laws to further the financial interests of the State's dentists. There is nothing new about the structure of the North Carolina Board. When the States first created medical and dental boards, well before the Sherman Act was enacted, they began to staff

them in this way.[1] Nor is there anything new about the suspicion that the North Carolina Board—in attempting to prevent persons other than dentists from performing teeth-whitening procedures—was serving the interests of dentists and not the public. Professional and occupational licensing requirements have often been used in such a way.[2] But that is not what *Parker* immunity is about. Indeed, the very state program involved in that case was unquestionably designed to benefit the regulated entities, California raisin growers.

The question before us is not whether such programs serve the public interest. The question, instead, is whether this case is controlled by *Parker*, and the answer to that question is clear. Under *Parker*, the Sherman Act (and the Federal Trade Commission Act, see *FTC* v. *Ticor Title Ins. Co.*, 504 U. S. 621, 635 (1992)) do not apply to state agencies; the North Carolina Board of Dental Examiners is a state agency; and that is the end of the matter. By straying from this simple path, the Court has not only distorted *Parker*; it has headed into a morass. Determining whether a state agency is structured in a way that militates against regulatory capture is no easy task, and there is reason to fear that today's decision will spawn confusion. The Court has veered off course, and therefore I cannot go along.

---

[1] S. White, History of Oral and Dental Science in America 197–214 (1876) (detailing earliest American regulations of the practice of dentistry).

[2] See, *e.g.*, R. Shrylock, Medical Licensing in America 29 (1967) (Shrylock) (detailing the deterioration of licensing regimes in the mid-19th century, in part out of concerns about restraints on trade); Gellhorn, The Abuse of Occupational Licensing, 44 U. Chi. L. Rev. 6 (1976); Shepard, Licensing Restrictions and the Cost of Dental Care, 21 J. Law & Econ. 187 (1978).

I

In order to understand the nature of *Parker* state-action immunity, it is helpful to recall the constitutional landscape in 1890 when the Sherman Act was enacted. At that time, this Court and Congress had an understanding of the scope of federal and state power that is very different from our understanding today. The States were understood to possess the exclusive authority to regulate "their purely internal affairs." *Leisy* v. *Hardin*, 135 U. S. 100, 122 (1890). In exercising their police power in this area, the States had long enacted measures, such as price controls and licensing requirements, that had the effect of restraining trade.[3]

The Sherman Act was enacted pursuant to Congress' power to regulate interstate commerce, and in passing the Act, Congress wanted to exercise that power "to the utmost extent." *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 558 (1944). But in 1890, the understanding of the commerce power was far more limited than it is today. See, *e.g., Kidd* v. *Pearson*, 128 U. S. 1, 17–18 (1888). As a result, the Act did not pose a threat to traditional state regulatory activity.

By 1943, when *Parker* was decided, however, the situation had changed dramatically. This Court had held that the commerce power permitted Congress to regulate even local activity if it "exerts a substantial economic effect on interstate commerce." *Wickard* v. *Filburn*, 317 U. S. 111, 125 (1942). This meant that Congress could regulate many of the matters that had once been thought to fall exclusively within the jurisdiction of the States. The new interpretation of the commerce power brought about an expansion of the reach of the Sherman Act. See *Hospital*

---

[3] See Handler, The Current Attack on the *Parker* v. *Brown* State Action Doctrine, 76 Colum. L. Rev. 1, 4–6 (1976) (collecting cases).

Building Co. v. *Trustees of Rex Hospital*, 425 U. S. 738, 743, n. 2 (1976) ("[D]ecisions by this Court have permitted the reach of the Sherman Act to expand along with expanding notions of congressional power"). And the expanded reach of the Sherman Act raised an important question. The Sherman Act does not expressly exempt States from its scope. Does that mean that the Act applies to the States and that it potentially outlaws many traditional state regulatory measures? The Court confronted that question in *Parker*.

In *Parker*, a raisin producer challenged the California Agricultural Prorate Act, an agricultural price support program. The California Act authorized the creation of an Agricultural Prorate Advisory Commission (Commission) to establish marketing plans for certain agricultural commodities within the State. 317 U. S., at 346–347. Raisins were among the regulated commodities, and so the Commission established a marketing program that governed many aspects of raisin sales, including the quality and quantity of raisins sold, the timing of sales, and the price at which raisins were sold. *Id.*, at 347–348. The *Parker* Court assumed that this program would have violated "the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons," and the Court also assumed that Congress could have prohibited a State from creating a program like California's if it had chosen to do so. *Id.*, at 350. Nevertheless, the Court concluded that the California program did not violate the Sherman Act because the Act did not circumscribe state regulatory power. *Id.*, at 351.

The Court's holding in *Parker* was not based on either the language of the Sherman Act or anything in the legislative history affirmatively showing that the Act was not meant to apply to the States. Instead, the Court reasoned that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Con-

gress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U. S., at 351. For the Congress that enacted the Sherman Act in 1890, it would have been a truly radical and almost certainly futile step to attempt to prevent the States from exercising their traditional regulatory authority, and the *Parker* Court refused to assume that the Act was meant to have such an effect.

When the basis for the *Parker* state-action doctrine is understood, the Court's error in this case is plain. In 1890, the regulation of the practice of medicine and dentistry was regarded as falling squarely within the States' sovereign police power. By that time, many States had established medical and dental boards, often staffed by doctors or dentists,[4] and had given those boards the authority to confer and revoke licenses.[5] This was quintessential police power legislation, and although state laws were often challenged during that era under the doctrine of substantive due process, the licensing of medical professionals easily survived such assaults. Just one year before the enactment of the Sherman Act, in *Dent* v. *West Virginia*, 129 U. S. 114, 128 (1889), this Court rejected such a challenge to a state law requiring all physicians to obtain a certificate from the state board of health attesting to their qualifications. And in *Hawker* v. *New York*, 170 U. S. 189, 192 (1898), the Court reiterated that a law

---

[4] Shrylock 54–55; D. Johnson and H. Chaudry, Medical Licensing and Discipline in America 23–24 (2012).

[5] In *Hawker* v. *New York,* 170 U. S. 189 (1898), the Court cited state laws authorizing such boards to refuse or revoke medical licenses. *Id.*, at 191–193, n. 1. See also *Douglas* v. *Noble*, 261 U. S. 165, 166 (1923) ("In 1893 the legislature of Washington provided that only licensed persons should practice dentistry" and "vested the authority to license in a board of examiners, consisting of five practicing dentists").

specifying the qualifications to practice medicine was clearly a proper exercise of the police power. Thus, the North Carolina statutes establishing and specifying the powers of the State Board of Dental Examiners represent precisely the kind of state regulation that the *Parker* exemption was meant to immunize.

II

As noted above, the only question in this case is whether the North Carolina Board of Dental Examiners is really a state agency, and the answer to that question is clearly yes.

- The North Carolina Legislature determined that the practice of dentistry "affect[s] the public health, safety and welfare" of North Carolina's citizens and that therefore the profession should be "subject to regulation and control in the public interest" in order to ensure "that only qualified persons be permitted to practice dentistry in the State." N. C. Gen. Stat. Ann. §90–22(a) (2013).
- To further that end, the legislature created the North Carolina State Board of Dental Examiners "as the agency of the State for the regulation of the practice of dentistry in th[e] State." §90–22(b).
- The legislature specified the membership of the Board. §90–22(c). It defined the "practice of dentistry," §90–29(b), and it set out standards for licensing practitioners, §90–30. The legislature also set out standards under which the Board can initiate disciplinary proceedings against licensees who engage in certain improper acts. §90–41(a).
- The legislature empowered the Board to "maintain an action in the name of the State of North Carolina to perpetually enjoin any person from . . . unlawfully practicing dentistry." §90–40.1(a). It authorized the Board to conduct investigations and to hire legal

counsel, and the legislature made any "notice or statement of charges against any licensee" a public record under state law. §§ 90–41(d)–(g).

- The legislature empowered the Board "to enact rules and regulations governing the practice of dentistry within the State," consistent with relevant statutes. §90–48. It has required that any such rules be included in the Board's annual report, which the Board must file with the North Carolina secretary of state, the state attorney general, and the legislature's Joint Regulatory Reform Committee. §93B–2. And if the Board fails to file the required report, state law demands that it be automatically suspended until it does so. *Ibid.*

As this regulatory regime demonstrates, North Carolina's Board of Dental Examiners is unmistakably a state agency created by the state legislature to serve a prescribed regulatory purpose and to do so using the State's power in cooperation with other arms of state government.

The Board is not a private or "nonsovereign" entity that the State of North Carolina has attempted to immunize from federal antitrust scrutiny. *Parker* made it clear that a State may not "'give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.'" *Ante,* at 7 (quoting *Parker*, 317 U. S., at 351). When the *Parker* Court disapproved of any such attempt, it cited *Northern Securities Co.* v. *United States*, 193 U. S. 197 (1904), to show what it had in mind. In that case, the Court held that a State's act of chartering a corporation did not shield the corporation's monopolizing activities from federal antitrust law. *Id.*, at 344–345. Nothing similar is involved here. North Carolina did not authorize a private entity to enter into an anticompetitive arrangement; rather, North Carolina *created a state agency* and gave that agency the power to regulate a particular subject affecting public health and

safety.

Nothing in *Parker* supports the type of inquiry that the Court now prescribes. The Court crafts a test under which state agencies that are "controlled by active market participants," *ante*, at 12, must demonstrate active state supervision in order to be immune from federal antitrust law. The Court thus treats these state agencies like private entities. But in *Parker*, the Court did not examine the structure of the California program to determine if it had been captured by private interests. If the Court had done so, the case would certainly have come out differently, because California conditioned its regulatory measures on the participation and approval of market actors in the relevant industry.

Establishing a prorate marketing plan under California's law first required the petition of at least 10 producers of the particular commodity. *Parker*, 317 U. S., at 346. If the Commission then agreed that a marketing plan was warranted, the Commission would "select a program committee *from among nominees chosen by the qualified producers*." *Ibid.* (emphasis added). That committee would then formulate the proration marketing program, which the Commission could modify or approve. But even after Commission approval, the program became law (and then, automatically) only if it gained the approval of 65 percent of the relevant producers, representing at least 51 percent of the acreage of the regulated crop. *Id.*, at 347. This scheme gave decisive power to market participants. But despite these aspects of the California program, *Parker* held that California was acting as a "sovereign" when it "adopt[ed] and enforc[ed] the prorate program." *Id.*, at 352. This reasoning is irreconcilable with the Court's today.

III

The Court goes astray because it forgets the origin of the

Parker doctrine and is misdirected by subsequent cases that extended that doctrine (in certain circumstances) to private entities. The Court requires the North Carolina Board to satisfy the two-part test set out in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980), but the party claiming *Parker* immunity in that case was not a state agency but a private trade association. Such an entity is entitled to *Parker* immunity, *Midcal* held, only if the anticompetitive conduct at issue was both "'clearly articulated'" and "'actively supervised by the State itself.'" 445 U. S., at 105. Those requirements are needed where a State authorizes private parties to engage in anticompetitive conduct. They serve to identify those situations in which conduct *by private parties* can be regarded as the conduct of a State. But when the conduct in question is the conduct of a state agency, no such inquiry is required.

This case falls into the latter category, and therefore *Midcal* is inapposite. The North Carolina Board is not a private trade association. It is a state agency, created and empowered by the State to regulate an industry affecting public health. It would not exist if the State had not created it. And for purposes of *Parker*, its membership is irrelevant; what matters is that it is part of the government of the sovereign State of North Carolina.

Our decision in *Hallie* v. *Eau Claire*, 471 U. S. 34 (1985), which involved Sherman Act claims against a municipality, not a State agency, is similarly inapplicable. In *Hallie,* the plaintiff argued that the two-pronged *Midcal* test should be applied, but the Court disagreed. The Court acknowledged that municipalities "are not themselves sovereign." 471 U. S., at 38. But recognizing that a municipality is "an arm of the State," *id.*, at 45, the Court held that a municipality should be required to satisfy only the first prong of the *Midcal* test (requiring a clearly articulated state policy), 471 U. S., at 46. That municipalities

are not sovereign was critical to our analysis in *Hallie*, and thus that decision has no application in a case, like this one, involving a state agency.

Here, however, the Court not only disregards the North Carolina Board's status as a full-fledged state agency; it treats the Board less favorably than a municipality. This is puzzling. States are sovereign, *Northern Ins. Co. of N. Y.* v. *Chatham County*, 547 U. S. 189, 193 (2006), and California's sovereignty provided the foundation for the decision in *Parker*, *supra,* at 352. Municipalities are not sovereign. *Jinks* v. *Richland County*, 538 U. S. 456, 466 (2003). And for this reason, federal law often treats municipalities differently from States. Compare *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 71 (1989) ("[N]either a State nor its officials acting it their official capacities are 'persons' under [42 U. S. C.] §1983"), with *Monell* v. *City Dept. of Social Servs., New York*, 436 U. S. 658, 694 (1978) (municipalities liable under §1983 where "execution of a government's policy or custom . . . inflicts the injury").

The Court recognizes that municipalities, although not sovereign, nevertheless benefit from a more lenient standard for state-action immunity than private entities. Yet under the Court's approach, the North Carolina Board of Dental Examiners, a full-fledged state agency, is treated like a private actor and must demonstrate that the State actively supervises its actions.

The Court's analysis seems to be predicated on an assessment of the varying degrees to which a municipality and a state agency like the North Carolina Board are likely to be captured by private interests. But until today, *Parker* immunity was never conditioned on the proper use of state regulatory authority. On the contrary, in *Columbia* v. *Omni Outdoor Advertising, Inc.,* 499 U. S. 365 (1991), we refused to recognize an exception to *Parker* for cases in which it was shown that the defendants had

engaged in a conspiracy or corruption or had acted in a way that was not in the public interest. *Id.,* at 374. The Sherman Act, we said, is not an anticorruption or good-government statute. 499 U. S., at 398. We were unwilling in *Omni* to rewrite *Parker* in order to reach the allegedly abusive behavior of city officials. 499 U. S., at 374–379. But that is essentially what the Court has done here.

III

Not only is the Court's decision inconsistent with the underlying theory of *Parker*; it will create practical problems and is likely to have far-reaching effects on the States' regulation of professions. As previously noted, state medical and dental boards have been staffed by practitioners since they were first created, and there are obvious advantages to this approach. It is reasonable for States to decide that the individuals best able to regulate technical professions are practitioners with expertise in those very professions. Staffing the State Board of Dental Examiners with certified public accountants would certainly lessen the risk of actions that place the well-being of dentists over those of the public, but this would also compromise the State's interest in sensibly regulating a technical profession in which lay people have little expertise.

As a result of today's decision, States may find it necessary to change the composition of medical, dental, and other boards, but it is not clear what sort of changes are needed to satisfy the test that the Court now adopts. The Court faults the structure of the North Carolina Board because "active market participants" constitute "a controlling number of [the] decisionmakers," *ante,* at 14, but this test raises many questions.

What is a "controlling number"? Is it a majority? And if so, why does the Court eschew that term? Or does the Court mean to leave open the possibility that something less than a majority might suffice in particular circum-

stances? Suppose that active market participants constitute a voting bloc that is generally able to get its way? How about an obstructionist minority or an agency chair empowered to set the agenda or veto regulations?

Who is an "active market participant"? If Board members withdraw from practice during a short term of service but typically return to practice when their terms end, does that mean that they are not active market participants during their period of service?

What is the scope of the market in which a member may not participate while serving on the board? Must the market be relevant to the particular regulation being challenged or merely to the jurisdiction of the entire agency? Would the result in the present case be different if a majority of the Board members, though practicing dentists, did not provide teeth whitening services? What if they were orthodontists, periodontists, and the like? And how much participation makes a person "active" in the market?

The answers to these questions are not obvious, but the States must predict the answers in order to make informed choices about how to constitute their agencies.

I suppose that all this will be worked out by the lower courts and the Federal Trade Commission (FTC), but the Court's approach raises a more fundamental question, and that is why the Court's inquiry should stop with an examination of the structure of a state licensing board. When the Court asks whether market participants control the North Carolina Board, the Court in essence is asking whether this regulatory body has been captured by the entities that it is supposed to regulate. Regulatory capture can occur in many ways.[6] So why ask only whether

---

[6] See, *e.g.,* R. Noll, Reforming Regulation 40–43, 46 (1971); J. Wilson, The Politics of Regulation 357–394 (1980). Indeed, it has even been

the members of a board are active market participants? The answer may be that determining when regulatory capture has occurred is no simple task. That answer provides a reason for relieving courts from the obligation to make such determinations at all. It does not explain why it is appropriate for the Court to adopt the rather crude test for capture that constitutes the holding of today's decision.

IV

The Court has created a new standard for distinguishing between private and state actors for purposes of federal antitrust immunity. This new standard is not true to the *Parker* doctrine; it diminishes our traditional respect for federalism and state sovereignty; and it will be difficult to apply. I therefore respectfully dissent.

---

charged that the FTC, which brought this case, has been captured by entities over which it has jurisdiction. See E. Cox, "The Nader Report" on the Federal Trade Commission vii–xiv (1969); Posner, Federal Trade Commission, Chi. L. Rev. 47, 82–84 (1969).

LEGISLATIVE COUNSEL
Diane F. Boyer-Vine

CHIEF DEPUTY
Aaron Silva

PRINCIPAL DEPUTIES
Joe Ayala
Cindy Marten Cardullo
Amy Jean Haydt
Thomas J. Kerbs
Kirk S. Louie
Fred A. Messerer
Robert A. Pratt
Janice L. Thurston

Sergio E.Carpio
Stephen G. Dehner
Lisa C. Goldkuhl
William E. Moddelmog
Sheila R. Mohan
Lara Bierman Nelson
Kendra A. Nielsen
Gerardo Partida
Armin G. Yazdi

DEPUTIES
Jennifer Klein Baldwin
Jeanette Barnard
Jennifer M. Barry
Vanessa S. Bedford
Brian Bitzer
Rebecca Bitzer
Brian Bobb
Ann M. Burastero
William Chan
Elaine Chu
Paul Coaxum
Byron D. Damiani, Jr.
Brandon L. Darnell
Thomas Dombrowski
Sharon L. Everett
Krista M. Ferns
Nathaniel W. Grader
Mari C. Guzman
Jacob D. Heninger
Alex Hirsch
Stephanie Elaine Hoehn
Russell H. Holder
Cara L. Jenkins
Valerie R. Jones
Lori Ann Joseph
Dave Judson
Alyssa Kaplan
Christina M. Kenzie
Michael J. Kerins
Daniel J. R. Kessler
Deborah Kiley
Mariko Kotani
L. Erik Lange
Felicia A. Lee
Jason K. Lee
Kathryn W. Londenberg
Embert P. Madison, Jr.
Richard Mafrica
Anthony P. Márquez
Aimee Martin
Francisco Martin
Christine P. Maruccia
Amanda Mattson
Abigail Maurer
Natalie R. Moore
Yooli Choi O'Brien
Sue-Ann Peterson
Lisa M. Plummer
Robert D. Roth
Stacy Sacchao
Michelle L. Samore
Kevin Schmitt
Amy E. Schweitzer
Melissa M. Scolari
Stephanie Lynn Shirkey
Jessica L. Steele
Mark Franklin Terry
Josh Tosney
Daniel Vandekoolwyk
Joanna E. Varner
Joyce L. Wallach
Bradley N. Webb
Rachelle M. Weed
Genevieve Wong
Jenny C. Yun
Jack Zorman

LEGISLATIVE COUNSEL BUREAU

A TRADITION OF TRUSTED LEGAL SERVICE
TO THE CALIFORNIA LEGISLATURE

LEGISLATIVE COUNSEL BUREAU
925 L STREET
SACRAMENTO, CALIFORNIA 95814
TELEPHONE (916) 341-8000
FACSIMILE (916) 341-8020
INTERNET WWW.LEGISLATIVECOUNSEL.CA.GOV

July 15, 2015

Honorable Jerry Hill
Room 5035, State Capitol

ANTITRUST LIABILITY: STATE-ACTION IMMUNITY - #1509722

Dear Senator Hill:

The Sherman Act[1] prohibits anticompetitive conduct including monopolies and agreements in restraint of trade, but states are immune from Sherman Act liability in certain circumstances. In *North Carolina State Bd. of Dental Examiners v. F.T.C.* (2015) 574 U.S. __ [135 S.Ct. 1101, 1110] (hereafter *North Carolina*), the United States Supreme Court held that the State of North Carolina's dental board, which was controlled by active market participants, was not immune from liability under the Sherman Act with respect to its anticompetitive actions because the board was not actively supervised by the state. You have asked us to describe the effect of this holding on the legal standard used by courts to determine when a state agency or board will be granted immunity from liability under the Sherman Act.

1. The Sherman Act

The Sherman Act prohibits agreements in restraint of trade and monopolies, as provided in sections 1 and 2 of the act. Section 1 of the Sherman Act prohibits contracts, combinations, or conspiracies in restraint of trade or commerce, or, in other words, the anticompetitive conduct of a combination of firms. Section 2 of the Sherman Act prohibits monopolies, attempts to monopolize, and combinations or conspiracies to monopolize, or, in other words, the anticompetitive conduct of either a single firm or a combination of firms. Not every combination in restraint of trade is unlawful under the Sherman Act. (*People v. Santa Clara Val. Bowling Proprietors' Ass'n* (1965) 238 Cal.App.2d 225, 233.) Rather, the act proscribes only those restraints that are unreasonable. (*Ibid.*)

[1] 15 U.S.C. §§ 1-7; hereafter the Sherman Act. All further section references are to title 15 of the United States Code.

2. History of state-action immunity prior to the ruling in *North Carolina*

In order to determine the impact of the *North Carolina* decision on the legal standards for state-action immunity, we must first examine United States Supreme Court jurisprudence applying state-action immunity leading up to *North Carolina*.

In *Parker v. Brown* (1943) 317 U.S. 341, 350-351 (hereafter *Parker*), the Supreme Court first addressed the issue of whether the Sherman Act applies to states and concluded that "nothing in the language of the Sherman Act or in its history ... suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Parker* involved a suit that challenged a California statute as violating the Sherman Act. The statute in that case established a program for the marketing of agricultural commodities produced in the state by restricting competition among growers and maintaining prices. (*Id.* at p. 346.) The program restricted the trade of raisins by authorizing the establishment of a commission with the authority to approve a petition of raisin producers for the establishment of a prorate marketing plan for raisins. (*Ibid.*) If the commission approved the program and 65 percent of specified raisin producers approved the program, then the program was instituted. (*Id.* at pp. 346-347.) In concluding that the Sherman Act did not prohibit the California program, the court held that state actions are immune from liability under the Sherman Act. (*Id.* at p. 352.) The court reasoned that the California program constituted state action because of the following:

> "It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, *it is the state, acting through the Commission, which adopts the program* and which enforces it with penal sanctions, *in the execution of a governmental policy*. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application." (*Ibid.*; emphasis added.)

Although the court held that the California program was entitled to state-action immunity, the court limited the application of state-action immunity by cautioning that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." (*Id.* at p. 351.)

Thus, the holding in *Parker* established that a state entity is immune from Sherman Act liability where it is executing a governmental policy. Following *Parker*, the United States Supreme Court decided a series of cases that developed the application of state-action immunity by examining the nature and extent of state involvement necessary for an action to be considered state action.

In *Goldfarb v. Virginia State Bar* (1975) 421 U.S. 773, 775 (hereafter *Goldfarb*), the United States Supreme Court determined that a minimum fee schedule for lawyers published

by a county bar association and enforced by the Virginia State Bar violated the Sherman Act. In reaching this conclusion, the court ruled that the anticompetitive activity of establishing a minimum fee schedule was not state action because "it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities." (*Id.* at p. 790.) Furthermore, the court stated as follows:

> "The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. [Citation.] The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act. [Citation.]" (*Id.* at pp. 791-792; fns. omitted.)

Thus, the holding in *Goldfarb* clarified that actions by a purported state agency are, nevertheless, subject to the prohibitions of the Sherman Act where those actions in essence constitute private anticompetitive activity.

However, in *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 362-363 (hereafter *Bates*), the United States Supreme Court held that the Arizona Supreme Court's imposition and enforcement of a disciplinary rule that restricted advertising did not violate the Sherman Act because the action qualified as exempt state action under *Parker, supra*. The court reached this conclusion after finding that the "disciplinary rules reflect a clear articulation of the State's policy with regard to professional behavior. Moreover, as the instant case shows, the rules are subject to pointed re-examination by the policymaker the Arizona Supreme Court in enforcement proceedings." (*Bates, supra*, at p. 362.) The court deemed "it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active." (*Ibid.*) Thus, *Bates* clarified that it is relevant to a grant of state-action immunity whether the anticompetitive actions represent a clear articulation of the state's policy and are subject to a pointed re-examination by the state Supreme Court.

In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.* (1980) 445 U.S. 97, 99 (hereafter *Midcal*), the United States Supreme Court examined a California statute that required all wine producers, wholesalers, and rectifiers to file fair trade contracts or price schedules with the state, and prohibited wine merchants from selling wine to a retailer at a price other than a price set in such an effective price schedule or fair trade contract. Under the statute, California had no direct control over, and did not review the reasonableness of, the prices set by wine dealers. (*Id.* at p. 100.) In determining whether the state's involvement in the above program was sufficient to establish antitrust immunity under *Parker, supra*, the court examined its preceding decisions and held that two standards must be met for state-action immunity to apply: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." (*Midcal, supra*, at p. 105, citing *City of Lafayette, La. v. Louisiana Power & Light Co.* (1978) 435 U.S. 389, 410 (hereafter *City of Lafayette*).) Ultimately, the court in *Midcal* found that the California program failed to meet the second requirement for state-action immunity because the state "neither establishes prices nor reviews the

reasonableness of the price schedule; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program. [Fn. omitted.]" (*Midcal, supra,* at pp. 105-106.) In sum, the court in *Midcal* expressly imposed two requirements for state-action immunity to apply: (1) a clearly articulated and affirmatively expressed state policy, and (2) active supervision of that policy by the state.

Subsequently, in *Hoover v. Ronwin* (1984) 466 U.S. 558 (hereafter *Hoover*), the United States Supreme Court examined whether state-action immunity applied to a committee appointed by the Arizona Supreme Court to administer the state bar examination. The court reiterated *Midcal's* two-part test and stated that when "the conduct at issue is in fact that of the state legislature or supreme court, we need not address the issues of 'clear articulation' and 'active supervision.'" (*Hoover, supra,* at p. 569.) However, the court articulated that when the conduct is that of a "nonsovereign state representative," it must be pursuant to a "'clearly articulated and affirmatively expressed state policy' to replace competition with regulation," and the degree of state supervision is also "relevant to the inquiry." (*Ibid.*) Applying these standards, the court held that the actions of the committee were entitled to state-action immunity because the Arizona Supreme Court "retained strict supervisory powers and ultimate full authority over [the committee's] actions." (*Id.* at p. 572.) In the court's view, the Arizona Supreme Court retained sufficient supervision and authority over the committee by specifying the subjects to be tested on the bar exam and the general qualifications required for bar applicants, approving the committee's grading formula, and, most significantly, making the final decision to grant or deny admission to the bar and providing individualized review of bar examinations when requested. (*Id.* at pp. 572-573.) In sum, *Hoover* confirmed that a "nonsovereign state representative" is entitled to state-action immunity when its actions meet *Midcal's* clear articulation requirement and emphasized that the degree of state supervision is also "relevant to the inquiry."

The court in *Town of Hallie v. City of Eau Claire* (1985) 471 U.S. 34, 44-46 (hereafter *Town of Hallie*) addressed the application of the state immunity doctrine with respect to municipalities. Distinguishing municipal actors from state actors, the court applied only the first *Midcal* requirement. Thus, the court held that municipalities are immune from Sherman Act liability when acting pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, but need not show active state supervision to maintain their state-action exemption. (*Town of Hallie, supra,* at pp. 40 & 46.) In deciding to apply only the first *Midcal* requirement, the court distinguished municipalities from both the state and private parties, explaining that municipalities "are not beyond the reach of antitrust laws by virtue of their status because they are not themselves sovereign." (*Town of Hallie, supra,* at p. 38.) In making this distinction, the court emphasized that municipalities differ from private parties because there is a real danger that private parties will act to further their own interests over the interests of the state. The court reasoned that with municipalities there is "little or no danger" of this occurring. (*Id.* at p. 47.) In sum, the ruling in *Town of Hallie* stands for the proposition that, to be entitled to state-action immunity, municipalities need only meet the first *Midcal* requirement of acting pursuant to a clearly articulated and affirmatively expressed state policy to displace competition.

The United States Supreme Court examined whether state-action immunity applied to protect private physicians with respect to their anticompetitive conduct on a hospital's peer-review committee that the hospital was under a statutory obligation to establish and review in *Patrick v. Burget* (1988) 486 U.S. 94, 102 (hereafter *Patrick*). The court determined that both *Midcal* requirements must be satisfied for the anticompetitive actions of private parties to be deemed state action and shielded from antitrust laws. (*Patrick, supra,* at p. 100.) After finding that the actions of the peer review committees did not meet the active supervision prong, the court declined to consider the clear articulation requirement and held that state-action immunity did not apply. (*Ibid.*) In discussing active supervision, the court stated that the requirement "stems from the recognition that '[w]here a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.' [Citation.]" (*Ibid.*) Therefore, the court determined that there was a danger that the private physicians on a hospital peer review committee were furthering their own private interests because the state did not have the ability to review the committee's decisions regarding hospital privileges to determine whether those decisions comported with state regulatory policy and correct abuses. (*Id.* at pp. 101-102.) In other words, according to the court in *Patrick,* both *Midcal* requirements apply to the anticompetitive actions of private parties because of the real danger that private parties will act to further their own interests.

In *City of Columbia v. Omni Outdoor Advertising, Inc.* (1991) 499 U.S. 365, 368-369 (hereafter *City of Columbia*), a private billboard company argued that the city's billboard ordinances were the result of an anticompetitive conspiracy between city officials and a private local billboard company, whereby the city colluded with the local billboard company to pass local ordinances intended to restrict competition from out-of-town companies. The United States Supreme Court rejected the argument that a conspiracy exception exists for *Parker's* state-action exemption "'where politicians or political entities are involved as conspirators' with private actors in the restraint of trade." (*City of Columbia, supra,* at p. 374.) In reaching this conclusion, the court cautioned that "[t]his does not mean, of course, that the States may exempt *private* action from the scope of the Sherman Act; we in no way qualify the well-established principal that 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring their action is unlawful.'" (*Id.* at p. 379, citing *Parker, supra,* 317 U.S. at p. 351; emphasis in original.) Additionally, the court stated that "with the possible market participant exception, *any* action that qualifies as state action is '*ipso facto* ... exempt from the operation of the antitrust laws.'" (*Id.* at p. 379, citing *Hoover, supra,* 466 U.S. at p. 568; emphasis in original.) Therefore, in *City of Columbia* the Supreme Court left open a "possible" exception from state-action immunity in instances where the state is acting as a market participant.

Next, the United States Supreme Court in *F.T.C. v. Ticor Title Ins. Co.* (1992) 504 U.S. 621, 632 (hereafter *Ticor*) considered whether the mere existence of a state regulatory program for setting insurance rates, if staffed, funded, and empowered by law, satisfied the active supervision requirement in *Midcal.* The court concluded that the regulatory program did not meet the active supervision requirement because "The mere potential for state supervision is not an adequate substitute for a decision by the State." (*Ticor, supra,* at p. 638.)

The court explained that "[w]here prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme." (*Ibid.*)[2] Accordingly, the holding in *Ticor* emphasized that the mere potential for state supervision by itself is not adequate for a finding of active state supervision.

Recently, in *F.T.C. v. Phoebe Putney Health System, Inc.* (2013) 568 U.S. __ [133 S.Ct. 1003] (hereafter *Phoebe Putney*), the United States Supreme Court addressed the question of whether a "substate governmental entity" (*id.* at p. 1010) in the form of a hospital authority created by the state legislature to "exercise public and essential governmental functions" (*id.* at p. 1007) is entitled to state-action immunity for permitting acquisitions that substantially lessened competition.[3] The court granted certiorari to answer two questions: (1) whether the hospital authorities acted pursuant to a clearly articulated and affirmatively expressed state policy to displace competition; and (2) if so, whether state-action immunity was nonetheless inapplicable as a result of the hospital authority's "minimal participation" and "limited supervision" of the hospitals' acquisitions and operations. (*Id.* at p. 1009.) The court answered the first question in the negative finding that "[g]rants of general corporate power that allow substate governmental entities to participate in a competitive marketplace" do not clearly articulate or affirmatively express a state policy to displace competition. (*Id.* at p. 1012.) Because the court concluded that the hospital authorities did not act pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, the court did not reach the second question. (*Id.* at p. 1009.) Accordingly, the United States Supreme Court left open the question of whether *Midcal's* active supervision requirement applies to "substate governmental entities." Additionally, in a footnote, the court declined to answer an amicus curiae question of whether a "market participant" exception to state-action immunity applied because the argument was not raised in the lower courts. (*Phoebe Putney, supra,* at p. 1010, fn. 4.) However, the court recognized that *City of Columbia, supra,* left open the possibility of a market participant exception. (*Phoebe Putney, supra,* at p. 1010.) Therefore, the court in *Phoebe Putney* left open the question of whether a "substate governmental agency" is required to be actively supervised by the state to be entitled to state-action immunity, and recognized that there is a possible market participant exception to state-action immunity.

---

[2] In *Ticor*, the potential for state supervision was not enough because the rates became effective unless they were rejected by the state within a set time. Furthermore, the facts of that case revealed that, at most, the rate filings were checked for mathematical accuracy and some were unchecked altogether. (*Ibid.*)

[3] The hospital authorities had the power, among other things, to acquire and operate hospitals and other public health facilities. (*Id.* at p. 1008.)

2.1 Summary of pre-*North Carolina* case law

The United States Supreme Court jurisprudence leading up to *North Carolina, supra,* 135 S.Ct. 1101, set forth varying requirements for state-action immunity that largely depend upon the character of the entity engaging in the anticompetitive conduct. Under the pre-*North Carolina* jurisprudence, the application of state-action immunity depends upon whether the entity engaging in the anticompetitive activity is the state, a municipality, a private party, or an agency delegated authority by the state. A state acting in its sovereign capacity is automatically exempt from the operation of antitrust laws. (See *Parker, supra,* 317 U.S. at p. 352; *Hoover, supra,* 466 U.S. at pp. 567-568.)[4] A municipality is entitled to state-action immunity if it engages in anticompetitive activities pursuant to a clearly articulated and affirmatively expressed state policy to displace competition. (*Town of Hallie, supra,* 471 U.S. at p. 44.) A private party is entitled to state-action immunity only if its anticompetitive conduct meets both the clear articulation and active supervision prongs of the *Midcal* test. (*Patrick, supra,* 486 U.S. at p. 100.) Lastly, the pre-*North Carolina* jurisprudence established that an entity that has been delegated state powers, and thus constitutes a state agency for limited purposes, is not automatically entitled to state-action immunity with regard to its anticompetitive activities. (*Goldfarb, supra,* 421 U.S. at pp. 791-792.) However, that jurisprudence provided less defined standards for determining when such an entity is entitled to state-action immunity.

For instance, in *Hoover,* the United States Supreme Court stated that when the activity is that of a "nonsovereign state representative," such as a committee appointed by a state supreme court, the activity must be conducted pursuant to a clearly articulated state policy to displace competition and the degree of the state's supervision of the activity is also "relevant to the inquiry." (*Hoover, supra,* 466 U.S. at p. 569.) Whereas, in *Phoebe Putney,* the court left open the question of whether *Midcal's* active supervision requirement applies to "substate governmental entities," such as hospital authorities cloaked by the state legislature with governmental authority. (*Phoebe Putney, supra,* 133 S.Ct. at pp. 1009-1010.) Additionally, in *City of Columbia,* the court noted the possibility that a state acting as a market participant rather than a regulator may not be ipso facto exempt under the state-action doctrine, and *Phoebe Putney* also recognized the potential application of the market participant exception to state-action immunity. (*Id.* at p. 1010, fn. 4; *City of Columbia, supra,* 499 U.S. at p. 379.) However, prior to *North Carolina,* no United States Supreme Court case had actually applied a market participant exception to deny state-action immunity to a state agency that engages in anticompetitive conduct.[5]

---

[4] "[W]hen a state legislature adopts legislation, its actions constitute those of the State, [citation] and ipso facto are exempt from the operation of the antitrust laws." (*Hoover, supra,* at pp. 567-568.)

[5] In its discussion of states acting as market participants in *City of Columbia,* the United States Supreme Court referenced *Union Pacific Railroad Co. v. United States* (1941) 313 U.S. 450,

(continued...)

Thus, the classification of an entity will guide a court in determining which, if any, of *Midcal's* clear articulation and active supervision requirements must be satisfied to entitle the entity to state-action immunity. In this regard, the pre-*North Carolina* jurisprudence provides guidance concerning what is required to satisfy *Midcal's* clear articulation and active supervision requirements.

Regarding clear articulation, the United States Supreme Court has stated that, although compulsion is often the best evidence, "a state policy that expressly *permits*, but does not compel, anticompetitive conduct may be 'clearly articulated' within the meaning of *Midcal*." (*Southern Motor Carriers Rate Conference, Inc. v. United States* (1985) 471 U.S. 48, 61-62; emphasis in original; hereafter *Southern Motor*.) It is not necessary for the state to explicitly require the anticompetitive activity because it can be presumed that anticompetitive effects logically result from broad authority to regulate. (*Town of Hallie, supra*, 471 U.S. at p. 42.) As long as the state statutes are not neutral[6] and "[contemplate] the kind of action complained of," this is sufficient to satisfy the clear articulation requirement of the state-action test. (*Id.* at p. 44.) Therefore, the clear articulation requirement is satisfied "if suppression of competition is the 'foreseeable result' of what the statute authorizes." (*City of Columbia, supra*, 499 U.S. at p. 373.)[7]

(...continued)

where the court held Kansas City liable for certain anticompetitive activity that it engaged in in its capacity as an owner and operator of a wholesale produce market. (*City of Columbia, supra*, at p. 375.) However, other than this brief discussion in *City of Columbia*, there has been no further elaboration by the United States Supreme Court concerning the application of the market participant exception.

Prior to *North Carolina*, several federal circuit courts of appeal were split regarding the recognition of a market participant exception. Some federal circuit courts of appeal recognized a market participant exception (see *A.D. Bedell Wholesale Co. v. Philip Morris Inc.* (3rd Cir. 2001) 263 F.3d 239, 265, fn. 55; *VIBO Corp. v. Conway* (6th Cir. 2012) 669 F.3d 675, 687; and *Washington State Electrical Contractors Ass'n. v. Forrest* (9th Cir. 1991) 930 F.2d 736, 737), and some did not (see *SSC Corp. v. Town of Smithtown* (2nd Cir. 1995) 66 F.3d 502, 517; *Limeco v. Division of Lime of Mississippi Dept. of Agriculture & Commerce* (5th Cir. 1985) 778 F.2d 1086, 1087; and *Paragould Cablevision v. City of Paragould* (8th Cir. 1991) 930 F.2d 1310, 1312-1313).

[6] The United States Supreme Court has held that a neutral home rule amendment to a state constitution that provides a municipal government with general authority to govern local affairs does not constitute "clear articulation." (*Community Communications Co. v. Boulder* (1982) 455 U.S. 40, 51-52.)

[7] For example, in *City of Columbia*, the suppression of competition was a foreseeable result of a state statute that authorized municipalities to regulate the use of land and the construction of buildings and other structures within their boundaries. (*Id.* at. pp. 370 & 373.) However, in *Phoebe Putney*, the suppression of competition was not a foreseeable result of a neutral grant of general corporate powers to a substate governmental entity. (*Phoebe Putney, supra*, 133 S. Ct. at pp. 1011-1012.)

(continued...)

Regarding active supervision, this requirement stems from the recognition that "Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the government interests of the State." (*Town of Hallie, supra,* 471 U.S. at p. 47.) As such, "The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." (*Patrick, supra,* 486 U.S. at p. 101.) Further, potential state supervision does not constitute active state supervision. (*Ticor, supra,* 504 U.S. at p. 638.)

In sum, the first prong of the *Midcal* test for state-action immunity is met if suppression of competition is the foreseeable result of a state statute. And the second prong of the *Midcal* test for state-action immunity is met if state officials have and exercise power to review anticompetitive decisions and disapprove those that fail to accord with state policy. In other words, the state supervision must be active rather than a mere potential for supervision. However, the *North Carolina* decision described below further elucidated when and how the *Midcal* test would apply with regard to an entity to which the state has delegated regulatory authority.

3. The *North Carolina* decision

The United States Supreme Court in *North Carolina* specifically addressed the issue of whether a state dental board controlled by active market participants that engaged in anticompetitive conduct was entitled to state-action immunity from liability under the Sherman Act. In that case, the entity claiming state-action immunity was the North Carolina State Board of Dental Examiners (SBDE), which was established as "'the agency of the State for the regulation of the practice of dentistry'" whose "principal duty is to create, administer, and enforce a licensing system for dentists." (*North Carolina, supra,* 135 S.Ct. at p. 1107.) The SBDE's duties included the authority to file suit to enjoin the unlawful practice of dentistry and the SBDE was authorized to promulgate rules and regulations governing the practice of dentistry in the state, provided those mandates were not inconsistent with state law and were approved by the North Carolina Rules Review Commission, whose members are appointed by the state legislature. (*Id.* at p. 1108.) The SBDE was comprised of eight members, six of whom were required to be licensed dentists engaged in the active practice of dentistry and to be elected by other licensed dentists in North Carolina through an election conducted by the SBDE. (*Ibid.*)[8] There was no mechanism for the removal of an elected member of the SBDE by a public official, and the SBDE members were required to swear an oath of office and to comply with the state's Administrative Procedure Act and open meeting laws. (*Ibid.*)

(...continued)

[8] The other two SBDE members were a licensed and practicing dental hygienist elected by other licensed hygienists and a "consumer" appointed by the Governor. (*Ibid.*)

The anticompetitive activity at issue in *North Carolina* was the SBDE's issuance of cease-and-desist letters on its official letterhead to nondentist teeth whitening service providers and product manufacturers that directed the recipients to cease "all activity constituting the practice of dentistry." (*North Carolina, supra,* 135 S.Ct. at p. 1108.)[9] At the time, neither North Carolina's statutory definition of the practice of dentistry nor the SBDE's official rules and regulations defined the practice of dentistry as specifically including, or not including, teeth whitening. (*Id.* at p. 1116.)

The court in *North Carolina* held that the SBDE was a nonsovereign actor controlled by active market participants, and as such "enjoys *Parker* immunity only if it satisfies two requirements: 'first that the "challenged restraint ... be one clearly articulated and affirmatively expressed as state policy," and second that the "policy ... be actively supervised by the State."' [Citations.]" (*North Carolina, supra,* 135 S.Ct. at p. 1110.) The court and the parties assumed that the clear articulation requirement was satisfied, but the court concluded that "the Board did not receive active supervision by the State when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to nondentist teeth whiteners." (*Ibid.*)

The court explained that automatic state-action immunity does not apply when the state "delegates control over a market to a *non-sovereign actor,*" which is "one whose conduct does not automatically qualify as that of the sovereign State itself," and "[s]tate agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity." (*North Carolina, supra,* 135 S.Ct. at pp. 1110-1111; emphasis added.) According to the court, a limitation on state-action immunity is "most essential when the State seeks to delegate its regulatory power to active market participants." (*Id.* at p. 1111.) Therefore, the court determined that state-action immunity "requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own." (*Ibid.*)

In deciding to apply both *Midcal* requirements, the court acknowledged that *Town of Hallie, supra,* exempted municipalities from the active supervision requirement. (*North Carolina, supra,* 135 S.Ct. at p. 1112.) The court distinguished *Town of Hallie* by explaining that active market participants "ordinarily have none of the features justifying the narrow exception" for municipalities, which are electorally accountable and exercise "a wide range of governmental powers across different economic spheres, substantially reducing the risk that it would pursue private interests while regulating any single field." (*North Carolina, supra,* at pp. 1112-1113.) Having made this distinction, the court concluded that "a state board on which *a controlling number of decisionmakers* are active market participants in the occupation the

---

[9] At the time the SBDE issued the cease-and-desist letters, several of its dentist members "earned substantial fees" for performing teeth whitening services. (*Ibid.*)

board regulates must satisfy *Midcal's* active supervision requirement in order to invoke state-action antitrust immunity." (*Id.* at p. 1114; emphasis added.)[10]

In applying the active supervision requirement, the court found no evidence of any decision by the state to initiate or concur with the SBDE's actions against nondentists.[11] Instead, the court found that the SBDE relied upon cease-and-desist letters "rather than any powers at its disposal that would invoke oversight by a *politically accountable official.*" (*Ibid.*; emphasis added.) The court then went on to describe general standards for active supervision, but cautioned that any inquiry regarding active supervision is "flexible and context-dependent." (*Ibid.*) In this regard, the court described the standards for active supervision as follows:

> "Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide 'realistic assurance' that a nonsovereign actor's anticompetitive conduct 'promotes state policy, rather than merely the party's individual interests.' [Citations.] [¶] The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it [citation]; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy [citation]; and the 'mere potential for state supervision is not an adequate substitute for a decision by the State' [citation]. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case." (*Id.* at pp. 1116-1117.)

In summary, the court found that active supervision is a fact-specific inquiry that requires, at a minimum, review of an anticompetitive decision by a state supervisor who is not an active market participant and who has the power to veto or modify the anticompetitive decision, which requires an actual decision by the state, rather than the mere potential for a decision.

The dissent in *North Carolina* pointed out several ambiguities in the court's opinion and noted that "it is not clear what sort of changes are needed to satisfy the test that the Court now adopts." (*North Carolina, supra,* 135 S.Ct. at p. 1123 (dis. opn. of Alito, J.).) For

---

[10] Because the case did not present a claim for money damages, the court left open the question of whether under some circumstances state agency officials, including board members, may enjoy immunity from damages liability. However, the court provided that "the States may provide for the defense and indemnification of agency members in the event of litigation." (*Id.* at p. 1115.)

[11] Because the SBDE did not contend that its anticompetitive conduct was actively supervised by the state, there was no evidence to review and the court did not review any specific supervisory systems. (*North Carolina, supra,* 135 S.Ct. at p. 1116.)

example, the dissent questioned at what point active market participants constitute a "controlling number of [the] decisionmakers" of a state agency to invoke the active supervision requirement. (*Ibid.*) The dissent posited whether a controlling number is a majority, or if something less than a majority would suffice, such as where active market participants constitute a powerful voting bloc. (*Ibid.*) The dissent also questioned who constitutes an active market participant by postulating the following:

> "If Board members withdraw from practice during a short term of service but typically return to practice when their terms end, does that mean that they are not active market participants during their period of service?
>
> "What is the scope of the market in which a member may not participate while serving on the board? Must the market be relevant to the particular regulation being challenged or merely to the jurisdiction of the entire agency? Would the result in the present case be different if a majority of the Board members, though practicing dentists, did not provide teeth whitening services? What if they were orthodontists, periodontists, and the like? And how much participation makes a person 'active' in the market?" (*Ibid.*)

Ultimately, the dissent conceded that "The answers to these questions are not obvious, but the States must predict the answers in order to make informed choices about how to constitute their agencies." (*Ibid.*)

4. Legal standards for grant of state-action immunity

Based on the foregoing, it is our opinion that a court would apply the following legal standards to a claim for state-action immunity from the Sherman Act in light of the United States Supreme Court's decision in *North Carolina*.

4.1 State acting as sovereign

Actions of the state acting as sovereign, such as legislation or decisions of the state supreme court acting legislatively, *ipso facto* are exempt from the Sherman Act. (*North Carolina, supra*, 135 S.Ct. at p. 1110.)

4.2 Municipalities

Municipalities are entitled to state-action immunity if their anticompetitive conduct is pursuant to a clearly articulated and affirmatively expressed state policy to displace competition. (*City of Lafayette, supra*, 435 U.S. at pp. 410 & 413; *Town of Hallie, supra*, 471 U.S. at p. 44.)

4.3 Private parties

Private parties delegated authority by the state are entitled to state-action immunity only if their anticompetitive conduct is pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, and the policy is actively supervised by the State. (*Patrick, supra*, 486 U.S. at p. 100.)

4.4 State agencies not controlled by active market participants

Although *North Carolina* did not specifically address state agencies not controlled by active market participants, the court did state that "State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity." (*North Carolina, supra,* 135 S.Ct. at p. 1111.) As such, the anticompetitive actions of a state agency are not automatically entitled to state-action immunity, unless they result from procedures that suffice to make it the state's own action. (*Ibid.*) Whether those procedures include both of *Midcal's* clear articulation and active supervision requirements was not specifically addressed by the court in *North Carolina*; however, the court reiterated that only the first requirement applies to municipalities because they are electorally accountable and there is minimal risk of municipal officers pursuing private, nonpublic aims. (*North Carolina, supra,* 135 S.Ct. at pp. 1112-1113.) Therefore, it is our opinion that, like municipalities, state agencies not controlled by active market participants are entitled to state-action immunity if their anticompetitive actions satisfy only *Midcal's* clear articulation requirement, as long as their actions pose minimal risk of furthering private interests over those of the state.

4.5 State agencies controlled by active market participants

A state agency or board on which "a controlling number of decisionmakers are active market participants" in the occupation that the state agency regulates is entitled to state-action immunity if it acts pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, and is actively supervised by the state. (*North Carolina, supra,* 135 S.Ct. at p. 1114.) It is not clear what "a controlling number of decisionmakers" entails, but in our view, the more likely it is that the members will be able to control decisions of the agency or board, the more likely it is that a court will find them to constitute a "controlling number." For instance, a majority of the voting members would almost certainly be considered a controlling number, but a court could consider an influential voting bloc to also constitute a controlling number. (*Id.* at p. 1123.) Likewise, it is unclear what it means to be an "active market participant." (*Ibid.*) At the very least we think an active market participant would include a person currently licensed and practicing in the field being regulated by the state agency or board because of the greater likelihood that such a person will be influenced by private, rather than public, interests. Ultimately, we think a court would make such a determination on a contextual basis using a spectrum analysis. For example, at one end of the spectrum would be a person with no connection to the industry being regulated, and at the other end of the spectrum would be a person currently practicing in the precise industry being regulated. In our view, the closer a person's ties are to the industry being regulated, the greater the likelihood that the person will act pursuant to private rather than public interests, and the more likely a court would be to consider them an active market participant.

4.6 Clear articulation

A state policy to displace competition is clearly articulated when the displacement of competition is "the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly

endorsed the anticompetitive effects as consistent with its policy goals. [Citation.]" (*North Carolina, supra,* 135 S.Ct. at p. 1112.) Although "compulsion is often the best evidence that the State has a clearly articulated and affirmatively expressed policy to displace competition," it is not required. (*Southern Motor, supra,* 471 U.S. at p. 62.) As long as the state statute providing authorization is not neutral and "contemplate[s] the kind of action complained of," in our view, a court would find it sufficient to satisfy the clear articulation requirement of the state-action test. (*Town of Hallie, supra,* 471 U.S. at pp. 43-44.)

4.7 Active state supervision

Any inquiry regarding active state supervision is "flexible and context-dependent" and should focus on whether the state's "review mechanisms provide 'realistic assurance' that a nonsovereign actor's anticompetitive conduct 'promotes state policy, rather than merely the party's individual interests.' [Citations.]" (*North Carolina, supra,* 135 S.Ct. at p. 1116.) As such, we think a court would analyze the presence of active supervision on a spectrum such that the more the state supervision assures the promotion of state over private interests, the more likely a court would be to find sufficient active supervision for purposes of state-action immunity. However, it is our opinion that a court would require, at a minimum, that the three criteria specified in *North Carolina* be satisfied for a finding of active supervision: (1) the anticompetitive decision is reviewed by a state supervisor;[12] (2) the state supervisor has the actual power, rather than the mere potential, to veto or modify an anticompetitive decision; and (3) the state supervisor is not an active market participant. (*Id.* at pp. 1116-1117.)

5. Conclusion

Ultimately, the United States Supreme Court has a "settled policy of giving concrete meaning to the general language of the Sherman Act by a process of case-by-case adjudication of specific controversies." (*Cantor v. Detroit Edison Co.* (1976) 428 U.S. 579, 603; hereafter *Cantor.*)[13] Therefore, we cannot affirmatively provide every instance in which a

---

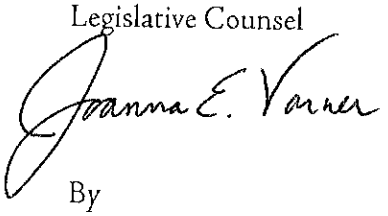
[12] In finding no evidence of active supervision, the court noted that SBDE's anticompetitive actions did not invoke oversight by a "politically accountable official." (*Ibid.*) Therefore, one could argue that the state supervisor should be politically accountable; however, the minimum requirements articulated by the court for active supervision do not specify this requirement. Accordingly, although perhaps not required, supervision by a politically accountable official may influence a court to view the state's supervision on the side of the spectrum that favors a grant of state-action immunity.

[13] In *Cantor,* the court rejected the application of "a simple rule than can easily be applied in any case in which a state regulatory agency approves a proposal and orders a regulated company to comply with it." (*Ibid.*)

court would grant state-action immunity. However, it is our opinion that, in light of the decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission* (2015) 574 U.S. __ [135 S.Ct. 1101], a court would use the legal standards described above to decide whether to grant state-action immunity from Sherman Act liability.

Very truly yours,

Diane F. Boyer-Vine
Legislative Counsel



By
Joanna E. Varner
Deputy Legislative Counsel

JEV:sjk

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

KAMALA D. HARRIS
Attorney General

OPINION	:	No. 15-402
of	:	September 10, 2015
KAMALA D. HARRIS Attorney General	:	
SUSAN DUNCAN LEE Deputy Attorney General	:	

THE HONORABLE JERRY HILL, MEMBER OF THE STATE SENATE, has requested an opinion on the following question:

What constitutes "active state supervision" of a state licensing board for purposes of the state action immunity doctrine in antitrust actions, and what measures might be taken to guard against antitrust liability for board members?

CONCLUSIONS

"Active state supervision" requires a state official to review the substance of a regulatory decision made by a state licensing board, in order to determine whether the decision actually furthers a clearly articulated state policy to displace competition with regulation in a particular market. The official reviewing the decision must not be an active member of the market being regulated, and must have and exercise the power to approve, modify, or disapprove the decision.

Measures that might be taken to guard against antitrust liability for board members include changing the composition of boards, adding lines of supervision by state officials, and providing board members with legal indemnification and antitrust training.

ANALYSIS

In *North Carolina State Board of Dental Examiners v. Federal Trade Commission*,[1] the Supreme Court of the United States established a new standard for determining whether a state licensing board is entitled to immunity from antitrust actions.

Immunity is important to state actors not only because it shields them from adverse judgments, but because it shields them from having to go through litigation. When immunity is well established, most people are deterred from filing a suit at all. If a suit is filed, the state can move for summary disposition of the case, often before the discovery process begins. This saves the state a great deal of time and money, and it relieves employees (such as board members) of the stresses and burdens that inevitably go along with being sued. This freedom from suit clears a safe space for government officials and employees to perform their duties and to exercise their discretion without constant fear of litigation. Indeed, allowing government actors freedom to exercise discretion is one of the fundamental justifications underlying immunity doctrines.[2]

Before *North Carolina Dental* was decided, most state licensing boards operated under the assumption that they were protected from antitrust suits under the state action immunity doctrine. In light of the decision, many states—including California—are reassessing the structures and operations of their state licensing boards with a view to determining whether changes should be made to reduce the risk of antitrust claims. This opinion examines the legal requirements for state supervision under the *North Carolina Dental* decision, and identifies a variety of measures that the state Legislature might consider taking in response to the decision.

---

[1] *North Carolina State Bd. of Dental Examiners v. F. T. C.* (2015) ___ U.S. ___, 135 S. Ct. 1101 (*North Carolina Dental*).

[2] See *Mitchell v. Forsyth* (1985) 472 U.S. 511, 526; *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 819.

I. *North Carolina Dental* Established a New Immunity Standard for State Licensing Boards

A. The *North Carolina Dental* Decision

The North Carolina Board of Dental Examiners was established under North Carolina law and charged with administering a licensing system for dentists. A majority of the members of the board are themselves practicing dentists. North Carolina statutes delegated authority to the dental board to regulate the practice of dentistry, but did not expressly provide that teeth-whitening was within the scope of the practice of dentistry.

Following complaints by dentists that non-dentists were performing teeth-whitening services for low prices, the dental board conducted an investigation. The board subsequently issued cease-and-desist letters to dozens of teeth-whitening outfits, as well as to some owners of shopping malls where teeth-whiteners operated. The effect on the teeth-whitening market in North Carolina was dramatic, and the Federal Trade Commission took action.

In defense to antitrust charges, the dental board argued that, as a state agency, it was immune from liability under the federal antitrust laws. The Supreme Court rejected that argument, holding that a state board on which a controlling number of decision makers are active market participants must show that it is subject to "active supervision" in order to claim immunity.[3]

B. State Action Immunity Doctrine Before *North Carolina Dental*

The Sherman Antitrust Act of 1890[4] was enacted to prevent anticompetitive economic practices such as the creation of monopolies or restraints of trade. The terms of the Sherman Act are broad, and do not expressly exempt government entities, but the Supreme Court has long since ruled that federal principles of dual sovereignty imply that federal antitrust laws do not apply to the actions of states, even if those actions are anticompetitive.[5]

This immunity of states from federal antitrust lawsuits is known as the "state action doctrine."[6] The state action doctrine, which was developed by the Supreme Court

---

[3] *North Carolina Dental*, *supra*, 135 S.Ct. at p. 1114.

[4] 15 U.S.C. §§ 1, 2.

[5] *Parker v. Brown* (1943) 317 U.S. 341, 350-351.

[6] It is important to note that the phrase "state action" in this context means something

in *Parker v. Brown*,[7] establishes three tiers of decision makers, with different thresholds for immunity in each tier.

In the top tier, with the greatest immunity, is the state itself: the sovereign acts of state governments are absolutely immune from antitrust challenge.[8] Absolute immunity extends, at a minimum, to the state Legislature, the Governor, and the state's Supreme Court.

In the second tier are subordinate state agencies,[9] such as executive departments and administrative agencies with statewide jurisdiction. State agencies are immune from antitrust challenge if their conduct is undertaken pursuant to a "clearly articulated" and "affirmatively expressed" state policy to displace competition.[10] A state policy is sufficiently clear when displacement of competition is the "inherent, logical, or ordinary result" of the authority delegated by the state legislature.[11]

The third tier includes private parties acting on behalf of a state, such as the members of a state-created professional licensing board. Private parties may enjoy state action immunity when two conditions are met: (1) their conduct is undertaken pursuant to a "clearly articulated" and "affirmatively expressed" state policy to displace competition, and (2) their conduct is "actively supervised" by the state.[12] The

---

very different from "state action" for purposes of analysis of a civil rights violation under section 1983 of title 42 of the United States Code. Under section 1983, *liability* attaches to "state action," which may cover even the inadvertent or unilateral act of a state official not acting pursuant to state policy. In the antitrust context, a conclusion that a policy or action amounts to "state action" results in *immunity* from suit.

[7] *Parker v. Brown*, *supra*, 317 U.S. 341.

[8] *Hoover v. Ronwin* (1984) 466 U.S. 558, 574, 579-580.

[9] Distinguishing the state itself from subordinate state agencies has sometimes proven difficult. Compare the majority opinion in *Hoover v. Ronwin*, *supra*, 466 U.S. at p. 581 with dissenting opinion of Stevens, J., at pp. 588-589. (See *Costco v. Maleng* (9th Cir. 2008) 522 F.3d 874, 887, subseq. hrg. 538 F.3d 1128; *Charley's Taxi Radio Dispatch Corp. v. SIDA of Haw., Inc.* (9th Cir. 1987) 810 F.2d 869, 875.)

[10] See *Town of Hallie v. City of Eau Claire* (1985) 471 U.S. 34, 39.

[11] *F.T.C. v. Phoebe Putney Health Systems, Inc.* (2013) ___ U.S. ___, 133 S.Ct. 1003, 1013; see also *Southern Motor Carriers Rate Conference, Inc. v. U.S.* (1985) 471 U.S. 48, 57 (state policy need not compel specific anticompetitive effect).

[12] *Cal. Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.* (1980) 445 U.S. 97, 105 (*Midcal*).

fundamental purpose of the supervision requirement is to shelter only those private anticompetitive acts that the state approves as actually furthering its regulatory policies.[13] To that end, the mere possibility of supervision—such as the existence of a regulatory structure that is not operative, or not resorted to—is not enough. "The active supervision prong . . . requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."[14]

C. State Action Immunity Doctrine After *North Carolina Dental*

Until the Supreme Court decided *North Carolina Dental*, it was widely believed that most professional licensing boards would fall within the second tier of state action immunity, requiring a clear and affirmative policy, but not active state supervision of every anticompetitive decision. In California in particular, there were good arguments that professional licensing boards[15] were subordinate agencies of the state: they are formal, ongoing bodies created pursuant to state law; they are housed within the Department of Consumer Affairs and operate under the Consumer Affairs Director's broad powers of investigation and control; they are subject to periodic sunset review by the Legislature, to rule-making review under the Administrative Procedure Act, and to administrative and judicial review of disciplinary decisions; their members are appointed by state officials, and include increasingly large numbers of public (non-professional) members; their meetings and records are subject to open-government laws and to strong prohibitions on conflicts of interest; and their enabling statutes generally provide well-guided discretion to make decisions affecting the professional markets that the boards regulate.[16]

Those arguments are now foreclosed, however, by *North Carolina Dental*. There, the Court squarely held, for the first time, that "a state board on which a controlling

---

[13] *Patrick v. Burget* (1988) 486 U.S. 94, 100-101.

[14] *Ibid*.

[15] California's Department of Consumer Affairs includes some 25 professional regulatory boards that establish minimum qualifications and levels of competency for licensure in various professions, including accountancy, acupuncture, architecture, medicine, nursing, structural pest control, and veterinary medicine—to name just a few. (See http://www.dca.gov/about_ca/entities.shtml.)

[16] Cf. 1A Areeda & Hovenkamp, *supra*, ¶ 227, p. 208 (what matters is not what the body is called, but its structure, membership, authority, openness to the public, exposure to ongoing review, etc.).

number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity."[17] The effect of *North Carolina Dental* is to put professional licensing boards "on which a controlling number of decision makers are active market participants" in the third tier of state-action immunity. That is, they are immune from antitrust actions as long as they act pursuant to clearly articulated state policy to replace competition with regulation of the profession, *and* their decisions are actively supervised by the state.

Thus arises the question presented here: What constitutes "active state supervision"?[18]

D. Legal Standards for Active State Supervision

The active supervision requirement arises from the concern that, when active market participants are involved in regulating their own field, "there is a real danger" that they will act to further their own interests, rather than those of consumers or of the state.[19] The purpose of the requirement is to ensure that state action immunity is afforded to private parties only when their actions actually further the state's policies.[20]

There is no bright-line test for determining what constitutes active supervision of a professional licensing board: the standard is "flexible and context-dependent."[21] Sufficient supervision "need not entail day-to-day involvement" in the board's operations or "micromanagement of its every decision."[22] Instead, the question is whether the review mechanisms that are in place "provide 'realistic assurance'" that the anticompetitive effects of a board's actions promote state policy, rather than the board members' private interests.[23]

---

[17] *North Carolina Dental*, *supra*, 135 S.Ct. at p. 1114; *Midcal*, *supra*, 445 U.S at p. 105.

[18] Questions about whether the State's anticompetitive policies are adequately articulated are beyond the scope of this Opinion.

[19] *Patrick v. Burget*, *supra*, 486 U.S. at p. 100, citing *Town of Hallie v. City of Eau Claire*, *supra*, 471 U.S. at p. 47; see *id.* at p. 45 ("A private party . . . may be presumed to be acting primarily on his or its own behalf").

[20] *Patrick v. Burget*, *supra*, 486 U.S. at pp. 100-101.

[21] *North Carolina Dental*, *supra*, 135 S.Ct. at p. 1116.

[22] *Ibid.*

[23] *Ibid.*

The *North Carolina Dental* opinion and pre-existing authorities allow us to identify "a few constant requirements of active supervision":[24]

- The state supervisor who reviews a decision must have the power to reverse or modify the decision.[25]
- The "mere potential" for supervision is not an adequate substitute for supervision.[26]
- When a state supervisor reviews a decision, he or she must review the substance of the decision, not just the procedures followed to reach it.[27]
- The state supervisor must not be an active market participant.[28]

Keeping these requirements in mind may help readers evaluate whether California law already provides adequate supervision for professional licensing boards, or whether new or stronger measures are desirable.

II. Threshold Considerations for Assessing Potential Responses to *North Carolina Dental*

There are a number of different measures that the Legislature might consider in response to the *North Carolina Dental* decision. We will describe a variety of these, along with some of their potential advantages or disadvantages. Before moving on to those options, however, we should put the question of immunity into proper perspective.

---

[24] *Id. at* pp. 1116-1117.

[25] *Ibid.*

[26] *Id.* at p. 1116, citing *F.T.C. v. Ticor Title Ins. Co.* (1992) 504 U.S. 621, 638. For example, a passive or negative-option review process, in which an action is considered approved as long as the state supervisor raises no objection to it, may be considered inadequate in some circumstances. (*Ibid.*)

[27] *Ibid.*, citing *Patrick v. Burget*, *supra*, 486 U.S. at pp. 102-103. In most cases, there should be some evidence that the state supervisor considered the particular circumstances of the action before making a decision. Ideally, there should be a factual record and a written decision showing that there has been an assessment of the action's potential impact on the market, and whether the action furthers state policy. (See *In the Matter of Indiana Household Moves and Warehousemen, Inc.* (2008) 135 F.T.C. 535, 555-557; see also Federal Trade Commission, Report of the State Action Task Force (2003) at p. 54.)

[28] *North Carolina Dental*, *supra*, 135 S.Ct. at pp. 1116-1117.

There are two important things keep in mind: (1) the loss of immunity, if it is lost, does not mean that an antitrust violation has been committed, and (2) even when board members participate in regulating the markets they compete in, many—if not most—of their actions do not implicate the federal antitrust laws.

In the context of regulating professions, "market-sensitive" decisions (that is, the kinds of decisions that are most likely to be open to antitrust scrutiny) are those that create barriers to market participation, such as rules or enforcement actions regulating the scope of unlicensed practice; licensing requirements imposing heavy burdens on applicants; marketing programs; restrictions on advertising; restrictions on competitive bidding; restrictions on commercial dealings with suppliers and other third parties; and price regulation, including restrictions on discounts.

On the other hand, we believe that there are broad areas of operation where board members can act with reasonable confidence—especially once they and their state-official contacts have been taught to recognize actual antitrust issues, and to treat those issues specially. Broadly speaking, promulgation of regulations is a fairly safe area for board members, because of the public notice, written justification, Director review, and review by the Office of Administrative Law as required by the Administrative Procedure Act. Also, broadly speaking, disciplinary decisions are another fairly safe area because of due process procedures; participation of state actors such as board executive officers, investigators, prosecutors, and administrative law judges; and availability of administrative mandamus review.

We are not saying that the procedures that attend these quasi-legislative and quasi-judicial functions make the licensing boards altogether immune from antitrust claims. Nor are we saying that rule-making and disciplinary actions are per se immune from antitrust laws. What we are saying is that, assuming a board identifies its market-sensitive decisions and gets active state supervision for those, then ordinary rule-making and discipline (faithfully carried out under the applicable rules) may be regarded as relatively safe harbors for board members to operate in. It may require some education and experience for board members to understand the difference between market-sensitive and "ordinary" actions, but a few examples may bring in some light.

North Carolina Dental presents a perfect example of a market-sensitive action. There, the dental board decided to, and actually succeeded in, driving non-dentist teeth-whitening service providers out of the market, even though nothing in North Carolina's laws specified that teeth-whitening constituted the illegal practice of dentistry. Counter-examples—instances where no antitrust violation occurs—are far more plentiful. For example, a regulatory board may legitimately make rules or impose discipline to prohibit license-holders from engaging in fraudulent business practices (such as untruthful or

deceptive advertising) without violating antitrust laws.[29] As well, suspending the license of an individual license-holder for violating the standards of the profession is a reasonable restraint and has virtually no effect on a large market, and therefore would not violate antitrust laws.[30]

Another area where board members can feel safe is in carrying out the actions required by a detailed anticompetitive statutory scheme.[31] For example, a state law prohibiting certain kinds of advertising or requiring certain fees may be enforced without need for substantial judgment or deliberation by the board. Such detailed legislation leaves nothing for the state to supervise, and thus it may be said that the legislation itself satisfies the supervision requirement.[32]

Finally, some actions will not be antitrust violations because their effects are, in fact, pro-competitive rather than anti-competitive. For instance, the adoption of safety standards that are based on objective expert judgments have been found to be pro-competitive.[33] Efficiency measures taken for the benefit of consumers, such as making information available to the purchasers of competing products, or spreading development costs to reduce per-unit prices, have been held to be pro-competitive because they are pro-consumer.[34]

III. Potential Measures for Preserving State Action Immunity

A. Changes to the Composition of Boards

The *North Carolina Dental* decision turns on the principle that a state board is a group of private actors, not a subordinate state agency, when "a controlling number of decisionmakers are active market participants in the occupation the board regulates."[35]

---

[29] See generally *California Dental Assn. v. F.T.C.* (1999) 526 U.S. 756.

[30] See *Oksanen v. Page Memorial Hospital* (4th Cir. 1999) 945 F.2d 696 (*en banc*).

[31] See *324 Liquor Corp. v. Duffy* (1987) 479 U.S. 335, 344, fn. 6.

[32] 1A Areeda & Hovenkamp, Antitrust Law, *supra*, ¶ 221, at p. 66; ¶ 222, at pp. 67, 76.

[33] See *Allied Tube & Conduit Corp. v. Indian Head, Inc.* (1988) 486 U.S. 492, 500-501.

[34] *Broadcom Corp. v. Qualcomm Inc.* (3rd Cir. 2007) 501 F.3d 297, 308-309; see generally Bus. & Prof. Code, § 301.

[35] 135 S.Ct. at p. 1114.

This ruling brings the composition of boards into the spotlight. While many boards in California currently require a majority of public members, it is still the norm for professional members to outnumber public members on boards that regulate healing-arts professions. In addition, delays in identifying suitable public-member candidates and in filling public seats can result in de facto market-participant majorities.

In the wake of *North Carolina Dental*, many observers' first impulse was to assume that reforming the composition of professional boards would be the best resolution, both for state actors and for consumer interests. Upon reflection, however, it is not obvious that sweeping changes to board composition would be the most effective solution.[36]

Even if the Legislature were inclined to decrease the number of market-participant board members, the current state of the law does not allow us to project accurately how many market-participant members is too many. This is a question that was not resolved by the *North Carolina Dental* decision, as the dissenting opinion points out:

> What is a "controlling number"? Is it a majority? And if so, why does the Court eschew that term? Or does the Court mean to leave open the possibility that something less than a majority might suffice in particular circumstances? Suppose that active market participants constitute a voting bloc that is generally able to get its way? How about an obstructionist minority or an agency chair empowered to set the agenda or veto regulations?[37]

Some observers believe it is safe to assume that the *North Carolina Dental* standard would be satisfied if public members constituted a majority of a board. The

---

[36] Most observers believe that there are real advantages in staffing boards with professionals in the field. The combination of technical expertise, practiced judgment, and orientation to prevailing ethical norms is probably impossible to replicate on a board composed entirely of public members. Public confidence must also be considered. Many consumers would no doubt share the sentiments expressed by Justice Breyer during oral argument in the *North Carolina Dental* case: "[W]hat the State says is: We would like this group of brain surgeons to decide who can practice brain surgery in this State. I don't want a group of bureaucrats deciding that. I would like brain surgeons to decide that." (*North Carolina Dental*, *supra*, transcript of oral argument p. 31, available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-534_l6h1.pdf (hereafter, Transcript).)

[37] *North Carolina Dental*, *supra*, 135 S.Ct. at p. 1123 (dis. opn. of Alito, J).

obvious rejoinder to that argument is that the Court pointedly did not use the term "majority;" it used "controlling number." More cautious observers have suggested that "controlling number" should be taken to mean the majority of a quorum, at least until the courts give more guidance on the matter.

North Carolina Dental leaves open other questions about board composition as well. One of these is: Who is an "active market participant"?[38] Would a retired member of the profession no longer be a participant of the market? Would withdrawal from practice during a board member's term of service suffice? These questions were discussed at oral argument,[39] but were not resolved. Also left open is the scope of the market in which a member may not participate while serving on the board.[40]

Over the past four decades, California has moved decisively to expand public membership on licensing boards.[41] The change is generally agreed to be a salutary one for consumers, and for underserved communities in particular.[42] There are many good reasons to consider continuing the trend to increase public membership on licensing boards—but we believe a desire to ensure immunity for board members should not be the decisive factor. As long as the legal questions raised by *North Carolina Dental* remain unresolved, radical changes to board composition are likely to create a whole new set of policy and practical challenges, with no guarantee of resolving the immunity problem.

B. Some Mechanisms for Increasing State Supervision

Observers have proposed a variety of mechanisms for building more state oversight into licensing boards' decision-making processes. In considering these alternatives, it may be helpful to bear in mind that licensing boards perform a variety of

---

[38] *Ibid*.

[39] Transcript, *supra*, at p. 31.

[40] *North Carolina Dental*, *supra*, 135 S.Ct. at p. 1123 (dis. opn. of Alito, J). Some observers have suggested that professionals from one practice area might be appointed to serve on the board regulating another practice area, in order to bring their professional expertise to bear in markets where they are not actively competing.

[41] See Center for Public Interest Law, A Guide to California's Health Care Licensing Boards (July 2009) at pp. 1-2; Shimberg, Occupational Licensing: A Public Perspective (1982) at pp. 163-165.

[42] See Center for Public Interest Law, *supra*, at pp. 15-17; Shimberg, *supra*, at pp. 175-179.

distinct functions, and that different supervisory structures may be appropriate for different functions.

For example, boards may develop and enforce standards for licensure; receive, track, and assess trends in consumer complaints; perform investigations and support administrative and criminal prosecutions; adjudicate complaints and enforce disciplinary measures; propose regulations and shepherd them through the regulatory process; perform consumer education; and more. Some of these functions are administrative in nature, some are quasi-judicial, and some are quasi-legislative. Boards' quasi-judicial and quasi-legislative functions, in particular, are already well supported by due process safeguards and other forms of state supervision (such as vertical prosecutions, administrative mandamus procedures, and public notice and scrutiny through the Administrative Procedure Act). Further, some functions are less likely to have antitrust implications than others: decisions affecting only a single license or licensee in a large market will rarely have an anticompetitive effect within the meaning of the Sherman Act. For these reasons, it is worth considering whether it is less urgent, or not necessary at all, to impose additional levels of supervision with respect to certain functions.

Ideas for providing state oversight include the concept of a superagency, such as a stand-alone office, or a committee within a larger agency, which has full responsibility for reviewing board actions de novo. Under such a system, the boards could be permitted to carry on with their business as usual, except that they would be required to refer each of their decisions (or some subset of decisions) to the superagency for its review. The superagency could review each action file submitted by the board, review the record and decision in light of the state's articulated regulatory policies, and then issue its own decision approving, modifying, or vetoing the board's action.

Another concept is to modify the powers of the boards themselves, so that all of their functions (or some subset of functions) would be advisory only. Under such a system, the boards would not take formal actions, but would produce a record and a recommendation for action, perhaps with proposed findings and conclusions. The recommendation file would then be submitted to a supervising state agency for its further consideration and formal action, if any.

Depending on the particular powers and procedures of each system, either could be tailored to encourage the development of written records to demonstrate executive discretion; access to administrative mandamus procedures for appeal of decisions; and the development of expertise and collaboration among reviewers, as well as between the reviewers and the boards that they review. Under any system, care should be taken to structure review functions so as to avoid unnecessary duplication or conflicts with other agencies and departments, and to minimize the development of super-policies not

adequately tailored to individual professions and markets. To prevent the development of "rubber-stamp" decisions, any acceptable system must be designed and sufficiently staffed to enable plenary review of board actions or recommendations at the individual transactional level.

As it stands, California is in a relatively advantageous position to create these kinds of mechanisms for active supervision of licensing boards. With the boards centrally housed within the Department of Consumer Affairs (an "umbrella agency"), there already exists an organization with good knowledge and experience of board operations, and with working lines of communication and accountability. It is worth exploring whether existing resources and minimal adjustments to procedures and outlooks might be converted to lines of active supervision, at least for the boards' most market-sensitive actions.

Moreover, the Business and Professions Code already demonstrates an intention that the Department of Consumer Affairs will protect consumer interests as a means of promoting "the fair and efficient functioning of the free enterprise market economy" by educating consumers, suppressing deceptive and fraudulent practices, fostering competition, and representing consumer interests at all levels of government.[43] The free-market and consumer-oriented principles underlying *North Carolina Dental* are nothing new to California, and no bureaucratic paradigms need to be radically shifted as a result.

The Business and Professions Code also gives broad powers to the Director of Consumer Affairs (and his or her designees)[44] to protect the interests of consumers at every level.[45] The Director has power to investigate the work of the boards and to obtain their data and records;[46] to investigate alleged misconduct in licensing examinations and qualifications reviews;[47] to require reports;[48] to receive consumer complaints[49] and to initiate audits and reviews of disciplinary cases and complaints about licensees.[50]

---

[43] Bus. & Prof. Code, § 301.

[44] Bus. & Prof. Code, §§ 10, 305.

[45] See Bus. & Prof. Code, § 310.

[46] Bus. & Prof. Code, § 153.

[47] Bus. & Prof. Code, § 109.

[48] Bus. & Prof. Code, § 127.

[49] Bus. & Prof. Code, § 325.

[50] Bus. & Prof. Code, § 116.

In addition, the Director must be provided a full opportunity to review all proposed rules and regulations (except those relating to examinations and licensure qualifications) before they are filed with the Office of Administrative Law, and the Director may disapprove any proposed regulation on the ground that it is injurious to the public.[51] Whenever the Director (or his or her designee) actually exercises one of these powers to reach a substantive conclusion as to whether a board's action furthers an affirmative state policy, then it is safe to say that the active supervision requirement has been met.[52]

It is worth considering whether the Director's powers should be amended to make review of certain board decisions mandatory as a matter of course, or to make the Director's review available upon the request of a board. It is also worth considering whether certain existing limitations on the Director's powers should be removed or modified. For example, the Director may investigate allegations of misconduct in examinations or qualification reviews, but the Director currently does not appear to have power to review board decisions in those areas, or to review proposed rules in those areas.[53] In addition, the Director's power to initiate audits and reviews appears to be limited to disciplinary cases and complaints about licensees.[54] If the Director's initiative is in fact so limited, it is worth considering whether that limitation continues to make sense. Finally, while the Director must be given a full opportunity to review most proposed regulations, the Director's disapproval may be overridden by a unanimous vote of the board.[55] It is worth considering whether the provision for an override maintains its utility, given that such an override would nullify any "active supervision" and concomitant immunity that would have been gained by the Director's review.[56]

---

[51] Bus. & Prof. Code, § 313.1.

[52] Although a written statement of decision is not specifically required by existing legal standards, developing a practice of creating an evidentiary record and statement of decision would be valuable for many reasons, not the least of which would be the ability to proffer the documents to a court in support of a motion asserting state action immunity.

[53] Bus. & Prof. Code, §§ 109, 313.1.

[54] Bus. & Prof. Code, § 116.

[55] Bus. & Prof. Code, § 313.1.

[56] Even with an override, proposed regulations are still subject to review by the Office of Administrative Law.

C. Legislation Granting Immunity

From time to time, states have enacted laws expressly granting immunity from antitrust laws to political subdivisions, usually with respect to a specific market.[57] However, a statute purporting to grant immunity to private persons, such as licensing board members, would be of doubtful validity. Such a statute might be regarded as providing adequate authorization for anticompetitive activity, but active state supervision would probably still be required to give effect to the intended immunity. What is quite clear is that a state cannot grant blanket immunity by fiat. "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . ."[58]

IV. Indemnification of Board Members

So far we have focused entirely on the concept of immunity, and how to preserve it. But immunity is not the only way to protect state employees from the costs of suit, or to provide the reassurance necessary to secure their willingness and ability to perform their duties. Indemnification can also go a long way toward providing board members the protection they need to do their jobs. It is important for policy makers to keep this in mind in weighing the costs of creating supervision structures adequate to ensure blanket state action immunity for board members. If the costs of implementing a given supervisory structure are especially high, it makes sense to consider whether immunity is an absolute necessity, or whether indemnification (with or without additional risk-management measures such as training or reporting) is an adequate alternative.

As the law currently stands, the state has a duty to defend and indemnify members of licensing boards against antitrust litigation to the same extent, and subject to the same exceptions, that it defends and indemnifies state officers and employees in general civil litigation. The duty to defend and indemnify is governed by the Government Claims Act.[59] For purposes of the Act, the term "employee" includes officers and uncompensated servants.[60] We have repeatedly determined that members of a board,

---

[57] See 1A Areeda & Hovenkamp, Antitrust Law, *supra*, 225, at pp. 135-137; e.g. *A1 Ambulance Service, Inc. v. County of Monterey* (9th Cir. 1996) 90 F.3d 333, 335 (discussing Health & Saf. Code, § 1797.6).

[58] *Parker v. Brown*, *supra*, 317 U.S. at 351.

[59] Gov. Code, §§ 810-996.6.

[60] See Gov. Code § 810.2.

commission, or similar body established by statute are employees entitled to defense and indemnification.[61]

A. Duty to Defend

Public employees are generally entitled to have their employer provide for the defense of any civil action "on account of an act or omission in the scope" of employment.[62] A public entity may refuse to provide a defense in specified circumstances, including where the employee acted due to "actual fraud, corruption, or actual malice."[63] The duty to defend contains no exception for antitrust violations.[64] Further, violations of antitrust laws do not inherently entail the sort of egregious behavior that would amount to fraud, corruption, or actual malice under state law. There would therefore be no basis to refuse to defend an employee on the bare allegation that he or she violated antitrust laws.

B. Duty to Indemnify

The Government Claims Act provides that when a public employee properly requests the employer to defend a claim, and reasonably cooperates in the defense, "the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed."[65] In general, the government is liable for an injury proximately caused by an act within the scope of employment,[66] but is not liable for punitive damages.[67]

One of the possible remedies for an antitrust violation is an award of treble damages to a person whose business or property has been injured by the violation.[68] This raises a question whether a treble damages award equates to an award of punitive damages within the meaning of the Government Claims Act. Although the answer is not

---

[61] E.g., 81 Ops.Cal.Atty.Gen. 199, 200 (1998); 57 Ops.Cal.Atty.Gen. 358, 361 (1974).

[62] Gov. Code, § 995.

[63] Gov. Code, § 995.2, subd. (a).

[64] Cf. *Mt. Hawley Insurance Co. v. Lopez* (2013) 215 Cal.App.4th 1385 (discussing Ins. Code, § 533.5).

[65] Gov. Code, § 825, subd. (a).

[66] Gov. Code, § 815.2.

[67] Gov. Code, § 818.

[68] 15 U.S.C. § 15(a).

entirely certain, we believe that antitrust treble damages do *not* equate to punitive damages.

The purposes of treble damage awards are to deter anticompetitive behavior and to encourage private enforcement of antitrust laws.[69] And, an award of treble damages is automatic once an antitrust violation is proved.[70] In contrast, punitive damages are "uniquely justified by and proportioned to the actor's particular reprehensible conduct as well as that person or entity's net worth . . . in order to adequately make the award 'sting' . . . ."[71] Also, punitive damages in California must be premised on a specific finding of malice, fraud, or oppression.[72] In our view, the lack of a malice or fraud element in an antitrust claim, and the immateriality of a defendant's particular conduct or net worth to the treble damage calculation, puts antitrust treble damages outside the Government Claims Act's definition of punitive damages.[73]

C. Possible Improvements to Indemnification Scheme

As set out above, state law provides for the defense and indemnification of board members to the same extent as other state employees. This should go a long way toward reassuring board members and potential board members that they will not be exposed to undue risk if they act reasonably and in good faith. This reassurance cannot be complete, however, as long as board members face significant uncertainty about how much litigation they may have to face, or about the status of treble damage awards.

Uncertainty about the legal status of treble damage awards could be reduced significantly by amending state law to specify that treble damage antitrust awards are not punitive damages within the meaning of the Government Claims Act. This would put them on the same footing as general damages awards, and thereby remove any uncertainty as to whether the state would provide indemnification for them.[74]

---

[69] *Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 783-784 (individual right to treble damages is "incidental and subordinate" to purposes of deterrence and vigorous enforcement).

[70] 15 U.S.C. § 15(a).

[71] *Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 981-982.

[72] Civ. Code, §§ 818, 3294.

[73] If treble damages awards were construed as constituting punitive damages, the state would still have the option of paying them under Government Code section 825.

[74] Ideally, treble damages should not be available at all against public entities and public officials. Since properly articulated and supervised anticompetitive behavior is

As a complement to indemnification, the potential for board member liability may be greatly reduced by introducing antitrust concepts to the required training and orientation programs that the Department of Consumer Affairs provides to new board members.[75] When board members share an awareness of the sensitivity of certain kinds of actions, they will be in a much better position to seek advice and review (that is, active supervision) from appropriate officials. They will also be far better prepared to assemble evidence and to articulate reasons for the decisions they make in market-sensitive areas. With training and practice, boards can be expected to become as proficient in making and demonstrating sound market decisions, and ensuring proper review of those decisions, as they are now in making and defending sound regulatory and disciplinary decisions.

V. Conclusions

North Carolina Dental has brought both the composition of licensing boards and the concept of active state supervision into the public spotlight, but the standard it imposes is flexible and context-specific. This leaves the state with many variables to consider in deciding how to respond.

Whatever the chosen response may be, the state can be assured that *North Carolina Dental*'s "active state supervision" requirement is satisfied when a non-market-

---

permitted to the state and its agents, the deterrent purpose of treble damages does not hold in the public arena. Further, when a state indemnifies board members, treble damages go not against the board members but against public coffers. "It is a grave act to make governmental units potentially liable for massive treble damages when, however 'proprietary' some of their activities may seem, they have fundamental responsibilities to their citizens for the provision of life-sustaining services such as police and fire protection." (*City of Lafayette, La. v. Louisiana Power & Light Co.* (1978) 435 U.S. 389, 442 (dis. opn. of Blackmun, J.).)

In response to concerns about the possibility of treble damage awards against municipalities, Congress passed the Local Government Antitrust Act (15 U.S.C. §§ 34-36), which provides that local governments and their officers and employees cannot be held liable for treble damages, compensatory damages, or attorney's fees. (See H.R. Rep. No. 965, 2nd Sess., p. 11 (1984).) For an argument that punitive sanctions should never be levied against public bodies and officers under the Sherman Act, see 1A Areeda & Hovenkamp, *supra*, ¶ 228, at pp. 214-226. Unfortunately, because treble damages are a product of federal statute, this problem is not susceptible of a solution by state legislation.

[75] Bus. & Prof. Code, § 453.

participant state official has and exercises the power to substantively review a board's action and determines whether the action effectuates the state's regulatory policies.

*****

FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants*

I. Introduction

States craft regulatory policy through a variety of actors, including state legislatures, courts, agencies, and regulatory boards. While most regulatory actions taken by state actors will not implicate antitrust concerns, some will. Notably, states have created a large number of regulatory boards with the authority to determine who may engage in an occupation (*e.g.*, by issuing or withholding a license), and also to set the rules and regulations governing that occupation. Licensing, once limited to a few learned professions such as doctors and lawyers, is now required for over 800 occupations including (in some states) locksmiths, beekeepers, auctioneers, interior designers, fortune tellers, tour guides, and shampooers.[1]

In general, a state may avoid all conflict with the federal antitrust laws by creating regulatory boards that serve only in an advisory capacity, or by staffing a regulatory board exclusively with persons who have no financial interest in the occupation that is being regulated. However, across the United States, "licensing boards are largely dominated by active members of their respective industries . . ."[2] That is, doctors commonly regulate doctors, beekeepers commonly regulate beekeepers, and tour guides commonly regulate tour guides.

Earlier this year, the U.S. Supreme Court upheld the Federal Trade Commission's determination that the North Carolina State Board of Dental Examiners ("NC Board") violated the federal antitrust laws by preventing non-dentists from providing teeth whitening services in competition with the state's licensed dentists. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015). NC Board is a state agency established under North Carolina law and charged with administering and enforcing a licensing system for dentists. A majority of the members of this state agency are themselves practicing dentists, and thus they have a private incentive to limit

---

* This document sets out the views of the Staff of the Bureau of Competition. The Federal Trade Commission is not bound by this Staff guidance and reserves the right to rescind it at a later date. In addition, FTC Staff reserves the right to reconsider the views expressed herein, and to modify, rescind, or revoke this Staff guidance if such action would be in the public interest.

[1] Aaron Edlin & Rebecca Haw, *Cartels By Another Name: Should Licensed Occupations Face Antitrust Scrutiny*, 162 U. PA. L. REV. 1093, 1096 (2014).

[2] *Id.* at 1095.

competition from non-dentist providers of teeth whitening services. NC Board argued that, because it is a state agency, it is exempt from liability under the federal antitrust laws. That is, the NC Board sought to invoke what is commonly referred to as the "state action exemption" or the "state action defense." The Supreme Court rejected this contention and affirmed the FTC's finding of antitrust liability.

In this decision, the Supreme Court clarified the applicability of the antitrust state action defense to state regulatory boards controlled by market participants:

> "The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal's* [*Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)] active supervision requirement in order to invoke state-action antitrust immunity." *N.C. Dental*, 135 S. Ct. at 1114.

In the wake of this Supreme Court decision, state officials have requested advice from the Federal Trade Commission regarding antitrust compliance for state boards responsible for regulating occupations. This outline provides FTC Staff guidance on two questions. *First*, when does a state regulatory board require active supervision in order to invoke the state action defense? *Second*, what factors are relevant to determining whether the active supervision requirement is satisfied?

Our answers to these questions come with the following caveats.

- Vigorous competition among sellers in an open marketplace generally provides consumers with important benefits, including lower prices, higher quality services, greater access to services, and increased innovation. For this reason, a state legislature should empower a regulatory board to restrict competition only when necessary to protect against a credible risk of harm, such as health and safety risks to consumers. The Federal Trade Commission and its staff have frequently advocated that states avoid unneeded and burdensome regulation of service providers.[3]

- Federal antitrust law does <u>not</u> require that a state legislature provide for active supervision of any state regulatory board. A state legislature may, and generally should, prefer that a regulatory board be subject to the requirements of the federal antitrust

[3] *See, e.g.*, Fed. Trade Comm'n Staff Policy Paper, *Policy Perspectives: Competition and the Regulation of Advanced Practice Registered Nurses* (Mar. 2014), https://www.ftc.gov/system/files/documents/reports/policy-perspectives-competition-regulation-advanced-practice-nurses/140307aprnpolicypaper.pdf; Fed. Trade Comm'n & U.S. Dept. of Justice, Comment before the South Carolina Supreme Court Concerning Proposed Guidelines for Residential and Commercial Real Estate Closings (Apr. 2008), https://www.ftc.gov/news-events/press-releases/2008/04/ftcdoj-submit-letter-supreme-court-south-carolina-proposed.

laws. If the state legislature determines that a regulatory board should be subject to antitrust oversight, then the state legislature need not provide for active supervision.

- Antitrust analysis – including the applicability of the state action defense – is fact-specific and context-dependent. The purpose of this document is to identify certain overarching legal principles governing when and how a state may provide active supervision for a regulatory board. We are not suggesting a mandatory or one-size-fits-all approach to active supervision. Instead, we urge each state regulatory board to consult with the Office of the Attorney General for its state for customized advice on how best to comply with the antitrust laws.

- This FTC Staff guidance addresses only the active supervision prong of the state action defense. In order successfully to invoke the state action defense, a state regulatory board controlled by market participants must also satisfy the clear articulation prong, as described briefly in Section II. below.

- This document contains guidance developed by the staff of the Federal Trade Commission. Deviation from this guidance does not necessarily mean that the state action defense is inapplicable, or that a violation of the antitrust laws has occurred.

II. Overview of the Antitrust State Action Defense

"Federal antitrust law is a central safeguard for the Nation's free market structures . . . . The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market." *N.C. Dental*, 135 S. Ct. at 1109.

Under principles of federalism, "the States possess a significant measure of sovereignty." *N.C. Dental*, 135 S. Ct. at 1110 (*quoting Community Communications Co. v. Boulder*, 455 U.S. 40, 53 (1982)). In enacting the antitrust laws, Congress did not intend to prevent the States from limiting competition in order to promote other goals that are valued by their citizens. Thus, the Supreme Court has concluded that the federal antitrust laws do not reach anticompetitive conduct engaged in by a State that is acting in its sovereign capacity. *Parker v. Brown*, 317 U.S. 341, 351-52 (1943). For example, a state legislature may "impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives." *N.C. Dental*, 135 S. Ct. at 1109.

Are the actions of a state regulatory board, like the actions of a state legislature, exempt from the application of the federal antitrust laws? In *North Carolina State Board of Dental Examiners*, the Supreme Court reaffirmed that a state regulatory board is not the sovereign. Accordingly, a state regulatory board is not necessarily exempt from federal antitrust liability.

More specifically, the Court determined that "a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates" may invoke the state action defense only when two requirements are satisfied: first, the challenged restraint must be clearly articulated and affirmatively expressed as state policy; and second, the policy must be actively supervised by a state official (or state agency) that is not a participant in the market that is being regulated. *N.C. Dental*, 135 S. Ct. at 1114.

- The Supreme Court addressed the clear articulation requirement most recently in *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013). The clear articulation requirement is satisfied "where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Id*. at 1013.

- The State's clear articulation of the intent to displace competition is not alone sufficient to trigger the state action exemption. The state legislature's clearly-articulated delegation of authority to a state regulatory board to displace competition may be "defined at so high a level of generality as to leave open critical questions about how

and to what extent the market should be regulated." There is then a danger that this delegated discretion will be used by active market participants to pursue private interests in restraining trade, in lieu of implementing the State's policy goals. *N.C. Dental*, 135 S. Ct. at 1112.

- The active supervision requirement "seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming [antitrust] immunity." *Id.*

Where the state action defense does not apply, the actions of a state regulatory board controlled by active market participants may be subject to antitrust scrutiny. Antitrust issues may arise where an unsupervised board takes actions that restrict market entry or restrain rivalry. The following are some scenarios that have raised antitrust concerns:

- A regulatory board controlled by dentists excludes non-dentists from competing with dentists in the provision of teeth whitening services. *Cf. N.C. Dental,* 135 S. Ct. 1101.

- A regulatory board controlled by accountants determines that only a small and fixed number of new licenses to practice the profession shall be issued by the state each year. *Cf. Hoover v. Ronwin*, 466 U.S. 558 (1984).

- A regulatory board controlled by attorneys adopts a regulation (or a code of ethics) that prohibits attorney advertising, or that deters attorneys from engaging in price competition. *Cf. Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975).

III. Scope of FTC Staff Guidance

A. This Staff guidance addresses the applicability of the state action defense under the federal antitrust laws. Concluding that the state action defense is inapplicable does not mean that the conduct of the regulatory board necessarily violates the federal antitrust laws. A regulatory board may assert defenses ordinarily available to an antitrust defendant.

1. **Reasonable restraints on competition do not violate the antitrust laws, even where the economic interests of a competitor have been injured.**

Example 1: A regulatory board may prohibit members of the occupation from engaging in fraudulent business practices without raising antitrust concerns. A regulatory board also may prohibit members of the occupation from engaging in untruthful or deceptive advertising. *Cf. Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

Example 2: Suppose a market with several hundred licensed electricians. If a regulatory board suspends the license of one electrician for substandard work, such action likely does not unreasonably harm competition. *Cf. Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696 (4th Cir. 1991) (en banc).

2. **The ministerial (non-discretionary) acts of a regulatory board engaged in good faith implementation of an anticompetitive statutory regime do not give rise to antitrust liability. See 324 Liquor Corp. v. Duffy, 479 U.S. 335, 344 n. 6 (1987).**

Example 3: A state statute requires that an applicant for a chauffeur's license submit to the regulatory board, among other things, a copy of the applicant's diploma and a certified check for $500. An applicant fails to submit the required materials. If for this reason the regulatory board declines to issue a chauffeur's license to the applicant, such action would not be considered an unreasonable restraint. In the circumstances described, the denial of a license is a ministerial or non-discretionary act of the regulatory board.

3. **In general, the initiation and prosecution of a lawsuit by a regulatory board does not give rise to antitrust liability unless it falls within the "sham exception." Professional Real Estate Investors v. Columbia Pictures Industries, 508 U.S. 49 (1993); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).**

Example 4: A state statute authorizes the state's dental board to maintain an action in state court to enjoin an unlicensed person from practicing dentistry. The members of the dental board have a basis to believe that a particular individual is practicing dentistry but does not hold a valid license. If the dental board files a lawsuit against that individual, such action would not constitute a violation of the federal antitrust laws.

B. Below, FTC Staff describes when active supervision of a state regulatory board is required in order successfully to invoke the state action defense, and what factors are relevant to determining whether the active supervision requirement has been satisfied.

1. When is active state supervision of a state regulatory board required in order to invoke the state action defense?

General Standard: "[A] state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity." *N.C. Dental*, 135 S. Ct. at 1114.

Active Market Participants: A member of a state regulatory board will be considered to be an active market participant in the occupation the board regulates if such person (i) is licensed by the board or (ii) provides any service that is subject to the regulatory authority of the board.

- If a board member participates in any professional or occupational sub-specialty that is regulated by the board, then that board member is an active market participant for purposes of evaluating the active supervision requirement.

- It is no defense to antitrust scrutiny, therefore, that the board members themselves are not directly or personally affected by the challenged restraint. For example, even if the members of the NC Dental Board were orthodontists who do not perform teeth whitening services (as a matter of law or fact or tradition), their control of the dental board would nevertheless trigger the requirement for active state supervision. This is because these orthodontists are licensed by, and their services regulated by, the NC Dental Board.

- A person who temporarily suspends her active participation in an occupation for the purpose of serving on a state board that regulates her former (and intended future) occupation will be considered to be an active market participant.

Method of Selection: The method by which a person is selected to serve on a state regulatory board is not determinative of whether that person is an active market participant in the occupation that the board regulates. For example, a licensed dentist is deemed to be an active market participant regardless of whether the dentist (i) is appointed to the state dental board by the governor or (ii) is elected to the state dental board by the state's licensed dentists.

***A Controlling Number, Not Necessarily a Majority, of Actual Decisionmakers*:**

- Active market participants need not constitute a numerical majority of the members of a state regulatory board in order to trigger the requirement of active supervision. A decision that is controlled, either as a matter of law, procedure, or fact, by active participants in the regulated market (*e.g.*, through veto power, tradition, or practice) must be actively supervised to be eligible for the state action defense.

- Whether a particular restraint has been imposed by a "controlling number of decisionmakers [who] are active market participants" is a fact-bound inquiry that must be made on a case-by-case basis. FTC Staff will evaluate a number of factors, including:

  - ✓ The structure of the regulatory board (including the number of board members who are/are not active market participants) and the rules governing the exercise of the board's authority.

  - ✓ Whether the board members who are active market participants have veto power over the board's regulatory decisions.

Example 5: The state board of electricians consists of four non-electrician members and three practicing electricians. Under state law, new regulations require the approval of five board members. Thus, no regulation may become effective without the assent of at least one electrician member of the board. In this scenario, the active market participants effectively have veto power over the board's regulatory authority. The active supervision requirement is therefore applicable.

  - ✓ The level of participation, engagement, and authority of the non-market participant members in the business of the board – generally and with regard to the particular restraint at issue.

  - ✓ Whether the participation, engagement, and authority of the non-market participant board members in the business of the board differs from that of board members who are active market participants – generally and with regard to the particular restraint at issue.

  - ✓ Whether the active market participants have in fact exercised, controlled, or usurped the decisionmaking power of the board.

Example 6: The state board of electricians consists of four non-electrician members and three practicing electricians. Under state law, new regulations require the approval of a majority of board members. When voting on proposed regulations, the non-electrician members routinely defer to the preferences of the electrician members. Minutes of

board meetings show that the non-electrician members generally are not informed or knowledgeable concerning board business – and that they were not well informed concerning the particular restraint at issue. In this scenario, FTC Staff may determine that the active market participants have exercised the decisionmaking power of the board, and that the active supervision requirement is applicable.

Example 7: The state board of electricians consists of four non-electrician members and three practicing electricians. Documents show that the electrician members frequently meet and discuss board business separately from the non-electrician members. On one such occasion, the electrician members arranged for the issuance by the board of written orders to six construction contractors, directing such individuals to cease and desist from providing certain services. The non-electrician members of the board were not aware of the issuance of these orders and did not approve the issuance of these orders. In this scenario, FTC Staff may determine that the active market participants have exercised the decisionmaking power of the board, and that the active supervision requirement is applicable.

2. What constitutes active supervision?

FTC Staff will be guided by the following principles:

- "[T]he purpose of the active supervision inquiry . . . is to determine whether the State has exercised sufficient independent judgment and control" such that the details of the regulatory scheme "have been established as a product of deliberate state intervention" and not simply by agreement among the members of the state board. "Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy." The State is not obliged to "[meet] some normative standard, such as efficiency, in its regulatory practices." *Ticor*, 504 U.S. at 634-35. "The question is not how well state regulation works but whether the anticompetitive scheme is the State's own." *Id*. at 635.

- It is necessary "to ensure the States accept political accountability for anticompetitive conduct they permit and control." *N.C. Dental*, 135 S. Ct. at 1111. *See also Ticor*, 504 U.S. at 636.

- "The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and the 'mere potential for state supervision is not an adequate substitute for a decision by the State.' Further, the state supervisor may not itself be an active market participant." *N.C. Dental*, 135 S. Ct. at 1116–17 (citations omitted).

- The active supervision must precede implementation of the allegedly anticompetitive restraint.

- "[T]he inquiry regarding active supervision is flexible and context-dependent." "[T]he adequacy of supervision . . . will depend on all the circumstances of a case." *N.C. Dental*, 135 S. Ct. at 1116–17. Accordingly, FTC Staff will evaluate each case in light of its own facts, and will apply the applicable case law and the principles embodied in this guidance reasonably and flexibly.

3. What factors are relevant to determining whether the active supervision requirement has been satisfied?

FTC Staff will consider the presence or absence of the following factors in determining whether the active supervision prong of the state action defense is satisfied.

- The supervisor has obtained the information necessary for a proper evaluation of the action recommended by the regulatory board. As applicable, the supervisor has ascertained relevant facts, collected data, conducted public hearings, invited and received public comments, investigated market conditions, conducted studies, and reviewed documentary evidence.

  - ✓ The information-gathering obligations of the supervisor depend in part upon the scope of inquiry previously conducted by the regulatory board. For example, if the regulatory board has conducted a suitable public hearing and collected the relevant information and data, then it may be unnecessary for the supervisor to repeat these tasks. Instead, the supervisor may utilize the materials assembled by the regulatory board.

- The supervisor has evaluated the substantive merits of the recommended action and assessed whether the recommended action comports with the standards established by the state legislature.

- The supervisor has issued a written decision approving, modifying, or disapproving the recommended action, and explaining the reasons and rationale for such decision.

  - ✓ A written decision serves an evidentiary function, demonstrating that the supervisor has undertaken the required meaningful review of the merits of the state board's action.

  - ✓ A written decision is also a means by which the State accepts political accountability for the restraint being authorized.

Scenario 1: Example of satisfactory active supervision of a state board regulation designating teeth whitening as a service that may be provided only by a licensed dentist, where state policy is to protect the health and welfare of citizens and to promote competition.

- The state legislature designated an executive agency to review regulations recommended by the state regulatory board. Recommended regulations become effective only following the approval of the agency.

- The agency provided notice of (i) the recommended regulation and (ii) an opportunity to be heard, to dentists, to non-dentist providers of teeth whitening, to the public (in a newspaper of general circulation in the affected areas), and to other interested and affected persons, including persons that have previously identified themselves to the agency as interested in, or affected by, dentist scope of practice issues.

- The agency took the steps necessary for a proper evaluation of the recommended regulation. The agency:

  - ✓ Obtained the recommendation of the state regulatory board and supporting materials, including the identity of any interested parties and the full evidentiary record compiled by the regulatory board.

  - ✓ Solicited and accepted written submissions from sources other than the regulatory board.

  - ✓ Obtained published studies addressing (i) the health and safety risks relating to teeth whitening and (ii) the training, skill, knowledge, and equipment reasonably required in order to safely and responsibly provide teeth whitening services (if not contained in submission from the regulatory board).

  - ✓ Obtained information concerning the historic and current cost, price, and availability of teeth whitening services from dentists and non-dentists (if not contained in submission from the regulatory board). Such information was verified (or audited) by the Agency as appropriate.

  - ✓ Held public hearing(s) that included testimony from interested persons (including dentists and non-dentists). The public hearing provided the agency with an opportunity (i) to hear from and to question providers, affected customers, and experts and (ii) to supplement the evidentiary record compiled by the state board. (As noted above, if the state regulatory board has previously conducted a suitable public hearing, then it may be unnecessary for the supervising agency to repeat this procedure.)

- The agency assessed all of the information to determine whether the recommended regulation comports with the State's goal to protect the health and

welfare of citizens and to promote competition.

- The agency issued a written decision accepting, rejecting, or modifying the scope of practice regulation recommended by the state regulatory board, and explaining the rationale for the agency's action.

Scenario 2: Example of satisfactory active supervision of a state regulatory board administering a disciplinary process.

A common function of state regulatory boards is to administer a disciplinary process for members of a regulated occupation. For example, the state regulatory board may adjudicate whether a licensee has violated standards of ethics, competency, conduct, or performance established by the state legislature.

Suppose that, acting in its adjudicatory capacity, a regulatory board controlled by active market participants determines that a licensee has violated a lawful and valid standard of ethics, competency, conduct, or performance, and for this reason, the regulatory board proposes that the licensee's license to practice in the state be revoked or suspended. In order to invoke the state action defense, the regulatory board would need to show both clear articulation and active supervision.

- In this context, active supervision may be provided by the administrator who oversees the regulatory board (*e.g.*, the secretary of health), the state attorney general, or another state official who is not an active market participant. The active supervision requirement of the state action defense will be satisfied if the supervisor: (i) reviews the evidentiary record created by the regulatory board; (ii) supplements this evidentiary record if and as appropriate; (iii) undertakes a de novo review of the substantive merits of the proposed disciplinary action, assessing whether the proposed disciplinary action comports with the policies and standards established by the state legislature; and (iv) issues a written decision that approves, modifies, or disapproves the disciplinary action proposed by the regulatory board.

Note that a disciplinary action taken by a regulatory board affecting a single licensee will typically have only a de minimis effect on competition. A pattern or program of disciplinary actions by a regulatory board affecting multiple licensees may have a substantial effect on competition.

The following do <u>not</u> constitute active supervision of a state regulatory board that is controlled by active market participants:

- The entity responsible for supervising the regulatory board is itself controlled by active market participants in the occupation that the board regulates. *See N.C. Dental*, 135 S. Ct. at 1113-14.

- A state official monitors the actions of the regulatory board and participates in deliberations, but lacks the authority to disapprove anticompetitive acts that fail to accord with state policy. *See Patrick v. Burget*, 486 U.S. 94, 101 (1988).

- A state official (*e.g.*, the secretary of health) serves ex officio as a member of the regulatory board with full voting rights. However, this state official is one of several members of the regulatory board and lacks the authority to disapprove anticompetitive acts that fail to accord with state policy.

- The state attorney general or another state official provides advice to the regulatory board on an ongoing basis.

- An independent state agency is staffed, funded, and empowered by law to evaluate, and then to veto or modify, particular recommendations of the regulatory board. However, in practice such recommendations are subject to only cursory review by the independent state agency. The independent state agency perfunctorily approves the recommendations of the regulatory board. *See Ticor*, 504 U.S. at 638.

- An independent state agency reviews the actions of the regulatory board and approves all actions that comply with the procedural requirements of the state administrative procedure act, without undertaking a substantive review of the actions of the regulatory board. *See Patrick*, 486 U.S. at 104-05.

CENTER FOR PUBLIC INTEREST LAW
University of San Diego School of Law
5998 Alcalá Park
San Diego, CA 92110-2492
P: (619) 260-4806 / F: (619) 260-4753
1107 Ninth Street, Suite 880
Sacramento, CA 95814 / P: (916) 844-5646
www.cpil.org

North Carolina State Board of Dental Examiners v. Federal Trade Commission: A Proposal for Implementation in California

Presented by the Center for Public Interest Law to the

SENATE COMMITTEE ON BUSINESS, PROFESSIONS AND ECONOMIC DEVELOPMENT
and
ASSEMBLY COMMITTEE ON BUSINESS AND PROFESSIONS

October 22, 2015

Introduction

In the Supreme Court's landmark decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, __US ___, 135 S. Ct. 1101 (2015) (*"North Carolina"*), Justice Kennedy makes a critical observation:

> Limits on state-action immunity are ***most essential when the State seeks to delegate its regulatory power to active market participants,*** for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. ***In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability.***

Id. at 135 S. Ct. at 1111 (emphases added), *citing California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980) ("*Midcal*") ("The national policy in favor of competition cannot be thwarted by casting [a] gauzy cloak of state involvement over what is essentially a private price-fixing arrangement").

Today, many of California's occupational licensing boards are controlled by "active market participants" – licensees who stand to directly benefit from anticompetitive decisions the board makes. Thus, to protect boards and their members from antitrust liability, California must either 1) re-constitute the boards to include a supermajority of non-conflicted "public members," or 2) ensure that all actions of a board dominated by active market participants are subject to a state supervision mechanism that "provide[s] ***'realistic assurance'*** that a nonsovereign actor's anticompetitive conduct 'promotes state policy, rather than merely the party's individual interests.'" *North Carolina,* 135 S.Ct. at 1116, *quoting Patrick v. Burget*, 486 U.S. 94, 100-01 (1988) (emphasis added).

If the legislature considers changing the composition of the boards, it is important to note that a simple majority of public members on a board will not suffice. On October 14, 2015, the Federal Trade Commission – indeed the prevailing party in the *North Carolina* case – issued staff guidance

regarding the implementation of *North Carolina*. *See* Appendix Ex. A. According to the FTC, "[a]ctive market participants need not constitute a numerical majority of the members of a state regulatory board in order to trigger the requirement of active supervision. A decision that is controlled, either as a matter of law, procedure or fact, by active participants in the regulated market (e.g., through veto power, tradition, or practice) must be actively supervised to be eligible for the state action defense." Ex. A at p. 8. [1]

If California chooses not to reconstitute the boards, it must implement a supervision mechanism which reviews "the ***substance*** of the anticompetitive decision, not merely the procedures followed to produce it…" *North Carolina*, 135 S.Ct. at 1116 (citations omitted, emphasis added). Moreover, "the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy…; and the 'mere potential for state supervision is not an adequate substitute for a decision by the State…." *Id.* The Supreme Court's *Midcal* decision holds that "state supervision" must be specific and *bona fide*; in other words, state "rubber stamping" of a regulatory board's action will not suffice. *Midcal*, 445 U.S. at 105-106.

Anticompetitive regulatory action

Many of the decisions occupational licensing boards make on a regular basis necessarily "restrain trade." For example, they decide who is allowed to practice a trade or profession and who is excluded, with the force of law. They revoke licenses, and specify how the licensees are to practice. These acts, if committed by a cartel – or any private grouping of competitors – would be *per se* antitrust violations under federal law (*e.g.*, Sherman Act, 15 U.S.C. § 1 *et seq.*) For example, licensing boards control supply by limiting entry into the profession or market. These barriers to entry are effectively "group boycotts" and/or price fixing, which, as *per se* offenses, constitute antitrust violations without recourse to their "reasonableness" or other related defenses. The federal remedy for any violation of the Sherman Act includes potential felony prosecution, as well as private civil treble damages relief.

The Attorney General's Opinion Misses Two Critical Points

While the Attorney General's Opinion No. 15-402, issued September 10, 2015, provides a thorough and generally accurate analysis of the *North Carolina* opinion, there are two elements that must also be considered when implementing a mechanism for protecting California's regulatory boards from antitrust liability:

1) ***Status Quo Rulemaking Review is Inadequate: Neither OAL nor DCA Currently Reviews Any Board Regulations for Anticompetitive Effect:*** The opinion's finding that "… promulgation of regulations is a fairly safe area for board members, because of the public notice, written justification, [Department of Consumer Affairs] Director review, and review by the Office of Administrative Law as required by the Administrative Procedure Act" (Op. at 8) is inaccurate. In fact, there is ***no entity*** in state government that currently reviews regulations for anticompetitive effect, nor is there an entity which has the power to

[1] Courts look to FTC guidance with deference with interpreting cases involving its jurisdiction. *See Harris v. Home Depot U.S.A., Inc.*, Case No. 15-CV-01058-VC, --- F.Supp.3d ---; 2015 WL 4270313, at *1 (N.D. Cal. June 30, 2015); *see also Chrislensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (Although an opinion letter by an agency charged with administering a statute, such as the FTC, is not entitled to "Chevron deference" [] it is well established that it is entitled to "respect" and is persuasive).

modify or disapprove of regulations for anticompetitive reasons. The opinion misses two key factors:

a. ***The DCA Director is not required to review DCA boards' regulations for anticompetitive effect***. *See* Bus. & Prof. Code § 313.1. In fact, that same provision ***precludes*** the DCA Director from reviewing several kinds of regulations at all. *Id.*

b. ***Anticompetitive impact is not one of the six criteria*** reviewed by the Office of Administrative Law (OAL) under current law. *See* Gov't Code § 11349.1, which lists necessity, authority, clarity, consistency, reference, and nonduplication as the six standards which OAL must review under the Administrative Procedure Act (APA).

2) ***Non-DCA Boards Are Excluded from the AG's Analysis:*** The opinion does not consider the impact of the *North Carolina* decision on non-DCA boards -- most significantly, the State Bar of California, whose governing Board of Trustees consists of a supermajority of active market participants, including six lawyers who are *elected* to the Board by lawyers in various parts of the state. The legislature must consider a mechanism to ensure that decisions and acts of the State Bar and other non-DCA boards are actively supervised with respect to anticompetitive conduct.[2]

Independent State Supervision Defined

The FTC also provided specific guidance regarding the post-*North Carolina* features of independent state supervision. *See* Appendix Ex. A at p. 10. Specifically, the following factors determine whether the active supervision requirement has been satisfied:

1) **Consideration of all Relevant Information:** The supervisor must obtain the information necessary for a proper evaluation of the action recommended by the regulatory board, including ascertaining relevant facts, collecting data, conducting public hearings, inviting and receiving public comments, investigating market conditions, conducting studies, and reviewing documentary evidence.

2) **Evaluation of the Substantive Merits**: The supervisor must assess whether the recommended action comports with the standards established by the legislature.

3) **Written Decision:** The supervisor must issue a written decision approving, modifying, or disapproving the recommended action, and explaining the reasons and rationale for such a decision.

The Center for Public Interest Law's Proposal for California:

1) **Ensure expert competitive impact review at OAL:** The Government Code should be amended to ensure OAL is reviewing all rulemaking for anticompetitive effect. For example,

[2] The *North Carolina* opinion expressly includes regulation of attorneys. 135 S. Ct. at 1111, *quoting Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975) ("'The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.'").

the legislature could create a panel of economic experts as a part of OAL, and add a seventh criterion to Government Code § 11349.1, requiring the panel or other expert(s) to review all rulemaking for "anticompetitive effect."

a. **Independence:** The expert review panel or any other person/entity that is reviewing these decisions should be independent of any profit stake interest in any matter before it.

b. **Simultaneous Review:** The expert review panel should conduct its review of anticompetitive impact as part of the OAL review process, with OAL simultaneously handling the other six elements as per current law.[3]

c. **Modification/Veto Power**: The expert review panel, unlike OAL, should have broad authority to revise or reject proposed rules, and issue a written decision as to its findings regarding the anticompetitive impact of the rule. This written decision would be included with OAL's final determination.

2) **Create a position at OAL to accept and evaluate complaints regarding non-rulemaking acts and decisions:** Many restraints of trade are accomplished by decisions *other* than rulemaking, including unreasonably difficult licensing exams, patterns of enforcement, or as in the *North Carolina* case, cease and desist letters to non-licensees. Accordingly, the Government Code should be amended to establish a position, also housed at OAL, to accept and evaluate complaints about such conduct. This individual would have a background in the economics of competition, and would refer any board actions that may have an anticompetitive effect to the expert panel for review and final decision. Individual disciplinary decisions would not be referred to the expert review panel unless there is a pattern of revocation or discipline, or a clear anticompetitive motivation beyond an alleged rule or statutory violation. Such a threshold filter will ensure that non-rulemaking activities may be addressed and reviewed, without unduly burdening the expert review panel with complaints about decisions that do not truly have anticompetitive impact.

3) **Require a "Competition Impact Statement" for all Rulemaking:** The Government Code should be amended to require agencies conducting rulemaking to include a "competition impact statement," similar to the other statements agencies are required to include in their rulemaking file. *See, e.g.*, Gov't Code § 11346.3. The competition impact statement must include the scope and nature of possible restraints; their effect on prices and competition; and any ameliorating exceptions, checks, or public interest justifications.

4) **Require all State Bar Actions to be Reviewed for Anticompetitive Effect:** The legislature must either convert the Bar's Board of Trustees to a public member supermajority, or subject the Bar to the same expert review set forth above. This active supervision could be performed by the OAL panel, or a separate one as the Supreme Court might decide. The State Bar will contend that it is already "actively supervised" by the Supreme Court, but this is not the case. The Supreme Court does review the Bar's proposed

[3] This format is designed to accommodate anticompetitive review within the present structure in order to avoid additional delay. The rulemaking file would be expanded to incorporate anticompetitive impact, and the same rulemaking file would be simultaneously available to OAL and the expert review panel.

changes to the Rules of Professional Conduct (RPC), but the Business and Professions Code only requires the Supreme Court's "approval;" it does not mandate anticompetitive impact review. Bus. & Prof. Code § 6076. Nor does the Supreme Court review any changes to the myriad number of non-RPC rule compilations maintained by the State Bar. And the Court reviews State Bar Court disciplinary decisions, but only if such a decision is appealed to it by the subject attorney and the Court decides to hear the matter; its review of State Bar Court disciplinary decisions is discretionary. California Rule of Court 9.16; *see also In Re Mason Harry Rose V*, 22 Cal. 4th 430 (2000).

CPIL submits that this mechanism will ensure that California complies with the *North Carolina* decision in a manner that uses an existing structure to minimize delay and complexity. It will provide meaningful review for anticompetitive impact, and ensure that relevant information is provided and considered. It will also ensure that individuals who review this conduct have the relevant expertise as well as independence from a profit stake interest in the decision. Critically, this model is fully supported by the FTC guidance on the subject.

Current Examples of Anticompetitive Actions by California Regulatory Boards

- **California Board of Accountancy** ("CBA"): CBA continues to administer the Uniform Certified Public Accountant Examination as a prerequisite to CPA licensure in California. That test is wholly controlled by the American Institute of Certified Public Accountants (AICPA) – a trade association completely dominated by market participants. All national trade associations that once controlled the licensing exam used by states to bar entry into a profession have divested themselves of such control due to the obvious conflict of interest – except the CPA profession. Only the accountancy profession – in the form of the AICPA – retains control over the licensing examination used in 54 jurisdictions to license its members. While CBA will argue it retains the power to supervise the exam, there is no evidence it has actually exercised such supervision in a way that would insulate the Board from antitrust liability as required by *Midcal*. Instead it impermissibly delegates this authority to the AICPA.

- **Medical Board of California's Contemplated Support of the Federation of State Medical Boards' "Licensing Compact":** If the Medical Board enters into this compact developed by the FSMB, it would necessarily delegate some of its licensing authority to other state medical boards and to a new commission within FSMB – all of which are dominated by active market participants in the medical profession.

- **Veterinary Medical Board:** VMB is currently considering proposed regulations mandating that "animal rehabilitation" may be performed by non-veterinarians only under the direct supervision of a licensed veterinarian. These proposed regulations have been challenged by hundreds of individuals and groups which argue that many aspects of "animal rehabilitation" – as defined in the proposed rules – do not constitute the practice of veterinary medicine and may not be restricted by the Board; these commenters also argue that the Board is simply attempting to protect the business of its DVM licensees by limiting business competition from non-veterinarians.

Center for Public Interest Law's Interest and Qualifications

The Center for Public Interest Law (CPIL) is a nonprofit, nonpartisan, academic center of research, teaching, learning, and advocacy in regulatory and public interest law based at the University of San Diego School of Law. Since 1980, CPIL has studied the state's regulation of business, professions, and trades, and monitors the activities of state occupational licensing agencies, including the regulatory boards within the Department of Consumer Affairs (DCA). CPIL publishes the *California Regulatory Law Reporter*, which chronicles the activities and decisions of 25 California regulatory agencies. CPIL's founder and Executive Director is Professor Robert C. Fellmeth, who holds the Price Chair in Public Interest Law at the USD School of Law. Prior to founding CPIL, Professor Fellmeth was an antitrust prosecutor at the San Diego District Attorney for nine years; he was cross-commissioned as a U.S. Attorney so he could bring antitrust suits in federal court. He co-authors *California White Collar Crime and Business Litigation*, 4th Ed. (with Thomas A. Papageorge) (Tower, 2013).

CPIL's expertise has long been relied upon by the legislature, the executive branch, and the courts where the regulation of licensed professions is concerned. CPIL personnel have served as enforcement monitors at the State Bar (1987-1992), the Medical Board of California (2003-2005), and the Contractors' State License Board (2001-2003). These multi-year projects have resulted in numerous reports and successful reform legislation at these agencies.

Memo

2450 Del Paso Road, Suite 105
Sacramento, CA 95834
(916) 575-7170, (916) 575-7292 Fax
www.optometry.ca.gov

To: Board Members **Date:** November 20, 2015

From: Robert Stephanopoulos
Enforcement Analyst **Telephone:** (916) 575-7185

Subject: **Agenda Item 11 - In the Matter of the Petition for Reduction of Penalty or Early Termination of Probation**

Dr. David J. Butchert, O.D. (Petitioner) was issued Optometrist License Number 10190 by the Board on September 16, 1993. On August 29, 2013, the Board filed an Accusation against Petitioner charging him with violations of laws and regulations based on a Prohibited Business Relationship with a Registered Dispensing Optician, Assisting in and Abetting Violations of the Optometry Practice Act, Failure to have Control over his Optometry Practice, Accepting Employment from an Unlicensed Person, Failure to Notify the Board of a Practice Location, Failure to Obtain a Branch Office License, Practicing Under a False or Assumed Name, and Advertising without using his Individual Name. Effective May 28, 2014, Petitioner's license was revoked, the revocation was stayed and Petitioner's license was placed on five (5) years' probation, subject to certain terms and conditions.

The Petitioner is requesting the Board to grant his Petition for Reduction of Penalty or Early Termination of Probation.

Attached are the following documents submitted for the Board's consideration in the above referenced matter:

1. Petition for Reduction of Penalty and Early Termination of Probation
2. Copies of the Stipulated Settlement and Disciplinary Order, and Accusation
3. Certification of Licensure

BUSINESS, CONSUMER SERVICES, AND HOUSING AGENCY GOVERNOR EDMUND G. BROWN JR.

CALIFORNIA STATE BOARD OF OPTOMETRY

STATE BOARD OF OPTOMETRY
2450 DEL PASO ROAD, SUITE 105, SACRAMENTO, CA 95834
P (916) 575-7170 F (916) 575-7292 www.optometry.ca.gov

PETITION FOR REDUCTION OF PENALTY OR EARLY TERMINATION OF PROBATION

No petition for reduction of penalty or early termination of probation will be entertained until one year after the effective date of the Board's disciplinary action. The decision of the petition will be made by the full Board and in accordance with the attached standards for reinstatement or reduction of penalty. Early release from probation or a modification of the terms of probation will be provided only in exceptional circumstances, such as when the Board determines that the penalty or probationary terms imposed have been excessive, considering both the violation of law charged and the supporting evidence, or when there is substantive evidence that there is no more need for the degree of probationary supervision as set forth in the original terms and conditions. As a rule, no reduction of penalty or early termination of probation will be granted unless the probationer has at all times been in compliance with the terms of probation.

PLEASE TYPE OR PRINT LEGIBLY

1. NAME (FIRST) David	(MIDDLE) Joseph	(LAST) Butchert	CERTIFICATE OF REGISTRATION NO. 10190T
2. ADDRESS (NUMBER) 11847	(STREET) South St.		DATE OF BIRTH 6/10/66
(CITY) Cerritos	(STATE) CA	(ZIP CODE) 90703	TELEPHONE (562) 865-6119
3. PHYSICAL DESCRIPTION	(HEIGHT) 6'3"	(WEIGHT) 240	(EYE COLOR) Blue / (HAIR COLOR) Brown

4. EDUCATION: NAME(S) OF SCHOOL(S) OR COLLEGE(S) OF OPTOMETRY ATTENDED

NAME OF SCHOOL Illinois College of Optometry

ADDRESS (NUMBER) 3241 (STREET) South Michigan Ave

(CITY) Chicago (STATE) IL (ZIP CODE) 60616

5. ARE YOU CURRENTLY LICENSED IN ANY OTHER STATE? ☒ YES ☐ NO

STATE	LICENSE NO.	ISSUE DATE	EXPIRATION DATE	LICENSE STATUS
MN	2464	1/1/15	12/31/15	Active

6. List locations, dates, and types of practice for 5 years prior to discipline of your California license.

LOCATION	DATE FROM	DATE TO	TYPE OF PRACTICE
Cerritos, CA	10/1/13	Present	Private - Optometry
Lakewood, CA	12/08	9/30/13	Private - Optometry
Simi Valley, CA + various	1/1/11	9/30/13	Commercial - Optometry
Los Angeles, CA	2/09	10/12	Private - Optometry

39M-12

7. Are you or have you ever been addicted to the use of narcotics or alcohol? ☐ YES ☒ NO

8. Are you or have you ever suffered from a contagious disease? ☐ YES ☒ NO

9. Are you or have you ever been under observation or treatment for mental disorders, alcoholism or narcotic addiction? ☐ YES ☒ NO

10. Have you ever been arrested, convicted or pled no contest to a violation of any law of a foreign country, the United States, any state, or a local ordinance? you must include all convictions, including those that have been set aside under Penal Code Section 1203.4 (which includes diversion programs) ☐ YES ☒ NO

11. Are you now on probation or parole for any criminal or administrative violations in this state or any other state? (Attach certified copies of all disciplinary or court documents) ☐ YES ☒ NO

12. Have you ever had disciplinary action taken against your optometric license in this state or any other state? Only Current ☐ YES ☒ NO

IF YOU ANSWERED YES TO ANY OF THE ABOVE QUESTIONS, YOU MUST ATTACHMENT A STATEMENT OF EXPLANATION GIVING FULL DETAILS.

ON A SEPARATE SHEET OF PAPER PROVIDE THE FOLLOWING INFORMATION

13. List the date of disciplinary action taken against your license and explain fully the cause of the disciplinary action.

14. Explain fully why you feel your license should be restored, or the disciplinary penalty reduced.

15. Describe in detail your activities and occupation since the date of the disciplinary action; include dates, employers and locations.

16. Describe any rehabilitative or corrective measures you have taken since your license was disciplined to support your petition.

17. List all post-graduate or refresher courses, with dates, location and type of course, you have taken since your license was disciplined.

18. List all optometric literature you have studied during the last year.

19. List all continuing education courses you have completed since your license was disciplined.

20. List names, addresses and telephone numbers of persons submitting letters of recommendation accompanying this petition.

I declare under penalty of perjury under the laws of the State of California that the answers and information given by me in completing this petition, and any attachments, are true and I understand and agree that any misstatements of material facts will be cause for the rejection of this petition.

Date 5/28/15 Signature _____ O.D.

All items of information requested in this petition are mandatory. Failure to provide any of the requested information will result in the petition being rejected as incomplete. The information will be used to determine qualifications for reinstatement, reduction of penalty or early termination of probation. The person responsible for information maintenance is the Executive Officer of the Board of Optometry at 2420 Del Paso Road, Suite 255, Sacramento, California, 95834. This information may be transferred to another governmental agency such as a law enforcement agency, if necessary to perform its duties. Each individual has the right to review the files or records maintained on them by our agency, unless the records are identified confidential information and exempted by Section 1798.3 of the Civil Code.

David Butchert, O.D.

11847 South Street
Cerritos, CA 90703

(562) 865-6119 / (714) 995-6563
Fax: (562) 865-4665

Note: Separate copy sent via fax.

Disciplinary Action Date and Cause

My disciplinary action became effective on May 28, 2014. These were the causes of the disciplinary action: prohibited business arrangement with an RDO, assisting in and abetting violations of the Optometry Act, failure to have control over an optometry practice, accepted employment to practice from an unlicensed person, failure to notify board of practice location, practicing optometry under a false or assumed name, and advertising without using individual name.

Request for Early Termination of Probation

I would like to request an early termination of my probation and to have my license fully restored for the following reasons: I have fully complied with all of the Board's terms and conditions related to the probationary period—I have filed quarterly reports in a timely manner as per the Board's requests; I have cooperated with the probation monitoring program, including filing the monthly probation monitoring costs; I have functioned as an optometrist a minimum of 60 hours per week; I have paid back to the Board in full the total cost of the investigation; I have taken and passed the California law exam; I have completed community service on a monthly basis as per the Board's request; I have maintained a current, active and valid license to practice optometry; and I have taken and completed the remedial education course *Practice Management and Ethics*.

In 2014, I took and passed the California law exam and while studying for that, realized that what I did was wrong, and I have taken steps to make sure I do not put myself in that type of position again. I have purchased my own professional practice in which I own the practice 100%. I obtained financing by myself through Wells Fargo. It is the only location I've worked at since the disciplinary action went into effect. I currently work at the practice 5 ½ days a week, which includes seeing patients 5 days and roughly one half day of administrative work. I have found it to be very rewarding being my own boss, and I have no interest in practicing elsewhere again. I have a vision for the practice—I'm a modernist and I enjoy the medical aspects of optometry—as a result, I plan to modernize the practice and to implement the medical model of optometry. I plan to fully comply with all rules pertaining to the practice of optometry.

One reason I request to be taken off of probation is the fact that some insurance plans have refused to allow me to participate on their plans because of this disciplinary action. By being fully restored, it will allow me to grow my practice to the fullest and be successful.

Activities and Occupation Since the Disciplinary Date

Since May 28, 2014, I have been working at my own practice 5-6 days a week, and I have not worked at any other location during that time. I have found the experience of being my own boss very satisfying and rewarding, and I have no interest of working in another capacity again.

Corrective Measures.

I have complied with the Board's requirements during the probationary period, and I have worked full-time at my own practice.

Post-graduate/Refresher Courses

I have taken and completed the course *Practice Management and Ethics* through Marshall B. Ketchum University. The course was given by Dr. Carnevali at the University Eye Center at Los Angeles--Marshall B. Ketchum University in October 2014.

Optometric Literature

The optometric literature I have studied this past year mainly consists of the optometric magazines I receive in the mail. This list includes Review of Optometry, Optometric Management, Optometry Times, Vision Monday, Eyecare Business, Invision, and Eyecare Product News. I also read the book *Diabetic Retinopathy* by Dr. David Boyer, M.D., et al.

Continuing Education Courses

Here is the list of continuing education course I have taken since May 28, 2014:

1. Ocular Symposium, San Francisco, CA. 5/30/14
2. IVA meeting, Buena Park, CA. 11/2/14
3. South Coast Retina, Huntington Beach, CA. 11/18/14
4. South Coast Retina, Long Beach, CA. 12/5/14
5. South Coast Retina, Long Beach, CA. 12/11/14
6. C and E Symposium, Orange, CA. 1/15/15
7. IVA meeting, Yorba Linda, CA. 2/8/15
8. Clarity meeting, Huntington Beach, CA. 2/15
9. Retina-Vitreous, Los Angeles, CA. 3/1/15
10. Vision Expo East, New York, NY. 3/20/15

Names of those submitting letters of recommendation

1. Michelle DePaula, 6102 Pageantry St., Long Beach, CA 90808. 562-377-0419

2. Dr. Tae Kim, M.D., 11829 E. South St., Suite 202, Cerritos, CA 90703. 562-402-4720

3. Shea Hamilton, 920 N. Alameda St., Compton, CA 90221. 310-537-2102

Note: The letters of recommendation will be sent separately.

July 15, 2015

California State Board of Optometry
2420 Del Paso Road #225
Sacramento, CA 95834

Dear Optometry Board:

I have known and worked with Dr. David Butchert since 2014 and can attest to his skill as a professional as the personal traits which make him an excellent candidate for reinstatement. Dr. Butchert has performed his community service with our organization by providing eye examinations to the uninsured, underserved, and working poor, at no cost to them or their families who otherwise would not have access to such services.

Professionally, Dr. Butchert has committed himself twice a month on Monday's to provide vision care to our most deserving population our children. He works very well with others. He takes time with each patient making them feel very special, each patient comes out of the examination room with reassurance that they are going to do better in school. Without Dr. Butchert's help this past year Angels for Sight would have had a difficult time maintain our trademark of providing quality vision care in a timely manner to our patients and the community as a whole.

Personally, I can say Dr. Butchert is one of our favorites to work with. He has a very positive attitude, compassionate and caring no task is impossible for him. Not only is he diligent and hardworking, he is also persistent, pro-active and possess excellent interpersonal skills. All that have had the opportunity to work with him have commented that they enjoyed their experience.

In conclusion, I whole-heartedly recommend Dr. David Butchert for reinstatement as he apply. Feel free to contact me should you want to further discuss my recommendation.

Respectfully,

Shea Hamilton
President

920 North Alameda Street • Compton, California 90221 • T 310.537.2102 • F 310.537.2100 • www.angelsforsight.org

Board of Directors

Shea Hamilton, *Founder* • Betty Ann Pace, *Chairman* • Robert "Bob" Bartlett, *Treasurer*
Karen Ayres, *ABOC and Sales Consultant, Secretary* • Barbara Cocks, *Huerta Quorum, President* • Dr. Lana Tu, *Board Advisor*

CERRITOS EYE MEDICAL CENTER, INC.
TAE S. KIM, M.D.
Cataract & Glaucoma Specialist & Eye Surgeon
Diplomate, American Board of Ophthalmology

June 8, 2015

RE: Letter of Reference on behalf of:
David Butchert, O.D.

To Whom It May Concern:

My name is Tae S. Kim, M.D., and I have been practicing ophthalmology in Cerritos for nearly 20 years. I have known Dr. David Butchert for the past 2 years. We have worked together in managing several patients during the course of that time.

I have found Dr. Butchert to be professional, courteous, and his diagnostic skill more than sufficient. He recognizes pathology and refers them in a timely and appropriate manner. His patients seem satisfied with his service, and I have no reservation about the quality of care that he provides to his patients.

With Regards,

Tae S. Kim, M.D.

11829 E. South St., Suite 202, Cerritos, California 90703 • Tel: (562) 402-4720 • Fax: (562) 402-9231

May 23, 2015

It is my pleasure to write a letter of reference for Dr David Butchert. For almost two years, I have been Dr. Butchert's office manager at his optometry practice in Cerritos. During this time, we have worked side by side in building a successful practice in order to help patients with their general eye health.

I know Dr. Butchert as an honorable, conscientious, and ethical person. He has been persistent in managing the practice to become one that is of very high standards in regards to patient care, business operations, and technical advancements. I have witnessed him successfully apply for business licenses, business insurances, and prestigious optical accounts.

On a weekly basis the patient's feedback of his performance has been superior. I am without doubt that Dr. Butchert will continue growing a successful practice. I am enthusiastic to be a part of his growth and knowledge in the optical field. I am proud to be employed by a man with high standards, great integrity, and outstanding work ethic.

Sincerely,
Michelle DePaula
Michelle DePaula

Office Manager/ Licensed Optician

BEFORE THE
STATE BOARD OF OPTOMETRY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: DAVID J. BUTCHERT 11847 South Street Cerritos, CA 90703 Optometrist License No. 10190 Respondent.	Case No. CC-2012-115 OAH No. 2013100323

DECISION AND ORDER

The attached Stipulated Settlement and Disciplinary Order is hereby adopted by the State Board of Optometry, Department of Consumer Affairs, as its Decision in this matter.

This Decision shall become effective on May 28, 2014.

It is so ORDERED April 28, 2014.

Alejandro M. Arredondo, OD

FOR THE STATE BOARD OF OPTOMETRY
DEPARTMENT OF CONSUMER AFFAIRS

KAMALA D. HARRIS
Attorney General of California
ARMANDO ZAMBRANO
Supervising Deputy Attorney General
LINDA L. SUN
Deputy Attorney General
State Bar No. 207108
300 So. Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-6375
Facsimile: (213) 897-2804
Attorneys for Complainant

BEFORE THE
STATE BOARD OF OPTOMETRY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: **DAVID J. BUTCHERT** **11847 South Street** **Cerritos, CA 90703** **Optometrist License No. 10190** Respondent.	Case No. CC-2012-115 OAH No. 2013100323 **STIPULATED SETTLEMENT AND DISCIPLINARY ORDER**

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-entitled proceedings that the following matters are true:

PARTIES

1. Mona Maggio ("Complainant") is the Executive Officer of the State Board of Optometry ("Board"). She brought this action solely in her official capacity and is represented in this matter by Kamala D. Harris, Attorney General of the State of California, by Linda L. Sun, Deputy Attorney General.

2. Respondent David J. Butchert ("Respondent") is represented in this proceeding by attorney Craig S. Steinberg, O.D., J.D., whose address is: 5737 Kanan Road, No. 540, Agoura Hills, CA 91301-1601.

3. On or about September 16, 1993, the Board issued Optometrist License No. 10190 to Respondent. The Optometrist License was in full force and effect at all times relevant to the

charges brought in Accusation No. CC-2012-115 and will expire on June 30, 2015, unless renewed.

JURISDICTION

4. Accusation No. CC-2012-115 was filed before the Board and is currently pending against Respondent. The Accusation and all other statutorily required documents were properly served on Respondent on September 4, 2013. Respondent timely filed his Notice of Defense contesting the Accusation.

5. A copy of Accusation No. CC-2012-115 is attached as Exhibit A and incorporated herein by reference.

ADVISEMENT AND WAIVERS

6. Respondent has carefully read, fully discussed with counsel, and understands the charges and allegations in Accusation No. CC-2012-115. Respondent has also carefully read, fully discussed with counsel, and understands the effects of this Stipulated Settlement and Disciplinary Order.

7. Respondent is fully aware of his legal rights in this matter, including the right to a hearing on the charges and allegations in the Accusation; the right to be represented by counsel at his own expense; the right to confront and cross-examine the witnesses against him; the right to present evidence and to testify on his own behalf; the right to the issuance of subpoenas to compel the attendance of witnesses and the production of documents; the right to reconsideration and court review of an adverse decision; and all other rights accorded by the California Administrative Procedure Act and other applicable laws.

8. Respondent voluntarily, knowingly, and intelligently waives and gives up each and every right set forth above.

CULPABILITY

9. Respondent admits the truth of each and every charge and allegation in Accusation No. CC-2012-115, with the exception of the following Cause for Discipline, found on page 14, paragraph 31 of the Accusation:

"SIXTH CAUSE FOR DISCIPLINE

(Failure to Obtain a Branch Office License)

Respondent is subject to disciplinary action under Code section 3110, subdivision (a) on the grounds of unprofessional conduct for violating Code section 3077, as set forth in paragraphs 21-25, above, which are incorporated by reference. The circumstances are that from about 2008 to 2012, Respondent failed to notify the Board in writing of his branch office practice location at 8920 W. Pico Boulevard, Los Angeles, CA 90035 and failed to obtain a branch office license, prior to engaging in the practice of optometry at that location."

10. Respondent agrees that his Optometrist License is subject to discipline and he agrees to be bound by the Board's probationary terms as set forth in the Disciplinary Order below.

CONTINGENCY

11. This stipulation shall be subject to approval by the State Board of Optometry. Respondent understands and agrees that counsel for Complainant and the staff of the State Board of Optometry may communicate directly with the Board regarding this stipulation and settlement, without notice to or participation by Respondent or his counsel. By signing the stipulation, Respondent understands and agrees that he may not withdraw his agreement or seek to rescind the stipulation prior to the time the Board considers and acts upon it. If the Board fails to adopt this stipulation as its Decision and Order, the Stipulated Settlement and Disciplinary Order shall be of no force or effect, except for this paragraph, it shall be inadmissible in any legal action between the parties, and the Board shall not be disqualified from further action by having considered this matter.

12. The parties understand and agree that Portable Document Format (PDF) and facsimile copies of this Stipulated Settlement and Disciplinary Order, including Portable Document Format (PDF) and facsimile signatures thereto, shall have the same force and effect as the originals.

13. This Stipulated Settlement and Disciplinary Order is intended by the parties to be an integrated writing representing the complete, final, and exclusive embodiment of their agreement. It supersedes any and all prior or contemporaneous agreements, understandings, discussions, negotiations, and commitments (written or oral). This Stipulated Settlement and Disciplinary

Order may not be altered, amended, modified, supplemented, or otherwise changed except by a writing executed by an authorized representative of each of the parties.

14. In consideration of the foregoing admissions and stipulations, the parties agree that the Board may, without further notice or formal proceeding, issue and enter the following Disciplinary Order:

DISCIPLINARY ORDER

IT IS HEREBY ORDERED that Optometrist License No. 10190 issued to Respondent is revoked. However, the revocation is stayed and Respondent is placed on probation for five (5) years on the following terms and conditions.

SEVERABILITY CLAUSE

Each condition of probation contained herein is a separate and distinct condition. If any condition of this Order, or any application thereof, is declared unenforceable in whole, in part, or to any extent, the remainder of this Order and all other applicants thereof, shall not be affected. Each condition of this Order shall separately be valid and enforceable to the fullest extent permitted by law.

1. **OBEY ALL LAWS**

Respondent shall obey all federal, state, and local laws, governing the practice of optometry in California.

Respondent shall notify the Board in writing within 72 hours of any incident resulting in his arrest, or charges filed against, or a citation issued against Respondent.

CRIMINAL COURT ORDERS: If Respondent is under criminal court orders by any governmental agency, including probation or parole, and the orders are violated, this shall be deemed a violation of probation and may result in the filing of an accusation or petition to revoke probation or both.

OTHER BOARD OR REGULATORY AGENCY ORDERS: If Respondent is subject to any other disciplinary order from any other health-care related board or any professional licensing or certification regulatory agency in California or elsewhere, and violates any of the orders or

///

conditions imposed by other agencies, this shall be deemed a violation of probation and may result in the filing of an accusation or petition to revoke probation or both.

2. **QUARTERLY REPORTS**

Respondent shall file quarterly reports of compliance under penalty of perjury to the probation monitor assigned by the Board. Quarterly report forms will be provided by the Board (DG-QR1 (05/2012)). Omission or falsification in any manner of any information on these reports shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against Respondent's optometrist license. Respondent is responsible for contacting the Board to obtain additional forms if needed. Quarterly reports are due for each year of probation throughout the entire length of probation as follows:

- For the period covering January 1st through March 31st, reports are to be completed and submitted between April 1st and April 7th.
- For the period covering April 1st through June 30th, reports are to be completed and submitted between July 1st and July 7th.
- For the period covering July 1st through September 30th, reports are to be completed and submitted between October 1st and October 7th.
- For the period covering October 1st through December 31st, reports are to be completed and submitted between January 1st and January 7th.

Failure to submit complete and timely reports shall constitute a violation of probation.

3. **COOPERATE WITH PROBATION MONITORING PROGRAM**

Respondent shall comply with the requirements of the Board's probation monitoring program, and shall, upon reasonable request, report or personally appear as directed.

Respondent shall claim all certified mail issued by the Board, respond to all notices of reasonable requests timely, and submit Reports, Identification Update reports or other reports similar in nature, as requested and directed by the Board or its representative.

Respondent is encouraged to contact the Board's probation monitoring program representative at any time he has a question or concern regarding his terms and conditions of probation.

Failure to appear for any scheduled meeting or examination, or cooperate with the requirements of the program, including timely submission of requested information, shall constitute a violation of probation and may result in the filing of an accusation and/or a petition to revoke probation against Respondent's Optometrist License.

4. **PROBATION MONITORING COSTS**

All costs incurred for probation monitoring during the entire probation shall be paid by the Respondent. The monthly cost may be adjusted as expenses are reduced or increased. Respondent's failure to comply with all terms and conditions may also cause this amount to be increased.

All payments for costs are to be sent directly to the Board and must be received by the date(s) specified. (Periods of tolling will not toll the probation monitoring costs incurred.)

If Respondent is unable to submit costs for any month, he shall be required, instead, to submit an explanation of why he is unable to submit the costs, and the date(s) he will be able to submit the costs, including payment amount(s). Supporting documentation and evidence of why the Respondent is unable to make such payment(s) must accompany this submission.

Respondent understands that failure to submit costs timely is a violation of probation and submission of evidence demonstrating financial hardship does not preclude the Board from pursuing further disciplinary action. However, Respondent understands that by providing evidence and supporting documentation of financial hardship it may delay further disciplinary action.

In addition to any other disciplinary action taken by the Board, an unrestricted license will not be issued at the end of the probationary period and the optometrist license will not be renewed, until such time as all probation monitoring costs have been paid.

5. **FUNCTION AS AN OPTOMETRIST**

Respondent shall function as an optometrist for a minimum of 60 hours per month for the entire term of his probation period.

///

///

6. **NOTICE TO EMPLOYER**

Respondent shall provide to the Board the names, physical addresses, mailing addresses, and telephone number of all employers and supervisors and shall give specific, written consent that the licensee authorizes the Board and the employers and supervisors to communicate regarding the licensee's work status, performance, and monitoring. Monitoring includes, but is not limited to, any violation of any probationary term and condition.

Respondent shall be required to inform his employer, and each subsequent employer during the probation period, of the discipline imposed by this Decision by providing his supervisor and director and all subsequent supervisors and directors with a copy of the Decision and Order, and the Accusation in this matter prior to the beginning of or returning to employment or within 14 calendar days from each change in a supervisor or director.

The Respondent must ensure that the Board receives written confirmation from the employer that he is aware of the Discipline, on forms to be provided to the Respondent (DG-Form 1 (05/2012)). The Respondent must ensure that all reports completed by the employer are submitted from the employer directly to the Board. Respondent is responsible for contacting the Board to obtain additional forms if needed.

7. **CHANGES OF EMPLOYMENT OR RESIDENCE**

Respondent shall notify the Board, and appointed probation monitor in writing, of any and all changes of employment, location, and address within 14 calendar days of such change. This includes but is not limited to applying for employment, termination or resignation from employment, change in employment status, and change in supervisors, administrators or directors.

Respondent shall also notify his probation monitor AND the Board IN WRITING of any changes of residence or mailing address within 14 calendar days. P.O. Boxes are accepted for mailing purposes; however the Respondent must also provide his physical residence address as well.

///

///

///

8. **COST RECOVERY**

Respondent shall pay to the Board a sum not to exceed the costs of the investigation and prosecution of this case. That sum shall be **$10,271.75** and shall be paid in full directly to the Board, in a Board-approved payment plan, within 6 months before the end of the Probation term. Cost recovery will not be tolled.

If Respondent is unable to submit costs timely, he shall be required instead to submit an explanation of why he is unable to submit these costs in part or in entirety, and the date(s) he will be able to submit the costs, including payment amount(s). Supporting documentation and evidence of why the Respondent is unable to make such payment(s) must accompany this submission.

Respondent understands that failure to submit costs timely is a violation of probation and submission of evidence demonstrating financial hardship does not preclude the Board from pursuing further disciplinary action. However, Respondent understands that by providing evidence and supporting documentation of financial hardship may delay further disciplinary action.

Consideration to financial hardship will not be given should Respondent violate this term and condition, unless an unexpected AND unavoidable hardship is established from the date of this order to the date payment(s) is due.

9. **TAKE AND PASS CALIFORNIA LAWS AND REGULATIONS EXAMINATION**

Within 60 calendar days of the effective date of this Decision, or within some other time as prescribed in writing by the Board, Respondent shall take and pass the California Laws and Regulations Examination (CLRE). If Respondent fails this examination, Respondent must take and pass a re-examination as approved by the Board. The waiting period between repeat examinations shall be at six-month intervals until success is achieved. Respondent shall pay the established examination fees.

If Respondent fails to pass the examination within seven (7) months of the effective date of this Decision, Respondent shall immediately cease the practice of optometry until the

examination has been successfully passed; as evidenced by written notice to Respondent from the Board.

If Respondent has not taken and passed the examination within six months from the effective date of this Decision, Respondent shall be considered to be in violation of probation.

10. **COMMUNITY SERVICES**

All types of community services shall be at the Board's discretion, depending on the violation. Within 30 calendar days of the effective date of this Decision, Respondent shall submit to the Board, for its prior approval, a community service program in which Respondent provides free non-optometric or professional optometric services on a regular basis to a community or charitable facility or agency, amounting to a minimum of 16 hours per month of probation. Such services shall begin no later than 15 calendar days after Respondent is notified of the approved program.

11. **VALID LICENSE STATUS**

Respondent shall maintain a current, active and valid license for the length of the probation period. Failure to pay all fees and meet CE requirements prior to his license expiration date shall constitute a violation of probation.

12. **TOLLING FOR OUT-OF-STATE RESIDENCE OR PRACTICE**

Periods of residency or practice outside California, whether the periods of residency or practice are temporary or permanent, will toll the probation period but will not toll the cost recovery requirement, nor the probation monitoring costs incurred. Travel outside of California for more than 30 calendar days must be reported to the Board in writing prior to departure. Respondent shall notify the Board, in writing, within 14 calendar days, upon his return to California and prior to the commencement of any employment where representation as an optometrist is/was provided.

Respondent's license shall be automatically cancelled if Respondent's periods of temporary or permanent residence or practice outside California total two years. However, Respondent's license shall not be cancelled as long as Respondent is residing and practicing in another state of the United States and is on active probation with the licensing authority of that state, in which

case the two year period shall begin on the date probation is completed or terminated in that state.

13. **LICENSE SURRENDER**

During Respondent's term of probation, if he ceases practicing due to retirement, health reasons, or is otherwise unable to satisfy any condition of probation, Respondent may surrender his license to the Board. The Board reserves the right to evaluate Respondent's request and exercise its discretion whether to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances, without further hearing. Upon formal acceptance of the tendered license and wall certificate, Respondent will no longer be subject to the conditions of probation. All costs incurred (i.e., Cost Recovery and Probation Monitoring) are due upon reinstatement.

Surrender of Respondent's license shall be considered a Disciplinary Action and shall become a part of Respondent's license history with the Board.

14. **VIOLATION OF PROBATION**

If Respondent violates any term of the probation in any respect, the Board, after giving Respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an accusation or a petition to revoke probation is filed against Respondent during probation, the Board shall have continuing jurisdiction and the period of probation shall be extended until the matter is final. No petition for modification of discipline shall be considered while there is an accusation or petition to revoke probation or other discipline pending against Respondent.

15. **COMPLETION OF PROBATION**

Upon successful completion of probation, Respondent's license shall be fully restored.

16. **SALE OR CLOSURE OF AN OFFICE AND/OR PRACTICE**

If Respondent sells or closes his office after the imposition of administrative discipline, Respondent shall ensure the continuity of patient care and the transfer of patient records. Respondent shall also ensure that patients are refunded money for work/services not completed or provided, and shall not misrepresent to anyone the reason for the sale or closure of the office and/or practice. The provisions of this condition in no way authorize the practice of optometry by

the Respondent during any period of license suspension.

17. **REMEDIAL EDUCATION**

Respondent shall take and successfully complete the equivalency of a minimum of 4.0 semester units in each of the following areas pertaining to the practice of Optometry: *Practice Management* and *Ethics* All course work shall be developed by and taken at the graduate level at Marshall B. Ketchum University, Southern California College of Optometry ("SCCO"), or an accredited and approved educational institution that offers a qualifying degree for licensure as an optometrist, or through a course approved by the Board. The specific course content and semester units will be determined by the educational institution developing the courses in cooperation with Board staff. Classroom attendance must be specifically required. Course content shall be pertinent to the violation and all course work must be completed within one year from the effective date of this Decision. Successful completion is a grade of "C" or "70%" or better for any completed course.

Within 90 calendar days of the effective date of the Decision, Respondent shall submit a plan for prior Board approval for meeting these educational requirements. All costs of the course work shall be paid by the Respondent. Units obtained for an approved course shall not be used for continuing education units required for renewal of licensure.

///

///

///

///

///

///

///

///

///

///

///

ACCEPTANCE

I have carefully read the above Stipulated Settlement and Disciplinary Order and have fully discussed it with my attorney, Craig S. Steinberg. I understand the stipulation and the effect it will have on my Optometrist License. I enter into this Stipulated Settlement and Disciplinary Order voluntarily, knowingly, and intelligently, and agree to be bound by the Decision and Order of the State Board of Optometry.

DATED: 3/4/14

DAVID J. BUTCHERT
Respondent

I have read and fully discussed with Respondent David J. Butchert the terms and conditions and other matters contained in the above Stipulated Settlement and Disciplinary Order. I approve its form and content.

DATED: 3-4-14

Craig S. Steinberg
Attorney for Respondent

ENDORSEMENT

The foregoing Stipulated Settlement and Disciplinary Order is hereby respectfully submitted for consideration by the State Board of Optometry.

Dated: 3-4-14

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
ARMANDO ZAMBRANO
Supervising Deputy Attorney General

LINDA L. SUN
Deputy Attorney General
Attorneys for Complainant

LA2013509184
51464252.doc

Exhibit A

Accusation No. CC-2012-115

KAMALA D. HARRIS
Attorney General of California
ARMANDO ZAMBRANO
Supervising Deputy Attorney General
LINDA L. SUN
Deputy Attorney General
State Bar No. 207108
300 So. Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-6375
Facsimile: (213) 897-2804
Attorneys for Complainant

BEFORE THE
STATE BOARD OF OPTOMETRY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: **DAVID J. BUTCHERT** **4074 Hardwick Street** **Lakewood, CA 90712** **Optometrist License No. 10190** Respondent.	Case No. CC-2012-115 ACCUSATION

Complainant alleges:

PARTIES

1. Mona Maggio (Complainant) brings this Accusation solely in her official capacity as the Executive Officer of the State Board of Optometry, Department of Consumer Affairs.

2. On or about September 16, 1993, the State Board of Optometry (Board) issued Optometrist License Number 10190 to David J. Butchert (Respondent). The Optometrist License was in full force and effect at all times relevant to the charges brought herein and will expire on June 30, 2015, unless renewed.

JURISDICTION

3. This Accusation is brought before the Board under the authority of the following laws. All section references are to the Business and Professions Code ("Code") unless otherwise indicated.

4. Section 118, subdivision (b), of the Code provides that the suspension, expiration, surrender, or cancellation of a license shall not deprive the Board of jurisdiction to proceed with a disciplinary action during the period within which the license may be renewed, restored, reissued or reinstated.

5. Section 3090 of the Code states:

"Except as otherwise provided by law, the board may take action against all persons guilty of violating this chapter or any of the regulations adopted by the board. The board shall enforce and administer this article as to licenseholders, and the board shall have all the powers granted in this chapter for these purposes, including, but not limited to, investigating complaints from the public, other licensees, health care facilities, other licensing agencies, or any other source suggesting that an optometrist may be guilty of violating this chapter or any of the regulations adopted by the board."

STATUTORY PROVISIONS

6. Section 652 of the Code states, in pertinent part:

"Violation of this article [Article 6, commencing with Section 650 of the Code] in the case of a licensed person constitutes unprofessional conduct and grounds for suspension or revocation of his or her license by the board by whom he or she is licensed, or if a license has been issued in connection with a place of business, then for the suspension or revocation of the place of business in connection with which the violation occurs. The proceedings for suspension or revocation shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code [the Administrative Procedure Act], and each board shall have all the powers granted therein."

7. Section 655 of the Code states, in pertinent part:

"(a) No person licensed under Chapter 7 (commencing with Section 3000) of this division [optometrist] may have any membership, proprietary interest, coownership, landlord-tenant relationship, or any profit-sharing arrangement in any form, directly or indirectly, with any person licensed under Chapter 5.5 (commencing with Section 2550) of this division [registered dispensing optician ("RDO")]."

8. Section 3006 of the Code states:

"As used in this chapter, the term 'advertise' and any of its variants include the use of a newspaper, magazine, or other publication, book, notice, circular, pamphlet, letter, handbill, poster, bill, sign, placard, card, label, tag, window display, store sign, radio announcement, or any other means or methods now or hereafter employed to bring to the attention of the public the practice of optometry or the prescribing, fitting, or sale, in connection therewith, of lenses, frames, or other accessories or appurtenances."

9. Section 3040 of the Code states:

"It is unlawful for a person to engage in the practice of optometry or to display a sign or in any other way to advertise or hold himself or herself out as an optometrist without having first obtained a certificate of registration from the board under the provisions of this chapter or under the provisions of any former act relating to the practice of optometry. The practice of optometry includes the performing or controlling of any acts set forth in Section 3041. In any prosecution for a violation of this section, the use of test cards, test lenses, or of trial frames is prima facie evidence of the practice of optometry."

10. Section 3041 of the Code states in pertinent part:

"(a) The practice of optometry includes the prevention and diagnosis of disorders and dysfunctions of the visual system, and the treatment and management of certain disorders and dysfunctions of the visual system, as well as the provision of rehabilitative optometric services, and is the doing of any or all of the following:

"(1) The examination of the human eye or eyes, or its or their appendages, and the analysis of the human vision system, either subjectively or objectively.

"(2) The determination of the powers or range of human vision and the accommodative and refractive states of the human eye or eyes, including the scope of its or their functions and general condition.

"(3) The prescribing or directing the use of, or using, any optical device in connection with ocular exercises, visual training, vision training, or orthoptics.

///

"(4) The prescribing of contact and spectacle lenses for, or the fitting or adaptation of contact and spectacle lenses to, the human eye, including lenses that may be classified as drugs or devices by any law of the United States or of this state.

"...."

11. Section 3070 of the Code states in pertinent part:

"(a) Before engaging in the practice of optometry, each licensed optometrist shall notify the board in writing of the address or addresses where he or she is to engage in the practice of optometry and, also, of any changes in his or her place of practice. After providing the address or addresses and place of practice information to the board, a licensed optometrist shall obtain a statement of licensure from the board to be placed in all practice locations other than an optometrist's principal place of practice. Any licensed optometrist who holds a branch office license is not required to obtain a statement of licensure to practice at that branch office. The practice of optometry is the performing or the controlling of any of the acts set forth in Section 3041.

"..."

12. Section 3077 of the Code states in pertinent part:

"As used in this section 'office' means any office or other place for the practice of optometry.

"..."

"(c) On and after October 1, 1959, no optometrist, and no two or more optometrists jointly, may have more than one office unless he or she or they comply with the provisions of this chapter as to an additional office. The additional office, for the purposes of this chapter, constitutes a branch office.

"..."

"(e) On and after January 1, 1957, any optometrist, or any two or more optometrists, jointly, who desire to open a branch office shall notify the board in writing in a manner prescribed by the board.

"(f) On and after January 1, 1957, no branch office may be opened or operated without a branch office license. Branch office licenses shall be valid for the calendar year in or for which they are issued and shall be renewable on January 1st of each year thereafter. Branch office licenses shall be issued or renewed only upon the payment of the fee therefor prescribed by this chapter."

13. Section 3078 of the Code states:

"(a) It is unlawful to practice optometry under a false or assumed name, or to use a false or assumed name in connection with the practice of optometry, or to make use of any false or assumed name in connection with the name of a person licensed pursuant to this chapter. However, the board may issue written permits authorizing an individual optometrist or an optometric group or optometric corporation to use a name specified in the permit in connection with its practice if, and only if, the board finds to its satisfaction all of the following:

"(1) The place or establishment, or the portion thereof, in which the applicant or applicants practice, is owned or leased by the applicant or applicants, and the practice conducted at that place or establishment, or portion thereof, is wholly owned and entirely controlled by the applicant or applicants. However, if the applicant or applicants are practicing optometry in a community clinic, as defined in subdivision (a) of Section 1204 of the Health and Safety Code, this subdivision shall not apply.

"(2) The name under which the applicant or applicants propose to operate is in the judgment of the board not deceptive or inimical to enabling a rational choice for the consumer public and contains at least one of the following designations: "optometry" or "optometric." However, if the applicant or applicants are practicing optometry in a community clinic, as defined in subdivision (a) of Section 1204 of the Health and Safety Code, this subdivision shall not apply. In no case shall the name under which the applicant or applicants propose to operate contain the name or names of any of the optometrists practicing in the community clinic.

"(3) The names of all optometrists practicing at the location designated in the application are displayed in a conspicuous place for the public to see, not only at the location, but also in any advertising permitted by law.

"(4) No charges that could result in revocation or suspension of an optometrist's license to practice optometry are pending against any optometrist practicing at the location.

"(b) Permits issued under this section by the board shall expire and become invalid unless renewed at the times and in the manner provided in Article 7 (commencing with Section 3145) for the renewal of licenses issued under this chapter.

"(c) A permit issued under this section may be revoked or suspended at any time that the board finds that any one of the requirements for original issuance of a permit, other than under paragraph (4) of subdivision (a), is no longer being fulfilled by the individual optometrist, optometric corporation, or optometric group to whom the permit was issued. Proceedings for revocation or suspension shall be governed by the Administrative Procedure Act.

"(d) If the board revokes or suspends the license to practice optometry of an individual optometrist or any member of a corporation or group to whom a permit has been issued under this section, the revocation or suspension shall also constitute revocation or suspension, as the case may be, of the permit."

14. Section 3101 of the Code states:

"It is unlawful to advertise by displaying a sign or otherwise or hold himself or herself out to be an optometrist without having at the time of so doing a valid unrevoked license from the board."

15. Section 3109 of the Code states:

"Directly or indirectly accepting employment to practice optometry from any person not having a valid, unrevoked license as an optometrist or from any company or corporation constitutes unprofessional conduct. Except as provided in this chapter, no optometrist may, singly or jointly with others, be incorporated or become incorporated when the purpose or a purpose of the corporation is to practice optometry or to conduct the practice of optometry.

"The terms 'accepting employment to practice optometry' as used in this section shall not be construed so as to prevent a licensed optometrist from practicing optometry upon an individual patient.

"Notwithstanding the provisions of this section or the provisions of any other law, a licensed optometrist may be employed to practice optometry by a physician and surgeon who holds a certificate under this division and who practices in the specialty of ophthalmology or by a health care service plan pursuant to the provisions of Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code."

16. Section 3110 of the Code states:

"The board may take action against any licensee who is charged with unprofessional conduct, and may deny an application for a license if the applicant has committed unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

"(a) Violating or attempting to violate, directly or indirectly assisting in or abetting the violation of, or conspiring to violate any provision of this chapter or any of the rules and regulations adopted by the board pursuant to this chapter.

"..."

REGULATORY PROVISIONS

17. California Code of Regulations, title 16 ("CCR"), section 1505 states:

"(a) The notification of intention to engage in the practice of optometry which is required by Section 3070 of the code shall be addressed to the Board at its office in Sacramento.

"(b) Such notification of intention to engage in the practice of optometry includes notifying the Board of intention to accept employment to practice optometry, the name or names of the optometrist or optometrists, or those who by law may employ an optometrist and the address or addresses of the office or offices at which the licensee will be employed.

"(c) Such notification of intention to engage in the practice of optometry includes notifying the Board prior to the establishment of any office or offices to practice optometry of the intention to establish such office or offices and the location or locations to be occupied."

18. CCR section 1513 states:

"All signs, cards, stationery or other advertising must clearly and prominently identify the individual optometrist or optometrists."

19. CCR section 1514 states:

"Where an optometrist rents or leases space from and practices optometry on the premises of a commercial (mercantile) concern, all of the following conditions shall be met:

"(a) The practice shall be owned by the optometrist and in every phase be under his/her exclusive control. The patient records shall be the sole property of the optometrist and free from any involvement with a person unlicensed to practice optometry. The optometrist shall make every effort to provide for emergency referrals.

"(b) The rented space shall be definite and apart from space occupied by other occupants of the premises.

"(c) All signs, advertising, and display shall likewise be separate and distinct from that of the other occupants and have the optometrist's name and the word "optometrist" prominently displayed in connection therewith.

"(d) There shall be no legends as "Optical Department," "Optometrical Department," "Optical Shoppe," or others of similar import, displayed on any part of the premises or in any advertising.

"(e) There shall be no linking of the optometrist's name, or practice, in advertising or in any other manner with that of the commercial (mercantile) concern from whom he/she is leasing space."

COST RECOVERY

20. Section 125.3 of the Code provides, in pertinent part, that the Board may request the administrative law judge to direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case, with failure of the licentiate to comply subjecting the license to not being renewed or reinstated. If a case settles, recovery of investigation and enforcement costs may be included in a stipulated settlement.

FACTS

21. At the times mentioned herein, Respondent had reported his places of practice to the Board at the following locations: 4074 Hardwick Street, Lakewood, CA 90712; 17 Lakewood

Mall, Lakewood, CA 90712; 5685 Woodruff Avenue, Lakewood, CA 90713; and 12300 Seal Beach Boulevard, Seal Beach, CA 90740. However, Respondent did not report to the Board his practice location at 8920 W. Pico Boulevard, Los Angeles, CA 90035.

22. On or about October 24, 2012, Board investigators conducted an undercover investigation of Respondent practicing optometry at Optics by Arne located at 8920 W. Pico Boulevard, Los Angeles, CA 90035. At all times mentioned herein, Optics by Arne was licensed as a registered dispensing optician (RDO) by the Medical Board of California. Several signs appeared on all sides of the building offering eyeglass and contact lens examinations. These signs read: "Independent Doctor of Optometry Enter Thru Suite #B (Rear)," "Eye Glass Exam $34.99," "CT Lens Exam $79.00" and "Optometry Enter in Rear Suite B." No optometrist's name appeared on any of the signage on the building.

23. Pursuant to the signage, the Board investigators attempted to enter through the rear entrance, but the door was locked. The investigators entered through the front entrance of Optics by Arne, an optical store which was open for business, and was greeted by Lee C., who worked for Optics by Arne. One of the investigators (M.C.) asked if an appointment was needed to see the optometrist. Lee C. took out an appointment book and offered to make the appointment for Investigator M.C. and informed the investigators that the optometrist only worked there on Mondays and Thursdays. When Investigator M.C. indicated he would call back for an appointment, Lee C. gave him a business card which read:

"Mon and Thurs Only
No Appt Necessary
1 – 5:30 Mon
10 – 5:30 Thurs

Optometrist
Eyeglass Exam $34.99
Contact Lens Exam Staring [*sic*] at $79.00
All Exams Cash Only

8920 W. Pico Blvd., Suite B
Los Angeles, CA 90035 **(310) 276-4290"**

Lee C. took out a pen and underlined the words "$34.99" and "All Exams Cash Only" and identified Respondent by name as the optometrist. When Investigator M.C. asked Lee C. about

what the exam would entail, Lee C. explained that M.C. did not need to have the portion of the eye exam which employs a puff of air into the eyes and that the exam was just a basic eye exam.

24. On or about October 25, 2012, Investigator M.C. dialed the number on the optometrist business card (310-276-4290) and left a message. Respondent returned his call on October 26, 2012. During the telephone call, Respondent provided Investigator M.C. the following information:

a. He was paid as an independent contractor to provide optometry services inside Optics by Arne;

b. He was the only optometrist working at Optics by Arne and he was unaware that any signs or stationery were required to display his name;

c. He did not have an account with Department of Water and Power at the Optics by Arne location;

d. He did not have an account for the phone number listed on the optometrist business card (310-276-4290) and he did not pay the phone bill at the Optics by Arne location;

e. He did not have a lease agreement nor did he pay rent for the space inside Optics by Arne where he provided optometry services; and

f. He did not have a branch license to perform optometry services at Optics by Arne.

25. On or about December 13, 2012, Investigator M.C. conducted an in-person interview with Respondent in the presence of his attorney. Respondent relayed the following pertinent facts:

a. He had provided optometry services at Optics by Arne for three to four years;

b. He received a telephone call from Arne C. one day out of the blue asking if Respondent was looking for extra work. Arne C. explained his optical store had a space in the back and asked Respondent if he wanted to work there one day a week;

c. The optometrist office inside Optics by Arne was already set up for eye exams with an optometrist's chair, a stand, a microscope, a phoropter, and a tonometer. All of these pieces of equipment were owned by Arne C.;

d. Respondent did not sign a lease or pay rent to anyone for the back office space inside Optics by Arne;

e. All signage related to optometry services on the outside of the building was already present and was provided by Optics by Arne; Respondent had no control over the signage;

f. Arne C. provided Respondent with the optometrist business cards for use and distribution;

g. Arne C. owned and operated both of the telephone lines for the optics business and for the optometrist business; Respondent did not answer the telephone line for the optometrist business; the line was answered by the receptionist who worked for Optics by Arne;

h. The receptionist for the optometrist business was not hired or paid by Respondent; that role was usually performed by Lee C. or the wife of Arne C., Wendy C.;

i. When a patient came in to receive optometry services from Respondent, the patient would see Wendy C. first, who would have the patient complete a patient information form and ask if the patient was there for an eyeglass or contact lens exam. Then Wendy C. would quote the price for the exam, and advise the patient that the payment was to be cash only. Wendy C. would perform a pretest on the patient using an auto refractor, and then turn the patient over to Respondent. After Respondent performed a complete eye exam on the patient, he would turn the patient back to Wendy C. with the prescription;

j. Although there was a sign which read: "Independent Doctor of Optometry, Enter through Suite B in Rear," it was Arne C.'s practice to keep the rear door locked so that all potential optometry patients would have to enter through the front door of the optics business;

k. After Respondent terminated his practice at Optics by Arne, Arne C. refused to turn over the patient records to him.

FIRST CAUSE FOR DISCIPLINE

(Prohibited Business Arrangement with RDO)

26. Respondent is subject to disciplinary action under Code section 655, subdivision (a), on the grounds of unprofessional conduct. The circumstances are set forth in paragraphs 21-25,

above, which are incorporated herein by reference, and as follows. From about 2008 to 2012 Respondent had a prohibited membership, proprietary interest, coownership, landlord-tenant relationship, or profit-sharing arrangement in any form, directly or indirectly, with Optics by Arne, an RDO, registered with the Medical Board of California pursuant to chapter 5.5 of division 2 of the Code. Respondent received free rent, free optometric equipment, a free telephone line, free utilities, free advertising, and free services of Optics by Arne staff members to answer his phone, make appointments for him, perform pre-examination testing for him, and allowed his optometry practice to be controlled by Optics by Arne.

SECOND CAUSE FOR DISCIPLINE

(Assisting in and Abetting Violations of Optometry Act)

27. Respondent is subject to disciplinary action under Code section 3110, subdivision (a), on the grounds of unprofessional conduct, in that Respondent directly or indirectly assisted or abetted Optics by Arne, an RDO, in the violation of the Optometry Practice Act and the Board's rules and regulations. The circumstances are set forth in paragraphs 21-25, above, which are incorporated herein by reference and as follows:

a. Optics by Arne practiced optometry without a license in violation of Code section 3040, by controlling Respondent's practice of optometry and its various components, per Code sections 3041 and 3078, including providing Respondent's working space within the RDO's premises; all of the optometric equipment for Respondent's use; staff to set appointments, quote fees, and perform optometric pre-testing; telephone lines and answering services; and advertising his optometric services, which Respondent aided and abetted by providing eye exams for Optics by Arne within its RDO premises.

b. Optics by Arne advertised the practice of optometry without having a valid license from the Board in violation of Code section 3101 by advertising on the building where it was located, "Independent Doctor of Optometry Enter Thru Suite #B (Rear)," "Eye Glass Exam $34.99," "CT Lens Exam $79.00" and "Optometry Enter in Rear Suite B," and distributing business cards offering the services of an optometrist, which Respondent aided and abetted by providing eye exams for Optics by Arne and within its RDO premises.

c. Optics by Arne advertised the practice of optometry in violation of CCR section 1513 by advertising on the outside of its business location and on business cards the practice of optometry without prominently identifying the individual optometrist, which Respondent aided and abetted by providing eye exams for Optics by Arne within its RDO premises.

THIRD CAUSE FOR DISCIPLINE

(Failure to Have Control Over Optometry Practice)

28. Respondent is subject to disciplinary action under Code section 3110, subdivision (a) on the grounds of unprofessional conduct for violating CCR section 1514, as set forth in paragraphs 21-25, above, which are incorporated by reference. The circumstances are that Respondent failed to own the optometry practice located inside Optics by Arne, failed to have exclusive control over his practice, failed to control the patient records, failed to rent a space that is definite and apart from Optics by Arne, failed to have control over signs and advertising which are definite and apart from Optics by Arne, failed to have his name prominently displayed in connection with his practice, and failed to separate his practice in advertising or in any other manner from Optics by Arne.

FOURTH CAUSE FOR DISCIPLINE

(Accepted Employment to Practice from Unlicensed Person)

29. Respondent is subject to disciplinary action under Code section 3110, subdivision (a) on the grounds of unprofessional conduct for violating Code section 3109, as set forth in paragraphs 21-25, above, which are incorporated herein by reference. The circumstances are that Respondent directly or indirectly accepted employment to practice optometry from an RDO, who was not a licensed optometrist.

FIFTH CAUSE FOR DISCIPLINE

(Failure to Notify Board of Practice Location)

30. Respondent is subject to disciplinary action under Code section 3110, subdivision (a) on the grounds of unprofessional conduct for violating Code section 3070, subdivision (a) and CCR section 1505, as set forth in paragraphs 21-25, above, which are incorporated by reference. The circumstances are that from about 2008 to 2012, Respondent failed to notify the Board in

writing of his practice location at 8920 W. Pico Boulevard, Los Angeles, CA 90035 and failed to obtain a statement of licensure from the Board to be placed at that practice location prior to engaging in the practice of optometry there, which was not his principle place of practice,.

SIXTH CAUSE FOR DISCIPLINE

(Failure to Obtain a Branch Office License)

31. Respondent is subject to disciplinary action under Code section 3110, subdivision (a) on the grounds of unprofessional conduct for violating Code section 3077, as set forth in paragraphs 21-25, above, which are incorporated by reference. The circumstances are that from about 2008 to 2012, Respondent failed to notify the Board in writing of his branch office practice location at 8920 W. Pico Boulevard, Los Angeles, CA 90035 and failed to obtain a branch office license, prior to engaging in the practice of optometry at that location.

SEVENTH CAUSE FOR DISCIPLINE

(Practicing Optometry under a False or Assumed Name)

32. Respondent is subject to disciplinary action under Code section 3110, subdivision (a) on the grounds of unprofessional conduct for violating Code section 3078, as set forth in paragraphs 21-25, above, which are incorporated by reference. The circumstances are that Respondent practiced optometry and used the false or assumed name, "Optics by Arne." In addition, Respondent did not own or lease the premises upon which he practiced inside the Optics by Arne RDO store and did not wholly own and entirely control his optometry practice.

EIGHTH CAUSE FOR DISCIPLINE

(Advertising without using Individual Name)

33. Respondent is subject to disciplinary action under Code section 3110, subdivision (a) on the grounds of unprofessional conduct for violating CCR section 1513, as set forth in paragraphs 21-25, above, which are incorporated by reference. The circumstances are that Respondent advertised his optometric practice on the outside of the Optics by Arne location without providing his individual name, and used and distributed business cards, which did not have Respondent's name clearly and prominently identified as an individual optometrist.

///

PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the State Board of Optometry issue a decision:

1. Revoking or suspending Optometrist License Number 10190, issued to David J. Butchert;

2. Ordering David J. Butchert to pay the State Board of Optometry the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;

3. Taking such other and further action as deemed necessary and proper.

DATED: August 29, 2013

MONA MAGGIO
Executive Officer
State Board of Optometry
Department of Consumer Affairs
State of California
Complainant

LA2013509184

BUSINESS, CONSUMER SERVICES, AND HOUSING AGENCY
EDMUND G. BROWN JR., GOVERNOR

CALIFORNIA STATE BOARD OF OPTOMETRY

STATE BOARD OF OPTOMETRY
2450 DEL PASO ROAD, SUITE 105, SACRAMENTO, CA 95834
P (916) 575-7170 F (916) 575-7292 www.optometry.ca.gov

CERTIFICATION

The undersigned, Jessica Sieferman hereby certifies as follows:

> *That she is the duly appointed, acting and qualified Acting Executive Officer of the California State Board of Optometry (Board), and that in such capacity she has custody of the official records of the Board.*

On this 3rd day of July 2015, the Executive Officer examined said official records of the Board and found that **David J. Butchert** graduated from Illinois College of Optometry in 1993, and is the holder of Certificate of Registration to Practice Optometry No. 10190, which was granted to him effective September 16, 1993. Said Certificate of Registration is currently in full force and effect and will expire June 30, 2017, unless renewed. The current address of record for said Certificate of Registration is 11847 South St, Cerritos, CA 90703.

Said records further reveal that on or about June 9, 1997, **David J. Butchert** became certified to utilize Therapeutic Pharmaceutical Agents and is authorized to diagnose and treat the conditions listed in subdivision (b), (d), and (e) of Section 3041.

Said records further reveal that on or about August 29, 2013, the Board filed an Accusation against **David J. Butchert**, in Case No. CC 2012-115. As a result of that action, the Board revoked Certificate of Registration No. 10190, effective May 28, 2014. However, the revocation was stayed and said Certificate of Registration was placed on probation for a period of five (5) years, with terms and conditions.

Given under my hand and the seal of the California State Board of Optometry, at Sacramento, California, this 3rd day of July 2015.

Jessica Sieferman, Acting Executive Officer

CALIFORNIA STATE BOARD OF OPTOMETRY

Memo

2450 Del Paso Road, Suite 105
Sacramento, CA 95834
(916) 575-7170, (916) 575-7292 Fax
www.optometry.ca.gov

To: Board Members **Date:** November 20, 2015

From: Board Staff **Telephone:** (916) 575-7170

Subject: **FULL BOARD CLOSED SESSION**

Pursuant to Government Code Section 11126(c)(3), the Board Will Meet in Closed Session for Discussion and Possible Action on Disciplinary Matters.

CALIFORNIA STATE BOARD OF OPTOMETRY

Memo

2450 Del Paso Road, Suite 105
Sacramento, CA 95834
(916) 575-7170, (916) 575-7292 Fax
www.optometry.ca.gov

To: Board Members **Date:** November 20, 2015

From: Jessica Sieferman
Executive Officer **Telephone:** (916) 575-7184

Subject: **Agenda Item 13 – Concerns Related to the National Board of Examiners (NBEO) and National Board Examinations (Parts I, II, and III)**

Presentation by the UC Berkeley School of Optometry faculty.

CALIFORNIA STATE BOARD OF OPTOMETRY

Memo

2450 Del Paso Road, Suite 105
Sacramento, CA 95834
(916) 575-7170, (916) 575-7292 Fax
www.optometry.ca.gov

To: Board Members **Date:** November 20, 2015

From: Jessica Sieferman
Executive Officer **Telephone:** (916) 575-7184

Subject: **Agenda Item 14 – Consideration and Approval of Legislation and Regulation Committee Recommendations Related to AB 684 Implementation and other Legislation Impacting the Practice of Optometry**

Background:
During the October 16, 2015 Board meeting, the Board directed the Legislation and Regulation Committee (LRC) to discuss and consider language proposed by staff to address various concerns raised by staff and Board Members related to AB 684. The LRC met on November 12, 2015 and made several recommendations. In addition, the LRC discussed pending legislation that the Board had sponsored and/or taken a position on in order to determine the best course of action for the Board, and made recommendations for the full Board.

A. Legislation

1. **Proposed Amendment to Business and Professions Code (BPC) § 655 to Regulate Optical Companies; Cite and Fine for Non-Compliance; Lease Information to be Provided by Licensees**
   The LRC discussed the proposed amendments to address the concerns related to optical companies not being regulated under the auspicious of the Department of Consumer Affairs (DCA), the lack of strong ramifications for not complying with BPC Section 655, and the ability for subjects to redact lease information prior to submitting the lease to the Board.

   The LRC accepted the proposed amendments and added clarifying language specifying that the citation and order of abatement was in addition to any action already available to the Board (e.g., disciplinary action). Please review and consider the LRC's recommendations for amendments to BPC Section 655 (Attachment 1).

2. **Proposed Amendment to BPC § 2556.1 to Require Registered Dispensing Opticians to Report Co-location**
   The LRC accepted the proposed amendments to address the concerns that the reporting requirement should be applied to both optometrists and registered dispensing opticians. Please review and consider the LRC's recommendations for amendments to BPC Section 2556.1 (Attachment 2).

3. **Proposed Amendment to BPC § 2556.2 Related to Reporting Requirements**
   The LRC discussed the proposed amendments to address the concerns that the Board does not regulate health plans or capture any data pertaining to health plans that employ

optometrists. In addition, they discussed the concern that there are no ramifications if health plan fail to report or meet the milestones indicated in 2556.2.

The committee accepted some of the proposed language, added language to ensure the reporting requirement also applied to optical companies, added clarifying language that the milestones are required to be met (not just reported on) and when the reports are due to the Board. In addition, the committee added stronger ramifications for each violation of the section. Please review and consider the LRC's recommendations for amendments to BPC Section 2556.2 (Attachment 3).

4. **Review and Possible Amendment to BPC § 3011: Board Composition**
5. **Review and Possible Amendment to BPC § 3020: RDO Advisory Committee**

The LRC discussed the Board Composition and the RDO Advisory Committee and requested the Board address both agenda items together during the Board meeting. The LRC discussed current law and potential alternatives (listed below), and would like the full board to consider each topic and discuss specific concerns, if any, as they relate to consumer protection. The LRC encourages thoughtful discussion that includes the pros and cons of each topic.

a) **Keeping current law and not proposing any changes.**
The LRC discussed how moving the RDO Program to the Board, changing the Board Composition, and creating the Advisory Committee derails other Board responsibilities. While the LRC acknowledges the need to strengthen enforcement mechanisms for the RDO Program, the LRC believes there are alternative solutions the Board should consider.

b) **Amending the RDO Advisory Committee to provide the committee more autonomy similar to the former Physician's Assistant Committee or the Dental Hygiene Committee of California.**
Committee model structures within the Department of Consumer Affairs rely on whether or not the intent is to task the committee with making decisions on licensing and discipline cases. As currently written, BPC Section 3020 tasks the committee with limited policy issues, but the Board is responsible for approving regulation changes or amendments and adjudicating any enforcement and disciplinary matters.

The LRC discussed committee structures and providing the RDOs more control over licensing and disciplinary matters like the former Physician's Assistant Committee (PAC) and the Dental Hygiene Committee of California (DHCC).

The Physician Assistant Board was formerly a Committee of the Medical Board and although it deliberated on decisions, scope of practice issues and revisions had to be considered by the Medical Board. The DHCC decides its own cases but has a statutory link to the Dental Board for policy issues.

Changing the committee makeup to mirror a DHCC-type model will add significantly more cost to the program. The DHCC functions with completely separate staff than the Dental Board – including its own Executive Officer.

c) **Creating a Registered Dispensing Opticians Board**
The LRC discussed allowing the RDO Program to have its own Board, so they are autonomous and separate from optometry. This would allow the RDO Program to self-regulate, have more efficient enforcement than in the past, and not create anti-competitive conflicts that exist with optometrists regulating opticians.

d) **Appointing more members to the Board**

The LRC discussed adding more members to the Board in lieu of removing one optometrist member. If this is considered, the Board should be kept at an odd number of members for voting purposes.

In comparison to the other 26 DCA Boards, the State Board of Optometry already has a large composition. Data from DCA's Annual Report indicates that the Board has the sixth lowest license population, but it has one of the largest Board compositions – with only five Boards (with significantly higher license populations) surpassing them (Attachment 4).

6. **SB 402 (Mitchell) Pupil health: vision examinations** (Attachment 5)
   Status: Senate Appropriations (Attachment 6)
   Board Position: Board Sponsored – Support
   This bill requires a pupil's vision to be examined by a physician, optometrist, or ophthalmologist, as specified, and requires the pupil's parent or guardian to provide the results of the examination to the pupil's school. This bill prohibits a school from denying admission to a pupil or taking any other adverse action against a pupil if his or her parent or guardian fails to provide the results of the examination. If the results of the examination are not provided to the school, this bill requires a pupil's vision to instead be appraised pursuant to existing law, as specified.

   Due to the fiscal impact, this bill met the criteria for referral to the Suspense File. It was determined by the Appropriations Committee and outlined in their analysis (Attachment 7) that this bill would increase costs to Medi-Cal, as students would be required to have their vision appraised by a physician, optometrist, or ophthalmologist instead of a school nurse or authorized person. In addition, it would incur administrative costs to the general fund in order to adopt regulations governing the requirements included in the bill. Further, school tracking of those who have received a comprehensive exam and those in need of a screening would result in a reimbursable state mandate. The bill analysis from the Senate Committee on Health is also attached (Attachment 8).

   The Board delegated authority to Board Members Rachel Michelin and Glen Kawaguchi, OD, to participate in meetings with legislative staff and stakeholders to assist with this bill. Both members are willing to continue their work with legislative staff, stakeholders and the opposition to ensure the success of this bill. SB 402 is also in line with the Board's January 2015 Resolution in Support of Comprehensive Eye Examinations for all School Aged Children.

   The California Optometric Association, in strong support of SB 402, has also offered to help any work and outreach on this bill.

   LRC Recommendation:
   The LRC recommends the Board maintain its sponsorship/support of this bill and continues its work with the author's office, stakeholders and opposition to get this bill passed this legislative session.

7. **SB 496 (Nguyen) Optometry: graduates of a foreign university: examinations and licensure** (Attachment 9)
   Status: Senate Business, Professions and Economic Development (Attachment 10)
   Board Position: Board Sponsored – Support
   This bill creates a pathway for foreign graduates to become licensed in California. Current law allows the foreign graduates to receive Board sponsorship to sit for the National Board of Examiners in Optometry (NBEO) examination, but there is no law that allows those sponsored graduates to become licensed as an optometrist in California. The bill analysis from the Senate Business, Professions and Economic Development is included for review (Attachment 11).

During the last legislative session, this bill was made into a two year bill in order to collaboratively work through the strong concerns raised by Dr. Stanley Woo, Dean of the Southern California College of Optometry, the California Optometric Association (Attachment 11), and other stakeholders.

LRC Recommendation:
The LRC recommends creating a workgroup to work with the author's office, stakeholders, and the opposition over the next year to create stronger legislation next session.

8. **SB 349 (Bates) Optometry: mobile optometric facilities** (Attachment 12)
Status: Senate Business, Professions and Economic Development (Attachment 13)
Board Position: Board Sponsored – Support
Current law only allows mobile optometric facilities to function as part of a school teaching program as approved by the Board (CCR Section 1507). This bill established requirements to allow a nonprofit or charitable organization, a governmental agency or a school to own and operate mobile optometric facilities in California.

During the last legislative session, concerns were raised regarding the Board's decision to limit who can own the mobile facilities. In addition, concerns were raised that this bill did not adequately protect consumers. COA raised concerns with "how to ensure the standard of care and quality care is being provided in mobile facilities." They are also concerned that "patients will not be able to access the doctor afterwards to obtain their medical records, prescription, or follow-up care due to the clinic being mobile."

In order to ensure all concerns are addressed and the public is adequately protected, this bill will require significant staff time and resources. If passed, this bill requires the Board to promulgate regulations to establish and implement a mobile optometric facility registry by January 1, 2017. Staff does not believe the Board will have adequate resources to devote to this bill this legislative

LRC Recommendation:
The LRC recommends creating a workgroup to work with the author's office, stakeholders, and the opposition over the next year to create stronger legislation next session

9. **SB 622 (Hernandez): Optometry** (Attachment 14)
Status: Assembly Business and Professions (Attachment 15)
Board Position: Support if Amended
This bill expands the scope of practice for optometrists in California and adds Board certifications in specified laser procedures, minor surgical procedures, and vaccinations.

The Board, in general, supported the bill, specifically the utilization of the extensive training and education of optometrists to expand access to health care for millions of Californians. The Board did propose some technical amendments and the inclusion of inspection authority. Thus, the Board took a Support if Amended position.

The author's office and the California Optometric Association did accept the technical amendments proposed by the Board. Due to the significant financial cost inspection authority would add to the bill, this amendment was not accepted. The COA agrees with the importance of inspection authority, but they believe it should not be tied to this bill.

If the Board wishes to pursue inspection authority, the Board could sponsor legislation specific to granting inspection authority to the Board. Another option would be to include it in legislative amendments the Board is already seeking for AB 684. AB 684 currently limits inspection authority to leases and co-locations for the purposes of ensuring compliance with BPC Section 655; the Board could propose amendments removing the limitations and applying it to all practice locations for compliance with all laws governing the optometric practice. The

Assembly Committee on Business and Professions bill analysis and Senate Appropriations are attached for review (Attachments 16 and 17).

LRC Recommendation:
The LRC recommends maintaining the Support if Amended position. The LRC further recommends that the full Board considers the accepted amendments and whether or not the exclusion of inspection authority should change the Board's position.

B. Regulation

1. **Proposed Addition to California Code of Regulations (CCR) for BPC § 2556.1: Co-Location Reporting Requirement**
   Once effective, BPC Section 2256.1 requires optometrists who are in co-located settings with registered dispensing opticians to report that business relationship to the Board. The attached proposed regulatory addition and related form defines the process for which optometrists will report that business relationship to the Board (Attachments 18 and 19).

   During public comment, a COA representative recommended adding employer information to the form, since many optometrists won't have a lease yet and will likely still be employed during the three-year transition period.

   Legal counsel also requested to work with the Executive Officer to make some non-substantive changes to the form.

   LRC Recommendation:
   The LRC recommends the Board accept the proposed regulatory language and the form, including the proposed amendments by COA and any non-substantive changes made by legal counsel and the Executive Officer.

2. **Proposed Addition to CCRs for BPC § 655: Implement Inspection Program**
   Prior to the LRC discussing this agenda item, legal counsel opined that regulations were unnecessary and recommended against proceeding with any regulations related to implementing the inspection program. She further opined that the statute is sufficient as it current stands, and the Board should not limit the inspection authority through regulations.

   LRC Recommendation:
   The LRC recommends the Board follows legal counsel's advice and not proceed with regulations.

3. **Proposed Amendment to CCR § 1399.260 RDO Fees, § 1399.261 Contact Lens Dispenser Fees, § 1399.263 Spectacle Lens Dispenser Fees**
   Prior to the LRC discussing this agenda item, legal counsel recommended that the Board repeal the applicable regulations rather than change the regulations. The fees are set in statute to $100 but allows for less if set in regulations. By repealing the regulations, the fees would go to the $100 defined in statute. However, since licensees can renew their license up to 90 days prior to expiration, legal counsel recommended clarifying specific renewal dates the new fees would apply.

   LRC Recommendation:
   The LRC recommends the Board follows legal counsel's advice by repealing the regulations related to the fees and adding clarifying language related to renewal dates and when the new fees apply (Attachment 20).

Attachments:

1. Proposed Amendments to BPC Section 655
2. Proposed Amendments to BPC Section 2556.1
3. Proposed Amendments to BPC Section 2556.2

4. DCA Board Compositions
5. SB 402
6. SB 402 Status
7. SB 402 Appropriations
8. SB 402 Bill Analysis
9. SB 496
10. SB 496 Status
11. SB 496 Bill Analysis
12. SB 349
13. SB 349 Status
14. SB 622
15. SB 622 Status
16. SB 622 Bill Analysis
17. SB 622 Appropriations
18. Regulatory Proposal – Co-Location Reporting
19. Proposed Co-Location Form
20. Regulatory Proposal – Fees

Proposed Amendments to Business and Professions Code Section 655 (January 1, 2016)

(a) For the purposes of this section, the following terms have the following meanings:

(1) "Health plan" means a health care service plan licensed pursuant to the Knox-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code).

(2) "Optical company" means a person or entity that is engaged in the manufacture, sale, or distribution to physicians and surgeons, optometrists, health plans, or dispensing opticians of lenses, frames, optical supplies, or optometric appliances or devices or kindred products.

(3) "Optometrist" means a person licensed pursuant to Chapter 7 (commencing with Section 3000) or an optometric corporation, as described in Section 3160.

(4) "Registered dispensing optician" means a person licensed pursuant to Chapter 5.5 (commencing with Section 2550).

(5) "Therapeutic ophthalmic product" means lenses or other products that provide direct treatment of eye disease or visual rehabilitation for diseased eyes.

(b) No optometrist may have any membership, proprietary interest, coownership, or any profit-sharing arrangement, either by stock ownership, interlocking directors, trusteeship, mortgage, or trust deed, with any registered dispensing optician or any optical company, except as otherwise permitted under this section.

(c) (1) A registered dispensing optician or an optical company may operate, own, or have an ownership interest in a health plan so long as the health plan does not directly employ optometrists to provide optometric services directly to enrollees of the health plan, and may directly or indirectly provide products and services to the health plan or its contracted providers or enrollees or to other optometrists. For purposes of this section, an optometrist may be employed by a health plan as a clinical director for the health plan pursuant to Section 1367.01 of the Health and Safety Code or to perform services related to utilization management or quality assurance or other similar related services that do not require the optometrist to directly provide health care services to enrollees. In addition, an optometrist serving as a clinical director may not employ optometrists to provide health care services to enrollees of the health plan for which the optometrist is serving as clinical director. For the purposes of this section, the health plan's 91 Ch. 405 — 4 — utilization management and quality assurance programs that are consistent with the Knox-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code) do not constitute providing health care services to enrollees.

(2) The registered dispensing optician or optical company shall not interfere with the professional judgment of the optometrist.

(3) The Department of Managed Health Care shall forward to the State Board of Optometry any complaints received from consumers that allege that an optometrist violated the Optometry Practice Act (Chapter 7 (commencing with Section 3000)). The Department of Managed Health Care and the State Board of Optometry shall enter into an Inter-Agency Agreement regarding the sharing of information related to the services provided by an optometrist that may be in violation of the Optometry Practice Act that the Department of Managed Health Care encounters in the course of the administration of the Knox-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with section 1340) of Division 2 of the Health and Safety Code.

(d) An optometrist, a registered dispensing optician, an optical company, or a health plan may execute a lease or other written agreement giving rise to a direct or indirect landlord-tenant relationship with an optometrist, if all of the following conditions are contained in a written agreement establishing the landlord-tenant relationship:

(1) (A) The practice shall be owned by the optometrist and in every phase be under the optometrist's exclusive control, including the selection and supervision of optometric staff, the scheduling of patients, the amount of time the optometrist spends with patients, fees charged for optometric products and services, the examination procedures and treatment provided to patients and the optometrist's contracting with managed care organizations.

(B) Subparagraph A shall not preclude a lease from including commercially reasonable terms that: (i) require the provision of optometric services at the leased space during certain days and hours, (ii) restrict the leased space from being used for the sale or offer for sale of spectacles, frames, lenses, contact lenses, or other ophthalmic products, except that the optometrist shall be permitted to sell therapeutic ophthalmic products if the registered dispensing optician, health plan, or optical company located on or adjacent to the optometrist's leased space does not offer any substantially similar therapeutic ophthalmic products for sale, (iii) require the optometrist to contract with a health plan network, health plan, or health insurer, or (iv) permit the landlord to directly or indirectly provide furnishings and equipment in the leased space.

(2) The optometrist's records shall be the sole property of the optometrist. Only the optometrist and those persons with written authorization from the optometrist shall have access to the patient records and the examination room, except as otherwise provided by law.

(3) The optometrist's leased space shall be definite and distinct from space occupied by other occupants of the premises, have a sign designating 91 — 5 — Ch. 405 that the leased space is occupied by an independent optometrist or optometrists and be accessible to the optometrist after hours or in the case of an emergency, subject to the facility's general accessibility. This paragraph shall not require a separate entrance to the optometrist's leased space.

(4) All signs and displays shall be separate and distinct from that of the other occupants and shall have the optometrist's name and the word "optometrist" prominently displayed in connection therewith. This paragraph shall not prohibit the optometrist from advertising the optometrist's practice location with reference to other occupants or prohibit the optometrist or registered dispensing optician from advertising their participation in any health plan's network or the health plan's products in which the optometrist or registered dispensing optician participates.

(5) There shall be no signs displayed on any part of the premises or in any advertising indicating that the optometrist is employed or controlled by the registered dispensing optician, health plan or optical company.

(6) Except for a statement that an independent doctor of optometry is located in the leased space, in-store pricing signs and as otherwise permitted by this subdivision, the registered dispensing optician or optical company shall not link its advertising with the optometrist's name, practice, or fees. (7) Notwithstanding paragraphs (4) and (6), this subdivision shall not preclude a health plan from advertising its health plan products and associated premium costs and any copayments, coinsurance, deductibles, or other forms of cost-sharing, or the names and locations of the health plan's providers, including any optometrists or registered dispensing opticians that provide professional services, in compliance with the Knox-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code).

(8) A health plan that advertises its products and services in accordance with paragraph (7) shall not advertise the optometrist's fees for products and services that are not included in the health plan's contract with the optometrist.
(9) The optometrist shall not be precluded from collecting fees for services that are not included in a health plan's products and services, subject to any patient disclosure requirements contained in the health plan's provider agreement with the optometrist or that are not otherwise prohibited by the Knox-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code).
(10) The term of the lease shall be no less than one year and shall not require the optometrist to contract exclusively with a health plan. The optometrist may terminate the lease according to the terms of the lease. The landlord may terminate the lease for the following reasons:

(A) The optometrist's failure to maintain a license to practice optometry or the imposition of restrictions, suspension or revocation of the optometrist's 91 Ch. 405 — 6 — license or if the optometrist or the optometrist's employee is or becomes ineligible to participate in state or federal government-funded programs.
(B) Termination of any underlying lease where the optometrist has subleased space, or the optometrist's failure to comply with the underlying lease provisions that are made applicable to the optometrist.
(C) If the health plan is the landlord, the termination of the provider agreement between the health plan and the optometrist, in accordance with the Knox-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code).
(D) Other reasons pursuant to the terms of the lease or permitted under the Civil Code.

(11) The landlord shall act in good faith in terminating the lease and in no case shall the landlord terminate the lease for reasons that constitute interference with the practice of optometry.
(12) Lease or rent terms and payments shall not be based on number of eye exams performed, prescriptions written, patient referrals or the sale or promotion of the products of a registered dispensing optician or an optical company.
(13) The landlord shall not terminate the lease solely because of a report, complaint, or allegation filed by the optometrist against the landlord, a registered dispensing optician or a health plan, to the State Board of Optometry or the Department of Managed Health Care or any law enforcement or regulatory agency.
(14) The landlord shall provide the optometrist with written notice of the scheduled expiration date of a lease at least 60 days prior to the scheduled expiration date. This notice obligation shall not affect the ability of either party to terminate the lease pursuant to this section. The landlord may not interfere with an outgoing optometrist's efforts to inform the optometrist's patients, in accordance with customary practice and professional obligations, of the relocation of the optometrist's practice.
(15) The State Board of Optometry may inspect, upon request, an individual lease agreement pursuant to its investigational authority, and if such a request is made, the landlord or tenant, as applicable, shall promptly comply with the request. Failure or refusal to comply with the request for lease agreements within 30 days of receiving the request constitutes unprofessional conduct and is grounds for disciplinary action by the appropriate regulatory agency. ~~Only personal information as defined in Section 1798.3 of the Civil Code may be redacted prior to submission of the lease or agreement.~~ This section shall not affect the Department of Managed Health Care's authority to inspect all books and records of a health plan pursuant to Section 1381 of the Health and Safety Code. Any financial information contained in the lease submitted to a

regulatory entity, pursuant to this paragraph, shall be considered confidential trade secret information that is exempt from disclosure under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code). 91 — 7 — Ch. 405

(16) This subdivision shall not be applicable to the relationship between any optometrist employee and the employer medical group, or the relationship between a medical group exclusively contracted with a health plan regulated by the Department of Managed Health Care and that health plan.

(e) No registered dispensing optician may have any membership, proprietary interest, coownership, or profit sharing arrangement either by stock ownership, interlocking directors, trusteeship, mortgage, or trust deed, with an optometrist, except as permitted under this section.

(f) Nothing in this section shall prohibit a person licensed under Chapter 5 (commencing with Section 2000) or its professional corporation from contracting with or employing optometrists, ophthalmologists, or optometric assistants and entering into a contract or landlord tenant relationship with a health plan, an optical company, or a registered dispensing optician, in accordance with Sections 650 and 654 of this code.

(g) Any violation of this section constitutes a misdemeanor as to such person licensed under Chapter 7 (commencing with Section 3000) of this division and as to any and all persons, whether or not so licensed under this division, who participate with such licensed person in a violation of any provision of this section.

(h) Notwithstanding any other provision of law and in addition to any action available to the Board, the board may issue a citation and order of abatement to an optical company, an optometrist or a registered dispensing optician and that entity shall be subject to a fine not to exceed fifty thousand dollars ($50,000), for a violation of each section.

Proposed Amendments to Business and Professions Code Section 2556.1 (January 1, 2016)

All licensed optometrists and registered dispensing opticians who are in a co-located setting ~~in a setting with a registered dispensing optician~~ shall report the business relationship to the State Board of Optometry, as determined by the board. The State Board of Optometry shall have the authority to inspect any premises at which the business of a registered dispensing optician is co-located with the practice of an optometrist, for the purposes of determining compliance with Section 655. The inspection may include the review of any written lease agreement between the registered dispensing optician and the optometrist or between the optometrist and the health plan. Failure to comply with the inspection or any request for information by the board may subject the party to disciplinary action. The board shall provide a copy of its inspection results, if applicable, to the Department of Managed Health Care.

Proposed Amendments to Business and Professions Code Section 2556.2 (January 1, 2016)

(a) Notwithstanding any other law, subsequent to the effective date of this section and until January 1, 2019, any individual, corporation, or firm operating as a registered dispensing optician under this chapter before the effective date of this section, or an employee of such an entity, shall not be subject to any action for engaging in conduct prohibited by Section 2556 or Section 655 as those sections existed prior to the effective date of this bill, except that a registrant shall be subject to discipline for duplicating or changing lenses without a prescription or order from a person duly licensed to issue the same.

(b) Nothing in this section shall be construed to imply or suggest that a person registered under this chapter is in violation of or in compliance with the law.

(c) This section shall not apply to any business relationships prohibited by Section 2556 commencing registration or operations on or after the effective date of this section.

(d) Subsequent to the effective date of this section and until January 1, 2019, nothing in this section shall prohibit an individual, corporation, or firm operating as a registered dispensing optician from engaging in a business relationship with an optometrist licensed pursuant to Chapter 7 (commencing with Section 3000) before the effective date of this section at locations registered with the Medical Board of California before the effective date of this section.

(e) This section does not apply to any administrative action pending, litigation pending, cause for discipline, or cause of action accruing prior to September 1, 2015.

(f) Any registered dispensing optician or optical company who owns a health plan that employs optometrists, ~~as defined in Section 655,~~ subject to this section shall comply with the following milestones:~~report to the State Board of Optometry in writing that~~ (1) 15 percent of its locations no longer employ an optometrist by January 1, 2017, (2) 45 percent of its locations no longer employ an optometrist by August 1, 2017, and (3) 100 percent of its locations no longer employ an optometrist by January 1, 2019.

(g) Any registered dispensing optician or optical company who owns a health plan that employs optometrists, shall report the milestones in subsection (f) to the State Board of Optometry in writing within 30 days of each milestone. The board shall provide those reports as soon as it receives them to the director and the Legislature. The report to the Legislature shall be submitted in compliance with Section 9795 of the Government Code.

(h) Notwithstanding any other provision of law and in addition to any action available to the Board, the board may issue a citation and order of abatement to an optical company, an optometrist or a registered dispensing optician and that entity shall be subject to a fine not to exceed fifty thousand dollars ($50,000), for a violation of each section.

DCA Board Compositions

			Board Members			
	Board	License Population	Professional	Public	Total	
1	Guide Dogs	106	2	5	7	
2	Podiatric Medicine	2,288	4	3	7	
3	Court Reporters	7,058	2	3	5	
4	Osteopathic	8,810	5	4	9	
5	Physician Assistants	9,482	5*	4	9	*4 licensees, 1 MBC
6	**Optometry**	**11,761**	**6**	**5**	**11**	
7	Occupational Therapy	15,584	4	3	7	
8	Acupuncture	17,063	3	4	7	
9	Chiro	18,407	5	2	7	
10	SLPAHADB	19,472	7*	3	10	*6 licensees, 1 MD
11	Architects	20,504	5	5	10	
12	Repiratory Care	22,153	5*	4	9	*4 licensees, 1 MD
13	Psychology	22,336	5	4	9	
14	Structural Pest	24,788	3	4	7	
15	Vet Med	29,783	5*	3	8	*4 licensees, 1 reg. tech
16	Physical Therapy	34,043	4	3	7	
17	Dental	86,000	10	5	15	
18	Accountancy	96,452	7	0	7	
19	BSIS	102,068	6	7	13	
20	BPELSG	104,947	7	0	7	
21	Pharmacy	138,744	7	6	13	
22	VNPT	145,805	5	6	11	
23	Med. Bd.	153,309	8	7	15	
24	Contractors	300,944	5	10	15	
25	BRN	518,872	5	4	9	
26	Barber/Cosmo	577,425	4	5	9	

Based on 13/14 Annual Report

AMENDED IN SENATE MAY 4, 2015

AMENDED IN SENATE APRIL 22, 2015

SENATE BILL No. 402

Introduced by Senator Mitchell

February 25, 2015

An act to amend Section 49455 of the Education Code, relating to pupil health.

LEGISLATIVE COUNSEL'S DIGEST

SB 402, as amended, Mitchell. Pupil health: vision examinations.

Existing law requires a pupil's vision to be appraised by a school nurse or other authorized person in the pupil's kindergarten year or upon first enrollment in elementary school, and in grades 2, 5, and 8, unless the appraisal is waived by the pupil's parents upon presentation of a certificate from a physician and surgeon, a physician assistant, or an optometrist. Existing law requires the State Department of Education to adopt guidelines to implement those provisions.

This bill would require a pupil's vision to be appraised in accordance with the above specified provisions only if the pupil's parent or guardian fails to provide the results of a vision examination conducted by a physician, optometrist, or ophthalmologist in accordance with specified provisions. The bill would prohibit a school from denying admission to, or taking adverse action against, a pupil if his or her parent or guardian fails to provide the results of the vision examination. The bill would require the department to adopt regulations, rather than guidelines, to implement these provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 49455 of the Education Code is amended to read:

49455. (a) During the kindergarten year or upon first enrollment or entry in a California school district of a pupil at an elementary school, and at least every second year thereafter until the pupil has completed grade 8, the pupil's vision shall be examined by a physician, optometrist, or ophthalmologist. This examination shall include tests for ~~visual acuity, binocular function, as well as refraction~~ *distance and near visual acuity, eye tracking, binocular vision skills, including both eye teaming and convergence, accommodation, color vision, depth perception, intraocular pressure, pupil evaluation, objective and subjective refraction,* and eye health evaluations. The parent or guardian of the pupil shall provide results of the *vision* examination to the school.

(b) A school shall not deny admission to a pupil or take any other adverse action against a pupil if his or her parent or guardian fails to provide the results of the vision examination to the school.

(c) (1) If the results of the vision examination are not provided to the school, then during the kindergarten year or upon first enrollment or entry, and in grades 2, 5, and 8, the pupil's vision shall be appraised by the school nurse or other person authorized under Section 49452.

(2) A pupil whose first enrollment or entry occurs in grade 4 or 7 shall not be required to be appraised in the year immediately following the pupil's first enrollment or entry.

(3) The appraisal shall include tests for visual acuity, including near vision and color vision. However, color vision shall be appraised once and only on male pupils, and the results of the appraisal shall be entered in the health record of the pupil. Color vision appraisal need not begin until the male pupil has reached grade 1.

(4) A pupil's vision may be appraised by using an eye chart or any other scientifically validated photoscreening test. Photoscreening tests shall be performed under an agreement with, or the supervision of, an optometrist or ophthalmologist, by the school nurse, or by a trained individual who meets requirements established by the department.

(d) Continual and regular observation of the pupil's eyes, appearance, behavior, visual performance, and perception that may indicate vision difficulties shall be done by the school nurse and the classroom teacher.

(e) This section shall not apply to a pupil whose parents or guardian file with the principal of the school in which the pupil is enrolling, a statement in writing that they adhere to the faith or teachings of any well-recognized religious sect, denomination, or organization and in accordance with its creed, tenets, or principles depend for healing upon prayer in the practice of their religion.

(f) The department shall adopt regulations to implement this section, including training ~~requirements~~ *requirements*, and shall provide participation data.

O

97

SB-402 Pupil health: vision examinations. (2015-2016)

Text | Votes | History | Bill Analysis | Today's Law As Amended ⓘ | Compare Versions | **Status** | Comments To Author

Senate: 1st Cmt 2nd Cmt 2nd Cmt

Assembly:

Bill Status	
Measure:	SB-402
Lead Authors:	Mitchell (S)
Principal Coauthors:	-
Coauthors:	-
Topic:	Pupil health: vision examinations.
31st Day in Print:	03/28/15
Title:	An act to amend Section 49455 of the Education Code, relating to pupil health.
House Location:	Senate
Last Amended Date:	05/04/15
Committee Location:	Sen Appropriations

Type of Measure
Active Bill - In Committee Process
Majority Vote Required
Non-Appropriation
Fiscal Committee
Non-State-Mandated Local Program
Non-Urgency
Non-Tax levy

Last 5 History Actions

Date	Action
05/28/15	May 28 hearing: Held in committee and under submission.
05/23/15	Set for hearing May 28.
05/18/15	May 18 hearing: Placed on APPR. suspense file.
05/08/15	Set for hearing May 18.
05/04/15	Read second time and amended. Re-referred to Com. on APPR.

SENATE COMMITTEE ON APPROPRIATIONS
Senator Ricardo Lara, Chair
2015 - 2016 Regular Session

SB 402 (Mitchell) - Pupil health: vision examinations.

Version: May 4, 2015
Urgency: No
Hearing Date: May 18, 2015
Policy Vote: ED. 7 - 0, HEALTH 8 - 0
Mandate: No
Consultant: Jillian Kissee

This bill meets the criteria for referral to the Suspense File.

Bill Summary: Requires a pupil's vision to be examined by a physician, optometrist, or ophthalmologist, as specified, and requires the pupil's parent or guardian to provide the results of the examination to the pupil's school. This bill prohibits a school from denying admission to a pupil or taking any other adverse action against a pupil if his or her parent or guardian fails to provide the results of the examination. If the results of the examination are not provided to the school, this bill requires a pupil's vision to instead be appraised pursuant to existing law, as specified.

Fiscal Impact:

- Increased costs to Medi-Cal: To the extent students shift from having their vision appraised by a school nurse or other person, as authorized in current law, to having a more expansive examination conducted by a physician, optometrist, or ophthalmologist as a result of this bill, it could potentially drive significant costs to the state through the Medi-Cal program. See staff comments.

- Administrative costs: The CDE indicates that this bill will result in costs in the low tens of thousands General Fund. Of this, $25,000 is one-time to adopt regulations governing the requirements included in this bill. About $6,000 will be necessary to provide participation data.

- Mandate: The bill will likely result in a reimbursable state mandate for activities imposed on schools such as: tracking students that have taken a comprehensive exam and those that need to be screened at the school site and staff training on the bill's new requirements.

Background:

Current law:

1. Requires, during kindergarten or upon first enrollment in an elementary school, and in grades 2, 5, and 8, the vision of students to be appraised by the school nurse or other authorized person. The appraisal must include tests for visual acuity and color vision, however, color vision is to be appraised once and only on male students. Continual and regular observation of students' eyes, appearance, behavior, visual performance and perception are to be done by the school nurse and the classroom teacher. The appraisal may be waived if the parents present a certificate from a physician and surgeon, a physician assistant or an optometrist, and parents may opt-out based on religious beliefs. (Education

Code § 49455)

2. Requires a report to be made to the parent when a visual or other defect has been noted by the supervisor of health or his/her assistant. (EC § 49456)

3. Requires school districts to provide for the testing of the sight and hearing of each student enrolled in the district. The test is to be given only by specified personnel.

4. Provides that:

    A. An employee of a school district or of a county superintendent of schools to be authorized to give vision tests and be designated a "duly qualified supervisor of health" if the employee is a physician and surgeon or osteopath, a school nurse, or an optometrist.

    B. Non-medical certificated employees of a school district or county office of education may be authorized to give vision tests if the employee has specified documentation. (California Code of Regulations, Title 5, § 591)

Proposed Law: This bill makes changes to the vision examination required under existing law. It requires that upon first enrollment in a California school district at an elementary school and at least every second year thereafter (instead of grades 2, 5, and 8) until the student completed grade 8, the student's vision must be examined by a physician, optometrist, or ophthalmologist. The parent or guardian of the student must provide results of the vision examination to the school.

The examination is required test for the following:

- Distance and near visual acuity
- Eye tracking
- Binocular vision skills, including both eye teaming and convergence, accommodation, color vision, depth perception, intraocular pressure, pupil evaluation, objective and subjective refraction, and eye health evaluations.

This bill prohibits a school from denying admission to a student or taking any other action against a student if the student's parent or guardian fails to provide the results of the vision examination to the school. The school nurse or other person, as specified, must appraise the student's vision in kindergarten or upon first enrollment or entry, and in grades 2, 5, and 8.

This bill requires the CDE to adopt regulations governing these provisions, including training requirements, and must provide participation data.

Related Legislation:
AB 1840 (Campos), Chapter 803, Statutes of 2014, authorized a child's vision to be appraised by using an eye chart or any scientifically validated photo screening test, among other things.

SB 430 (Wright, 2013) would have deleted the existing requirement for appraisal upon first enrollment in an elementary school by the school nurse or other authorized person, and replaced it with a requirement that a pupil receive a vision examination from a physician, optometrist, or ophthalmologist, as specified. SB 430 failed in the Assembly Health Committee without being heard.

Staff Comments: This bill requires that students' vision be examined by a physician, optometrist, or ophthalmologist every other year until grade 8 and requires the student's parent or guardian to provide results of the vision examination to the school. If the results of the examination are not provided to the school, this bill requires that the student's vision, instead, be appraised pursuant to existing law. Because this bill does not require a school district to take any adverse action, such as denying the student admission for failure to provide the school with examination results, the rate at which students will receive this examination is unknown. To the extent they do, and are eligible for Medi-Cal benefits, this bill could drive significant increases in costs to the state. The Affordable Care Act requires health plans to cover essential health benefits such as pediatric services which include vision care.

In 2013-14, there were approximately 2.4 million students enrolled in kindergarten and grades 2, 4, 6, and 8. Assuming 10 percent of these students get the vision examination as prescribed in this bill, and roughly one-half of the children in the state are covered by Medi-Cal, this bill could increase costs to the Medi-Cal program of about $6 million in a mix of federal and General Fund (assuming a Medi-Cal rate of $50 per exam).

Though not a state-level cost driver, those families that are not eligible for Medi-Cal would likely incur out-of-pocket costs such as co-pays for their child to receive the examination required by this bill.

-- END --

SENATE COMMITTEE ON HEALTH

Senator Ed Hernandez, O.D., Chair

BILL NO: SB 402
AUTHOR: Mitchell
VERSION: April 22, 2015
HEARING DATE: April 29, 2015
CONSULTANT: Reyes Diaz

SUBJECT: Pupil health: vision examinations.

SUMMARY: Requires a pupil's vision to be examined by a physician, optometrist, or ophthalmologist, as specified, and requires the pupil's parent or guardian to provide the results of the examination to the pupil's school. Prohibits a school from denying admission to a pupil or take any other adverse action against a pupil if his or her parent or guardian fails to provide the results of the examination. If the results of the examination are not provided to the school, requires a pupil's vision, instead, to be appraised pursuant to existing law, as specified.

Existing law:

1. Requires a pupil's vision to be appraised, during the kindergarten year or upon first enrollment or entry in a school district of a pupil at an elementary school, and in grades two, five, and eight, by the school nurse or other authorized person, including duly qualified supervisors of health employed by the district; certificated employees of the district or of the county superintendent of schools who possess the qualifications prescribed by the Commission for Teacher Preparation and Licensing; by contract with an agency duly authorized to perform those services by the county superintendent of schools of the county in which the district is located, under guidelines established by the State Board of Education; or accredited schools or colleges of optometry, osteopathic medicine, or medicine.

2. Prohibits a pupil's vision from being required to be appraised in the year immediately following the pupil's first enrollment or entry if it occurs in grades four or seven.

3. Requires the vision appraisal to include tests for visual acuity, including near vision, and color vision. Requires color vision appraisal to be performed once on male pupils only with the results to be entered in the pupil's health record, and specifies that appraisal need not begin until the male pupil has reached the first grade.

4. Allows the vision appraisal to be waived by the pupil's parents if they present a certificate from a physician and surgeon, a physician assistant, or an optometrist setting out the results of a determination of a pupil's vision, including visual acuity and color vision.

5. Allows a pupil's vision to be appraised using an eye chart or any other scientifically validated photo screening test. Requires photo screening tests to be performed, under an agreement with or the supervision of an optometrist or ophthalmologist, by the school nurse or a trained individual who meets requirements established by the California Department of Education (CDE).

6. Requires continual and regular observation of the pupil's eyes, appearance, behavior, visual performance, and perception that may indicate vision difficulties to be done by the school nurse and the classroom teacher.

7. Provides for an exemption of vision appraisal to a pupil whose parent or guardian files with the principal of the school, in which the pupil is enrolling, a statement in writing that they adhere to the faith or teachings of any well-recognized religious sect, denomination, or organization and in accordance with its creed, tenets, or principals depend for healing upon prayer in the practice of their religion.

8. Requires CDE to adopt guidelines to implement the vision appraisal requirements, including training requirements and a method of testing for near vision.

This bill:

1. Expands current law by requiring a pupil's vision to be examined during the kindergarten year or upon first enrollment or entry in a school district of a pupil at an elementary school, and at least every second year thereafter until the pupil has completed grade 8, by a physician, optometrist or ophthalmologist.

2. Expands current law by requiring the examination to include tests for visual acuity, binocular function, and refraction and eye health evaluations, in addition to current screening tests. Requires the pupil's parent or guardian to provide results of the examination to the school.

3. Prohibits a school from denying admission to a pupil or taking any other adverse action against a pupil if his or her parent or guardian fails to provide the results of the vision examination to the school.

4. If results of the vision examination required in this bill are not provided to the school by a parent or guardian, requires a pupil's vision to be appraised pursuant to existing law, using existing vision screening methods at required grade levels, by the school nurse or other qualified person pursuant to existing law.

5. Requires CDE to adopt regulations, instead of guidelines, to implement the provisions of this bill, including training requirements. Requires CDE to provide participation data.

FISCAL EFFECT: This bill has not been analyzed by a fiscal committee.

COMMENTS:

1. **Author's statement.** According to the author, this bill clarifies that comprehensive vision exams should include critical evaluations that can catch serious eye problems in pupils. Studies show that impaired vision in children can affect cognitive, emotional, neurological, and physical development. Students with impaired vision experience developmental delays, lower educational attainment, and a greater need for special education, as well as vocational and social services.

   In 2011, almost 40 percent of students tested at Los Angeles Unified School District experienced significant discomfort while reading or trying to study. In the author's district, 56 percent of students at Bradley Elementary School in Leimert Park experienced binocular eye health problems. These eye problems in children directly correlate with low reading fluency. Under existing law, in-school vision screenings only test school children for near- and farsightedness, color blindness, and any noticeable abnormalities. This bill will ensure that children are tested for 11 more conditions that can limit a student's ability to learn in the classroom, such as astigmatism, convergence problems, binocular vision, accommodation

issues, and other serious eye diseases. Detecting vision problems early through more comprehensive exams will ensure that every child has the same opportunity and potential to learn.

2. **Current vision screening in schools vs. requirements in this bill.** Current law requires vision appraisals for pupils by school nurses and other authorized persons. Current vision appraisals test for visual acuity, including near vision and color vision (for male pupils only, and only once). Appraisals can be performed using an eye chart or any scientifically validated photo screening test (under agreement with or supervision of an optometrist or ophthalmologist). Also, continual and regular observation of the pupil's eyes, appearance, behavior, visual performance, and perception that may indicate vision difficulties are required to be done by the school nurse and the classroom teacher.

   This bill would instead require a pupil to receive an eye examination by a physician, optometrist, or ophthalmologist. The eye examination would include current required tests (visual acuity and color vision) and tests for binocular function, as well as refraction and eye health evaluations. A pupil's parent or guardian is required to submit results of this examination to the school. However, if a parent or guardian does not submit the results of the examination, a pupil's vision would be appraised according to current law. This bill prohibits a school from denying a pupil entry if the results of examination required in this bill are not submitted.

3. **National Commission on Vision and Health (NCVH).** A report by the NCVH, *Vision Exams for Children Prior to Entering School*, stated that one in four school-age children suffers from vision problems that could have been treated if the child had been properly screened upon entering school. Studies show that there is an increasing need for eye care among children: 25 percent of children aged five to 17 have a vision problem; 79 percent have not visited an eye care provider in the past year; 35 percent have never seen an eye care professional; and 40 percent who fail initial vision screenings do not receive the appropriate follow-up care. Younger children entering school are even less likely than teenagers to receive vision services. Only one out of 13 children under the age of six visited an eye care provider, compared with about one third of adolescents aged 12-17. Only 22 percent of preschool children received some vision screening, and only 15 percent received an eye exam.

   NCVH states there are three primary methods for vision assessment: school-based vision screening programs; community-based or office-based screening programs; and comprehensive eye exams conducted by an eye care professional. In addition, studies have found that physicians do not consistently conduct vision screenings on children. According to the NCVH, the public, and most importantly parents and teachers, believe that vision screenings can accurately identify those children who need a comprehensive eye exam. A vast majority of children's vision screenings have high rates of false negatives, failing to adequately detect signs of significant vision problems in children chronically burdened by these difficulties, according to NCVH. The NCVH recommended that children have timely access to comprehensive eye exams and stated that if comprehensive exams by an optometrist or ophthalmologist are not possible, science-based vision screening with high sensitivity and specificity and controlled follow-up for treatment is an acceptable, though not preferred, method to providing vision care for children.

4. **Vision problems in children.** According to the National Association of School Nurses (NASN), vision problems are the fourth most prevalent class of disability in the United States and one of the most prevalent conditions in childhood. NASN maintains that this is an extremely important statistic considering that 80 percent of what children learn comes through their visual processing of information. According to the Centers for Disease Control and Prevention (CDC), impaired vision can affect a child's cognitive, emotional, neurologic and physical development by potentially limiting the range of experiences and kinds of information to which the child is exposed. Despite the importance of appropriate vision testing, the CDC reports that nearly two in three children enter school without ever having had a vision screening.

5. **Binocular vision.** According to the Optometrists Network's Web site, binocular vision is wherein both eyes aim simultaneously at the same visual target and both eyes work together (simultaneously, equally, and accurately) as a coordinated team. Healthy binocular vision produces important visual perceptual skills, which are part of normal human vision: binocular depth perception and stereopsis. Binocular vision impairment is any visual condition wherein binocular visual skills are inadequately developed, and often result in partial or total loss of stereoscopic vision and binocular depth perception. Conditions where the eye is obviously turned or crossed are commonly referred to with terms like "cross-eyed," "wall-eyes," or "wandering eyes." These binocular vision impairments are easily detected by others as all the observer needs to do is notice that both eyes do not aim in the same direction at all times. Binocular vision impairments are more common than thought. Just one type of binocular impairment, amblyopia (lazy eye), affects approximately three percent of the population. At least 12 percent of the population has some type of problem with binocular vision.

6. **Refraction.** According to the National Institutes of Health, the refraction test is an eye exam that measures a person's prescription for eyeglasses or contact lenses. This test is performed by an ophthalmologist or optometrist. This test can be done as part of a routine eye exam. The purpose is to determine whether a person has a refractive error (a need for glasses or contact lenses). If a person's final vision is less than 20/20, even with lenses, there is probably another, non-optical problem with the eye. The vision level one achieves during the refraction test is called the best-corrected visual acuity. Abnormal results may be due to: astigmatism, farsightedness, nearsightedness, or presbyopia (inability to focus on near objects that develops with age). People with a refractive error should have an eye examination every one to two years, or whenever their vision changes.

7. **Double referral.** This bill was heard in the Senate Education Committee on April 15, 2015, and passed with a vote of 7-0.

8. **Prior legislation.** SB 1172 (Steinberg), Chapter 925, Statutes of 2014, required a pupil's vision to be appraised by the school nurse or other authorized person during kindergarten or upon first enrollment or entry in a California school district of a pupil at an elementary school, and in grades two, five, and eight, except as provided; revised the functions to be performed by the school nurse and the classroom teacher in observing a pupil's eyes, appearance, and other factors that may indicate vision difficulties; required the Department of Education to adopt guidelines to implement those provisions, including training requirements and a method of testing for near vision.

AB 1840 (Campos), Chapter 803, Statutes of 2014, authorized a child's vision to be appraised by using an eye chart or any scientifically validated photo screening test. Required photo screening tests to be performed, under an agreement with or the supervision of an optometrist or ophthalmologist, by the school nurse or a trained individual who meets requirements established by the Department of Education.

SB 430 (Wright), of 2013, would have deleted the existing requirement for appraisal upon first enrollment in an elementary school by the school nurse or other authorized person, and replaced it with a requirement that a pupil receive a vision examination from a physician, optometrist, or ophthalmologist and required that screening to include a test for binocular function, refraction, and eye health. *SB 430 failed in the Assembly Health Committee without being heard.*

SB 606 (Vasconcellos), of 2001, would have required the student eye examination to include screening for binocular function, ocular alignment, ocular motility, and near visual acuity. *SB 606 was held on suspense in the Assembly Appropriations Committee.*

AB 1095 (Wright), of 2001, would have required every student, within 90 days of entering grade 1, to undergo a comprehensive eye exam that includes, in addition to ocular health and distance and near visual acuity, additional evaluations of visual skills such as eye teaming, focusing and tracking that may impact a child's ability to read. *AB 1095 was held on suspense in the Senate Appropriations Committee.*

AB 1096 (Wright), of 2001, would have established a pilot program for schools scoring in the bottom 20 percent on state achievement tests to administer to poor readers a comprehensive eye screening and remedial vision training. *AB 1096 died on the Senate Floor's inactive file.*

9. **Support.** The sponsor of this bill (State Board of Optometry) and supporters, which include consumer advocates, labor groups, and optometrists, argue that current vision testing in schools is limited to using the eye chart for acuity one eye at a time, from 20 feet away, which does not address how well the two eyes work together while reading. Supporters argue that emerging data and practice in the field of vision show that reading speed and fluency are impacted by poor eye coordination, which can lead to problems like declined reading speed, poor hand-eye coordination, headaches, eye strains, and frustration, which has often been misdiagnosed as attention, behavioral, or emotional disorders. The California Pan-Ethnic Health Network and the California Black Health Network cite health disparities that disproportionately affect Latino, African-American, and American Indian/Alaska Native populations, who have scored lower than white students as proficient or advanced on the third-grade state language arts exam. They state that reading exams can serve as a tool to identify vision problems early in life to help reduce educational disparities.

10. **Opposition.** Kaiser Permanente and the American Academy of Pediatrics argue that the requirements in this bill mandate procedures that are not necessary or recommended by eye health professionals and bring very little clinical value at a possible cost and inconvenience to parents. They state that this bill could fragment care for children who can be screened in the medical home by their pediatrician or other health care provider, and also state that there is no data to support that a visit with an optometrist or ophthalmologist is an effective screening system or justifies the associated costs. They argue that expanded screening requirements increase cost and the complexity of accomplishing the screens without evidence

that it would produce better outcomes for children and that this bill will result in school absenteeism for children and work absenteeism for parents for having to take children to unnecessary extra provider visits.

Other opponents shared similar concerns in a previous version of this bill. They expressed concerns about the need for expanding the current vision screenings and the costs associated with the new requirements.

11. **Technical amendment.** The author has indicated that an amendment to clarify what should be included in a comprehensive exam will be proposed to be taken in this committee.

SUPPORT AND OPPOSITION:

Support: California State Board of Optometry (sponsor)
American Federation of State, County and Municipal Employees, AFL-CIO
California Black Health Network
California Chapter of the National Association of Social Workers
California Federation of Teachers
California Optometric Association
California Pan-Ethnic Health Network
Disability Rights California
Hundreds of individuals

Oppose: American Academy of Pediatrics
California Academy of Family Physicians (previous version)
California School Nurses Organization (previous version)
Kaiser Permanente

-- END --

AMENDED IN SENATE APRIL 6, 2015

SENATE BILL No. 496

Introduced by Senator Nguyen

February 26, 2015

An act to amend Section 3057.5 of, *and to add Section 3058 to,* the Business and Professions Code, relating to healing arts, and making an appropriation therefor.

LEGISLATIVE COUNSEL'S DIGEST

SB 496, as amended, Nguyen. Optometry: graduates of a foreign university: ~~examinations.~~ *examinations and licensure.*

Existing law, the Optometry Practice Act, creates the State Board of Optometry, which licenses optometrists and regulates their practice. Existing law provides that the State Board of Optometry is required, by regulation, to establish educational and examination requirements for licensure to ensure the competence of optometrists to practice. Existing law requires an applicant for licensure to submit an application that is provided under oath and to pay a prescribed fee. All fees are deposited in the Optometry Fund, which is continuously appropriated to the board to administer the act. Any violation of the act is a crime.

Existing law authorizes the board to permit a graduate of a foreign university who meets specified requirements to take the examinations for an optometrist license.

This bill would revise the license examination requirements for a graduate of a foreign university to, among other things, require submission of an application and payment of a prescribed fee. *This bill would also authorize the board to issue a license to a graduate of a foreign university who meets specified requirements, including requirements that the applicant have permission to take the examinations*

for an optometrist license, submit an application on a form approved by the board, and pay a prescribed fee for an application for licensure. By increasing the amount of moneys deposited into a continuously appropriated fund, this bill would make an appropriation. Because the application would be required to be provided under oath, this bill would expand the scope of an existing crime and create a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: yes. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 3057.5 of the Business and Professions Code is amended to read:

3057.5. (a) Notwithstanding any other provision of this chapter, the board shall permit a graduate of a foreign university who meets all of the following requirements to take the examinations for an optometrist license:

(1) Is over 18 years of age.

(2) Is not subject to denial of a license under Section 480.

(3) Has obtained any of the following:

(A) A degree as a doctor of optometry issued by a university located outside of the United States.

(B) A degree from a school of optometry program located outside of the United States that has a minimum of a four year or equivalent curriculum leading to an optometry license in the country where the program is located.

(C) A degree from a school of medicine located outside of the United States and completed the necessary requirements to practice in the field of ophthalmology in the country where the school of medicine is located.

(4) Submits an application to obtain a letter of sponsorship on a form approved by the board.

(5) Pays to the board the fee for an application for licensure prescribed in subdivision (a) of Section 3152.

(b) (1) A graduate of a foreign university shall provide to the board any supporting documents requested by the board to establish that the requirement of paragraph (3) of subdivision (a) has been met. These supporting documents may include, but are not limited to, a curriculum vitae, official examination score, certificate of optometric or medical education, official school transcript, certified copy of optometric or medical diploma, official English translation, certificate of completion of postgraduate training, and certificate of clinical training.

(2) Every document provided pursuant to this subdivision shall be in English or translated into English by a certified United States translation service approved by the board.

(c) The board shall require a graduate of a foreign university to obtain an evaluation of his or her official school transcript by an education evaluation service approved by the board. The board shall determine from the evaluation whether the applicant has met the educational requirements that are reasonable and necessary to ensure that an optometrist has the knowledge to adequately protect the public health and safety.

(d) Notwithstanding paragraph (3) of subdivision (a), if a graduate of a foreign university does not meet the educational requirements that are reasonable and necessary to ensure that an optometrist has the knowledge to adequately protect the public health and safety, the board may establish alternative education requirements for the graduate of a foreign university to meet in order to ensure this knowledge. A graduate of a foreign university shall provide any supporting documents requested by the board to establish that these requirements are met.

(e) The board shall issue a letter of sponsorship, or its equivalent, required by the National Board of Examiners in Optometry, or its equivalent, to permit a graduate of a foreign university to take all examinations required for licensure. This letter of sponsorship shall expire two years from the date of issuance.

SEC. 2. Section 3058 is added to the Business and Professions Code, to read:

3058. (a) The board may issue a license to practice optometry to a person who meets all of the following requirements:

(1) Has obtained permission to take the examinations for an optometrist license pursuant to Section 3057.5.

(2) Has successfully passed the required examinations.

(3) Is not subject to denial of a license under Section 480.

(4) Has met the requirements described in paragraphs (1) to (5), inclusive, of subdivision (b) of Section 3041.3.

(5) Has provided the board with any other information requested by the board to the extent necessary to determine that the person has met the requirements for licensure under this chapter.

(6) Has submitted an application on a form approved by the board.

(7) Pays the fee for an application for licensure prescribed in subdivision (a) of Section 3152.

(8) Has no physical or mental impairment related to drugs or alcohol and has not been found mentally incompetent by a licensed psychologist or licensed psychiatrist so that the person is unable to undertake the practice of optometry in a manner consistent with the safety of a patient or the public.

(b) A license issued pursuant to this section shall expire as provided in Section 3146 and may be renewed as provided in this chapter, subject to the same conditions as other licenses issued under this chapter.

~~SEC. 2.~~

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

O

SB-496 Optometry: graduates of a foreign university: examinations and licensure. (2015-2016)

Text | Votes | History | Bill Analysis | Today's Law As Amended | Compare Versions | **Status** | Comments To Author

Senate: 1st Cmt

Assembly:

Bill Status	
Measure:	SB-496
Lead Authors:	Nguyen (S)
Principal Coauthors:	-
Coauthors:	-
Topic:	Optometry: graduates of a foreign university: examinations and licensure.
31st Day in Print:	03/29/15
Title:	An act to amend Section 3057.5 of, *and to add Section 3058 to,* the Business and Professions Code, relating to healing arts, and making an appropriation therefor.
House Location:	Senate
Last Amended Date:	04/06/15
Committee Location:	Sen Business, Professions and Economic Development

Type of Measure
Active Bill - In Committee Process
Majority Vote Required
Appropriation
Fiscal Committee
State-Mandated Local Program
Non-Urgency
Non-Tax levy

Last 5 History Actions

Date	Action
04/13/15	April 20 hearing postponed by committee.
04/08/15	Set for hearing April 20.
04/06/15	April 6 hearing postponed by committee.
04/06/15	From committee with author's amendments. Read second time and amended. Re-referred to Com. on B., P. & E.D.
03/25/15	Set for hearing April 6.

SENATE COMMITTEE ON
BUSINESS, PROFESSIONS AND ECONOMIC DEVELOPMENT
Senator Jerry Hill, Chair
2015 - 2016 Regular

Bill No:	SB 496	**Hearing Date:**	April 6, 2015
Author:	Nguyen		
Version:	April 6, 2015		
Urgency:	No	**Fiscal:**	Yes
Consultant:	Sarah Huchel		

Subject: Optometry: graduates of a foreign university: examinations.

SUMMARY: Expands and specifies requirements for a graduate of a foreign university to be eligible for California licensure.

Existing law:

1) Establishes the Optometry Practice Act, which regulates the practice of optometry. (Business and Professions Code (BPC) Section 3000)

2) Requires the State Board of Optometry (Board) to promulgate regulations establishing educational and examination requirements. (BPC § 3041.2)

3) Requires the Board to permit a graduate of a foreign university who meets all of the following requirements to take the examinations for an optometrist license:

   a) Is over 18 years of age.

   b) Is not subject to denial of a license because of a crime, as specified.

   c) Has a degree as a doctor of optometry issued by a university located outside of the United States. (BPC § 3057.5)

4) Establishes eligibility requirements for licensure. (BPC §§ 3046, 3056, 3057)

5) States that foreign graduate applicants who meet the statutory requirements shall be admitted to the optometry examination upon furnishing satisfactory evidence that the course of instruction completed is reasonably equivalent to the course of instruction given by a school accredited by the Board; provided, however, that an applicant who is unable to furnish satisfactory evidence of equivalency may take those courses or subjects, in an accredited school or in another program of instruction acceptable to the Board, which would remedy areas of deficiency. (Title 16, California Code of Regulations Section 1530.1).

This bill:

1) Requires the Board to accept either of the following degrees, in addition to existing requirements, as qualifying educational experience for a foreign graduate to take the optometry license examination:

a) A degree from a school of optometry program located outside of the United States that has a minimum of a four year or equivalent curriculum leading to an optometry license in the country where the program is located.

b) A degree from a school of medicine located outside of the United States and the applicant has completed the necessary requirements to practice in the field of ophthalmology in the country where the school of medicine is located.

2) Requires a graduate of a foreign university seeking California licensure to do the following:

a) Submit an application to the Board to obtain a letter of sponsorship.

b) Pay a license application fee.

c) Provide to the Board any supporting documents in English requested to establish that the educational requirements have been met.

3) Requires a graduate of a foreign university to obtain an evaluation of his or her official school transcript by an education evaluation service approved by the Board, and requires the Board to determine whether the applicant has met the educational requirements.

4) Permits the Board to establish alternative education requirements to ensure public health and safety even if the foreign graduate meets the degree requirements.

5) Requires the Board to issue a letter of sponsorship, or its equivalent, required by the National Board of Examiners in Optometry or its equivalent, to permit a graduate of a foreign university to take all examinations required for licensure. This letter of sponsorship shall expire two years from the date of issuance.

6) Permits the Board to issue a license to practice optometry to a person who meets the following requirements:

a) Has obtained permission to take the examination for an optometrist license based on his or her foreign graduate education.

b) Is not subject to license denial of a license, as specified.

c) Has met the requirements to be issued a certificate to use therapeutic pharmaceutical agents, as specified.

d) Has provided all information requested by the Board.

e) Has submitted a license application and paid the fee.

f) Has no physical or mental impairment related to drugs or alcohol and has not been found mentally incompetent by a licensed psychologist or licensed psychiatrist.

7) States that a license issued to a foreign graduate expires and may be renewed in the same manner as other licenses.

FISCAL EFFECT: Unknown. This bill is keyed "fiscal" by Legislative Counsel.

COMMENTS:

1. **Purpose.** This bill is sponsored by the California Board of Optometry. This bill resolves the dilemma that foreign graduates are eligible to take the optometry licensing examination but have no ability to become licensed in California. This bill also provides additional educational pathways for license eligibility.

2. **Background.** Optometrists must complete a four year Doctor of Optometry degree program meeting California educational requirements and pass the National Board of Examiners in Optometry (NBEO) examination to be eligible for California licensure. The Board also has license pathways for individuals who are licensed in other states. However, while California offers a means for foreign graduates to sit for the NBEO, there is no pathway for a license to practice.

   According to the Author's office, although procedures allowing foreign graduates to sit for the examination have been in place since 1987, there has never been cause to revisit the licensing provisions because there have been no individuals with the appropriate educational background who passed the exam. Recent events have caused the Board to reconsider this issue and sponsor this bill.

   In addition to providing a licensure pathway, this bill expands the educational options for foreign graduates. According to the Author, other countries may not issue a doctorate degree to practicing optometrists because their educational programs issue certification as masters or bachelors. This bill establishes eligibility for individuals who attend four-year schools of optometry or schools of medicine outside of the United States.

3. **Arguments in Support.** The California State Board of Optometry writes, "Currently, foreign graduates qualified to practice optometry abroad lack a pathway to legally practice optometry in the state of California. Current law only authorizes the Board to issue a letter of sponsorship to a foreign graduate interested in taking the NBEO. The problem is once the candidate takes and passes the test they leave California to practice elsewhere.

   "The requirements for licensure proposed are similar to the requirements for new U.S. Graduates and out-of-state graduates. SB 496 is necessary to close the loophole that allows foreign optometrists to receive a sponsor letter, but not practice in California."

4. **Current Related Legislation.** SB 349 (Bates, 2015) establishes a regulatory framework for mobile optometric facilities.

SUPPORT AND OPPOSITION:

Support:

California State Board of Optometry (Sponsor)

Opposition:

None received as of March 31, 2015.

-- END --

AMENDED IN SENATE APRIL 6, 2015

SENATE BILL No. 349

Introduced by Senator Bates
(Coauthors: Senators Berryhill and Nguyen)

February 24, 2015

An act to add Section 3070.2 to the Business and Professions Code, relating to ~~optometry.~~ *optometry, and making an appropriation therefor.*

LEGISLATIVE COUNSEL'S DIGEST

SB 349, as amended, Bates. Optometry: mobile optometric facilities.

The Optometry Practice Act provides for the licensure and regulation of the practice of optometry by the State Board of Optometry, and makes a violation of the act a crime. The act requires each licensed optometrist, before engaging in the practice of optometry, to notify the board in writing of the address or addresses where he or she is to engage in the practice of optometry and of any changes in his or her place of practice. *Under existing law, all moneys collected pursuant to the act, except where otherwise provided, are deposited in the Optometry Fund and continuously appropriated to the board to carry out the act.*

~~This bill would authorize an optometrist to engage in the practice of mobile optometry with a mobile optometric facility, as defined, if the optometrist meets certain requirements, including, but not limited to, that the optometrist maintain a primary business office separate from the mobile optometric facility, as specified. The bill would also require an optometrist to certify that any information included on a printed copy of an original document to a patient is true, accurate, and complete. The bill would require that the mobile optometric facility, among other things, has a vehicle identification number. The bill would exempt~~

~~mobile optometric facilities that are part of an extended optometric clinical facility, as defined, from these requirements.~~

This bill would define "mobile optometric facility" as mobile optometric equipment, including, but not limited to, a trailer or van that may be moved. The bill would limit ownership of a mobile optometric facility to a nonprofit or charitable organization, a governmental agency, or a school, as specified. The bill would require a mobile optometric facility, while providing services, to have access to, among other things, sufficient lighting around the perimeter of the work site from which the mobile optometric facility provides those services. The bill would require an owner of a mobile optometric facility to be responsible for certain things, including, but not limited to, maintaining the mobile optometric facility in good repair and in a clean and sanitary manner. The bill would also require the optometrist or owner of a mobile optometric facility to maintain and disclose patient records as specified. The bill would make these provisions operative on January 1, 2017.

This bill would require the board, by January 1, 2017, to promulgate regulations establishing a registry for mobile optometric facilities and shall set a registration fee at an amount not to exceed the costs of administration. Because this bill would increase those moneys deposited in a continuously appropriated fund, it would make an appropriation.

Because a violation of the act is a crime, this bill would expand the scope of an existing crime and would therefore impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: ~~no~~ *yes*. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 *SECTION 1. The Legislature finds and declares the necessity*
2 *of establishing regulations for mobile optometric facilities in order*
3 *to help secure the availability of quality vision care services for*
4 *patients who receive care in remote or underserved areas and for*
5 *patients who need specialized types of cost-effective health care.*

~~SECTION 1.~~

SEC. 2. Section 3070.2 is added to the Business and Professions Code, to read:

3070.2. (a) For purposes of this section, "mobile optometric facility" means ~~a self-contained unit housing~~ *mobile optometric* equipment, which may include a trailer or van, that may be moved, towed, or transported from one location to another in which the practice of optometry is performed as defined in Section 3041. ~~Mobile optometric facilities are limited to nonprofit, charitable organizations with federal tax-exempt status as described in Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. Sec. 501(c)(3)) or a mobile unit that is operated by a governmental agency.~~ *"Mobile optometric facility" does not include an extended optometric clinical facility, as defined in Section 1507 of Title 16 of the California Code of Regulations.*

~~(b) The purpose of this section is to provide requirements for mobile optometric facilities to provide optometric services as authorized in Section 3041, in order to help secure the availability of quality vision care services for patients who receive care in remote or underserved areas and for patients who need specialized types of cost-effective health care.~~

~~(c) An optometrist may engage in the practice of mobile optometry provided that all of the following requirements are met:~~

~~(1) The optometrist maintains a primary business office, separate from the mobile optometric facility, that meets all of the following requirements:~~

~~(A) Is open to the public during normal business hours by telephone and for purposes of billing services or access to patient records.~~

~~(B) Is licensed to the optometrist or the employer of the optometrist as a local business with the city or county in which the primary business office is located.~~

~~(C) Is registered by the optometrist with the board.~~

~~(D) Is owned or leased by the optometrist or by the employer of the optometrist.~~

~~(E) Is not located in or connected with a residential dwelling.~~

(b) The ownership of a mobile optometric facility shall be limited to a nonprofit or charitable organization, a governmental agency, or a school as provided in subdivision (e) of Section 1507 of Title 16 of the California Code of Regulations.

(c) The board shall promulgate regulations establishing a registry for mobile optometric facilities and shall set a registration fee at an amount not to exceed the costs of administration by January 1, 2017.

~~(2)~~

(d) The optometrist ~~maintains and discloses~~ *or owner shall maintain and disclose* patient records in the following manner:

~~(A)~~

(1) Records are maintained and made available to the patient in such a way that the type and extent of services provided to the patient are conspicuously disclosed. ~~The disclosure of records shall be made at or near the time services are rendered and shall be maintained at the primary business office specified in paragraph (1).~~ *The optometrist shall notify the patient where his or her records are stored and how the patient may access them.*

~~(B)~~

(2) The ~~optometrist~~ *individual maintaining the records* complies with all federal and state laws and regulations regarding the maintenance and protection of medical records, including, but not limited to, the federal Health Insurance Portability and Accountability Act of 1996 (Public Law 104-191).

~~(C) The optometrist keeps all necessary records for a minimum of seven years from the date of service in order to disclose fully the extent of services furnished to a patient, pursuant to Section 3007. Any information included on a printed copy of an original document to a patient shall be certified by the optometrist as being true, accurate, and complete.~~

~~(D)~~

(3) If a prescription is issued to a patient, records shall be maintained for each prescription as part of the patient's record, including all of the following ~~information about the prescribing optometrist:~~ *information.*

~~(i) Name.~~

~~(ii) License number.~~

~~(iii) The place of practice and the primary business office.~~

(A) The optometrist's name, license number, and contact information

(B) The mobile facility's owner, registration, and contact information.

(C) The location at which optometric services were provided.

~~(iv)~~

(D) Description of the goods and services for which the patient is charged and the amount charged.

~~(E)~~

(4) For services provided at a schoolsite, a copy of consent by the parent, guardian, or legal representative and referral or order requesting optometric services from personnel in a school district or county office of education, as defined in Section 49452 of the Education Code and Section 591 of Title 5 of the California Code of Regulations, shall be kept in the patient's medical record.

~~(3) The optometrist possesses and appropriately uses the instruments and equipment required for all optometric services and procedures performed within the mobile optometric facility.~~

~~(4) For mobile optometric facilities, the optometrist informs patients in writing of any condition that requires follow-up care or treatment.~~

~~(5) Mobile optometric facilities shall comply with all consumer notice requirements of the board.~~

~~(6) There is a written procedure for follow-up care of patients treated in a mobile optometric facility and that such procedure includes arrangements for treatment by a local health care professional.~~

~~(7) The mobile optometric facility shall arrange for emergency medical care when indicated.~~

~~(8) The mobile optometric facility shall do all of the following:~~

~~(A) Have an access ramp or lift if services are provided to disabled persons.~~

~~(B) Have adequate~~

(e) A mobile optometric facility shall comply with applicable federal and state laws governing access for disabled individuals.

(f) When providing services, a mobile optometric facility shall have access to all of the following:

(1) Adequate equipment and supplies for cleaning, disinfection, and sterilization.

~~(C) Have access to an~~

(2) Adequate instruments and equipment required for all optometric services and procedures performed within the mobile optometric facility.

(3) An adequate supply of ~~clean~~ *clean,* running ~~water, including~~ hot *and cold* water.

~~(D) Have ready access to toilet~~

(4) Toilet facilities.

~~(E) Have a~~

(5) A covered, galvanized stainless steel or other noncorrosive metal container for deposit of refuse and waste materials.

~~(F) Comply~~

(6) Sufficient lighting around the perimeter of the work site from which the mobile optometric facility provides any services.

(g) An owner of an optometric facility shall be responsible for all of the following:

(1) Compliance with the applicable requirements of the Vehicle ~~Code, and shall have a vehicle identification number for the mobile optometric facility.~~ *Code.*

~~(G) Maintain~~

(2) Maintaining the mobile optometric facility in good repair and in a clean and sanitary manner.

~~(H) Have a written policy~~

(3) Establishing written policies and procedures that include, but are not limited to, all of the following:

~~(i)~~

(A) Scope of services.

~~(ii)~~

(B) Procedures for the performance of the services provided.

~~(iii)~~

(C) Quality assurance.

~~(iv)~~

(D) Infection control.

~~(v)~~

(E) Medical record documentation of services ~~provided, as appropriate.~~ *provided.*

~~(vi) Transport for patients, including, but not limited to, a method of transportation, special equipment, necessary personnel, and protection from inclement weather.~~

~~(vii)~~

(F) Emergency response and evacuation plan for the mobile unit.

~~(I) Maintain~~

(G) Arrangements for treatment by a local health care professional.

(H) Patient emergency medical care.

(I) Written notification for patients of any condition that requires follow-up care or treatment.

(4) Maintaining a mobile unit services log that shall include, but is not limited to, all of the following:

~~(i)~~

(A) Patient record or identification number.

~~(ii)~~

(B) Name, age, and sex of patient.

~~(iii)~~

(C) Site, date, time, and as appropriate, duration of exam.

~~(iv)~~

(D) Printed optometrist name and license number.

~~(v)~~

(E) Signature or electronic signature, or the equivalent.

~~(d)~~

(h) An optometrist who satisfies all of the requirements in this section for the practice of optometry in a mobile optometric facility shall not be required to comply with ~~Section~~ *Sections* 3070 *and 3077* in regard to providing notification to the board of each location at which he or she practices.

~~(e) Mobile optometric facilities that are part of an extended optometric clinical facility, as defined in Section 1507 of Title 16 of the California Code of Regulations, are exempt from the requirements of this section.~~

~~(f) The licensed primary business office shall be responsible for obtaining approval for parking of the mobile optometric facility as required by the local planning, zoning, and fire authorities. The mobile unit shall be situated for safe and comfortable patient access. The mobile unit shall comply with all local parking laws. Any parking restrictions developed by a primary business office or clinic for mobile units shall be strictly enforced by the primary business office or clinic. The primary business office or clinic shall ensure that there is sufficient lighting around the perimeter of the site from which the mobile unit provides any services.~~

(i) This section shall become operative on January 1, 2017.

~~SEC. 2.~~

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or

infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

O

SB-349 Optometry: mobile optometric facilities. (2015-2016)

Text | Votes | History | Bill Analysis | Today's Law As Amended ⓘ | Compare Versions | **Status** | Comments To Author

Senate: 1st Cmt

Assembly:

Bill Status	
Measure:	SB-349
Lead Authors:	Bates (S)
Principal Coauthors:	-
Coauthors:	Berryhill (S) , Nguyen (S)
Topic:	Optometry: mobile optometric facilities.
31st Day in Print:	03/27/15
Title:	An act to add Section 3070.2 to the Business and Professions Code, relating to ~~optometry.~~ *optometry, and making an appropriation therefor.*
House Location:	Senate
Last Amended Date:	04/06/15
Committee Location:	Sen Business, Professions and Economic Development

Type of Measure
Active Bill - In Committee Process
Majority Vote Required
Appropriation
Fiscal Committee
State-Mandated Local Program
Non-Urgency
Non-Tax levy

Last 5 History Actions

Date	Action
04/16/15	April 27 hearing postponed by committee.
04/16/15	Set for hearing April 27.
04/15/15	April 20 set for second hearing canceled at the request of author.
04/08/15	Set for hearing April 20.
04/06/15	April 6 set for first hearing canceled at the request of author.

AMENDED IN SENATE MAY 4, 2015

AMENDED IN SENATE APRIL 9, 2015

SENATE BILL No. 622

Introduced by Senator Hernandez

February 27, 2015

An act to amend ~~Section~~ *Sections* 3041 *and 3110* of, to add Sections 3041.4, 3041.5, 3041.6, 3041.7, and 3041.8 to, and to repeal and add Sections 3041.1, 3041.2, and 3041.3 of, the Business and Professions Code, relating to optometry, and making an appropriation therefor.

LEGISLATIVE COUNSEL'S DIGEST

SB 622, as amended, Hernandez. Optometry.

The Optometry Practice Act provides for the licensure and regulation of the practice of optometry by the State Board of Optometry, and defines the practice of optometry to include, among other things, the prevention and diagnosis of disorders and dysfunctions of the visual system, and the treatment and management of certain disorders and dysfunctions of the visual system, as well as the provision of rehabilitative optometric services, and doing certain things, including, but not limited to, the examination of the human eyes, the determination of the powers or range of human vision, and the prescribing of contact and spectacle lenses. Existing law authorizes an optometrist certified to use therapeutic pharmaceutical agents to diagnose and treat specified conditions, use specified pharmaceutical agents, and order specified diagnostic tests. The act requires optometrists treating or diagnosing eye disease, as specified, to be held to the same standard of care to which physicians and surgeons and osteopathic physician and surgeons are held. *The act requires an optometrist, in certain circumstances, to refer a patient to an opthamologist or a physician and surgeon,*

including when a patient has been diagnosed with a central corneal ulcer and the central corneal ulcer has not improved within 48 hours of the diagnosis. The act makes a violation of any of its provisions a crime. All moneys collected pursuant to the act, except where otherwise provided, are deposited in the Optometry Fund and continuously appropriated to the board to carry out the act.

This bill would revise and recast those provisions. *The bill would delete certain requirements that an optometrist refer a patient to an opthamologist or a physician and surgeon, including when a patient has been diagnosed with a central corneal ulcer and the central corneal ulcer has not improved within 48 hours of the diagnosis.* The bill would additionally define the practice of optometry as the provision of habilitative optometric services, and would authorize the board to allow optometrists to use nonsurgical technology to treat any authorized condition under the act. The bill would *additionally* authorize an optometrist *certified* to use ~~diagnostic~~ *therapeutic* pharmaceutical ~~agents, as specified, including, but not limited to, oral and topical diagnostic pharmaceutical agents that are not controlled substances.~~ *agents to collect a blood specimen by finger prick method, to perform skin tests, as specified, to diagnose ocular allergies, and to use mechanical lipid extraction of meibomian glands and nonsurgical techniques.* The bill would ~~authorize an optometrist to independently initiate and administer vaccines, as specified, for a person 3 years of age and older, if the optometrist meets certain requirements, including, but not limited to,~~ *require the board to grant an optometrist certified to treat glaucoma a certificate for the use of specified immunizations if certain conditions are met, including, among others,* that ~~he or she~~ *the optometrist* is certified in basic life ~~support for health care professionals.~~ *support.* The bill would additionally authorize an optometrist certified to use therapeutic pharmaceutical agents to, among other things, be certified to use anterior segment lasers, as specified, and to be certified to perform specified minor procedures, as specified, if certain requirements are met.

The bill would require the board to charge a fee of not more than $150 to cover the reasonable regulatory cost of certifying an optometrist to use anterior segment ~~lasers.~~ *lasers, a fee of not more than $150 to cover the reasonable regulatory cost of certifying an optometrist to use minor procedures, and a fee of not more than $100 to cover the reasonable regulatory cost of certifying an optometrist to use*

immunizations. Because this bill would increase those moneys deposited in a continuously appropriated fund, it would make an appropriation.

Existing law establishes the Office of Statewide Health Planning and Development, which is vested with all the duties, powers, responsibilities, and jurisdiction of the State Department of Public Health relating to health planning and research development.

This bill would declare the intent of the Legislature that the Office of Statewide Health Planning designate a pilot project to test, demonstrate, and evaluate expanded roles for optometrists in the performance of management and treatment of diabetes mellitus, hypertension, and hypercholesterolemia.

Because a violation of the act is a crime, this bill would expand the scope of an existing crime and would, therefore, result in a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: yes. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 3041 of the Business and Professions Code is amended to read:

3041. (a) The practice of optometry includes the prevention and diagnosis of disorders and dysfunctions of the visual system, and the treatment and management of certain disorders and dysfunctions of the visual system, as well as the provision of habilitative or rehabilitative optometric services, and is the doing of any or all of the following:

(1) The examination of the human eye or eyes, or its or their appendages, and the analysis of the human vision system, either subjectively or objectively.

(2) The determination of the powers or range of human vision and the accommodative and refractive states of the human eye or eyes, including the scope of its or their functions and general condition.

(3) The prescribing or directing the use of, or using, any optical device in connection with ocular exercises, visual training, vision training, or orthoptics.

(4) The prescribing of contact and spectacle lenses for, or the fitting or adaptation of contact and spectacle lenses to, the human eye, including lenses that may be classified as drugs or devices by any law of the United States or of this state.

(5) The use of topical pharmaceutical agents for the purpose of the examination of the human eye or eyes for any disease or pathological condition.

(b) The State Board of Optometry shall, by regulation, establish educational and examination requirements for licensure to ensure the competence of optometrists to practice pursuant to this ~~chapter.~~ *chapter, except as specified in Section 3041.3 related to the use of anterior segment lasers and in Section 3041.4 related to minor procedures.* Satisfactory completion of the required educational and examination requirements shall be a condition for the issuance of an original optometrist license or required certifications pursuant to this chapter.

(c) The board may ~~authorize~~ *promulgate regulations authorizing* optometrists to use *noninvasive,* nonsurgical technology to treat a condition authorized by this chapter. *The board shall require a licensee to take a minimum of four hours of education courses on the new technology and perform an appropriate number of complete clinical procedures on live human patients to qualify to use each new technology authorized by the board pursuant to this subdivision.*

SEC. 2. Section 3041.1 of the Business and Professions Code is repealed.

SEC. 3. Section 3041.1 is added to the Business and Professions Code, to read:

3041.1. (a) (1) An optometrist who is certified to use therapeutic pharmaceutical agents pursuant to this section may also diagnose and treat the human eye or eyes, or any of its or their appendages, for all of the following conditions:

(A) Through medical treatment, infections of the anterior segment and adnexa.

(B) Ocular allergies of the anterior segment and adnexa.

~~(C) Ocular inflammation that is nonsurgical in cause, except when comanaged with the treating physician and surgeon.~~

(C) Ocular inflammation, nonsurgical in cause except when comanaged with the treating physician and surgeon, limited to inflammation resulting from traumatic iritis, peripheral corneal inflammatory keratitis, episcleritis, and unilateral nonrecurrent nongranulomatous idiopathic iritis in patients over 18 years of age.

(D) Traumatic or recurrent conjunctival or corneal abrasions and erosions.

(E) Corneal and conjunctival surface disease and dry eyes disease.

(F) Ocular pain that is nonsurgical in cause, except when comanaged with the treating physician and surgeon.

(G) ~~Eyelid disorders, including, but not limited to, hypotrichosis and blepharitis.~~ *Hypotrichosis and blepharitis.*

(2) For purposes of this section, "treat" means the use of therapeutic pharmaceutical agents, as described in subdivision (b), and the procedures described in subdivision (c).

(3) For purposes of this chapter, "adnexa" means ocular adnexa.

(b) In diagnosing and treating the conditions listed in subdivision (a), an optometrist certified to use therapeutic pharmaceutical agents pursuant to this section may use all of the following ~~diagnostic and~~ therapeutic pharmaceutical agents:

~~(1) Oral and topical diagnostic and therapeutic pharmaceutical agents that are not controlled substances. The use of pharmaceutical agents shall be limited to the use for which the drug has been approved for marketing by the federal Food and Drug Administration (FDA).~~

~~(2) Notwithstanding paragraph (1), an optometrist certified to use therapeutic pharmaceutical agents may use a drug in a way for which the drug has not been approved for marketing by the FDA if all of the following requirements are met:~~

~~(A) The drug is approved by the FDA.~~

~~(B) The drug has been recognized for treatment of the condition by either of the following:~~

~~(i) The American Hospital Formulary Service's Drug Information.~~

~~(ii) Two articles from major peer reviewed medical journals that present data supporting the proposed off-label use or uses as generally safe and effective, unless there is clear and convincing~~

~~contradictory evidence presented in a major peer reviewed medical journal.~~

~~(3) Notwithstanding paragraph (1), codeine with compounds and hydrocodone with compounds as listed in the California Uniform Controlled Substances Act (Division 10 (commencing with Section 11000) of the Health and Safety Code) and the federal Controlled Substances Act (21 U.S.C. Sec. 801, et seq.) may be used. The use of these controlled substances shall be limited to five days.~~

(1) Topical pharmaceutical agents for the purpose of the examination of the human eye or eyes for any disease or pathological condition, including, but not limited to, topical miotics.

(2) Topical lubricants.

(3) Antiallergy agents. In using topical steroid medication for the treatment of ocular allergies, an optometrist shall consult with an ophthalmologist if the patient's condition worsens 21 days after diagnosis.

(4) Topical and oral anti-inflammatories.

(5) Topical antibiotic agents.

(6) Topical hyperosmotics.

(7) Topical and oral antiglaucoma agents pursuant to the certification process defined in Section 3041.2.

(8) Nonprescription medications used for the rational treatment of an ocular disorder.

(9) Oral antihistamines.

(10) Prescription oral nonsteroidal anti-inflammatory agents.

(11) Oral antibiotics for medical treatment of ocular disease.

(12) Topical and oral antiviral medication for the medical treatment of herpes simplex viral keratitis, herpes simplex viral conjunctivitis, periocular herpes simplex viral dermatitis, varicella zoster viral keratitis, varicella zoster viral conjunctivitis, and periocular varicella zoster viral dermatitis.

(13) Oral analgesics that are not controlled substances.

(14) Codeine with compounds and hydrocodone with compounds as listed in the California Uniform Controlled Substances Act (Division 10 (commencing with Section 11000) of the Health and Safety Code) and the United States Uniform Controlled Substances Act (21 U.S.C. Sec. 801 et seq.). The use of these agents shall be

limited to five days, with a referral to an ophthalmologist if the pain persists.

(c) An optometrist who is certified to use therapeutic pharmaceutical agents pursuant to this section may also perform all of the following:

(1) Corneal scraping with cultures.

(2) Debridement of corneal epithelia.

(3) Mechanical epilation.

(4) Collection of a blood specimen by finger prick method or venipuncture for testing patients suspected of having diabetes.

(5) Suture removal, with prior consultation with the treating health care provider.

(6) Treatment or removal of sebaceous cysts by expression.

(7) Administration of oral fluorescein to patients suspected as having diabetic retinopathy.

(8) Use of an auto-injector to counter anaphylaxis.

~~(9) Ordering of clinical laboratory and imaging tests related to the practice of optometry.~~

~~(10) A clinical laboratory test or examination classified as waived under CLIA and related to the practice of optometry.~~

(9) Ordering of smears, cultures, sensitivities, complete blood count, mycobacterial culture, acid fast stain, urinalysis, tear fluid analysis, and X-rays necessary for the diagnosis of conditions or diseases of the eye or adnexa. An optometrist may order other types of images subject to prior consultation with the appropriate physician and surgeon.

(10) A clinical laboratory test or examination classified as waived under the Clinical Laboratory Improvement Amendments of 1988 (CLIA)(42 U.S.C. Sec. 263a; Public Law 100-578) or any regulations adopted pursuant to CLIA, and that are necessary for the diagnosis of conditions and diseases of the eye or adnexa, or if otherwise specifically authorized by this chapter.

(11) Skin test to diagnose ocular allergies. Skin tests shall be limited to the superficial lawyer of the skin.

(12) Punctal occlusion by plugs, excluding laser, diathermy, cryotherapy, or other means constituting surgery as defined in this chapter.

(13) The prescription of therapeutic contact lenses, diagnostic contact lenses, or biological or technological corneal ~~devices.~~

devices that diagnose or treat a condition authorized under this chapter.

(14) Removal of foreign bodies from the cornea, eyelid, and conjunctiva with any appropriate instrument other than a ~~scalpel or needle.~~ *scalpel*. Corneal foreign bodies shall be nonperforating, be no deeper than the midstroma, and require no surgical repair upon removal.

(15) For patients over 12 years of age, lacrimal irrigation and dilation, excluding probing of the nasal lacrimal tract. The board shall certify any optometrist who graduated from an accredited school of optometry before May 1, 2000, to perform this procedure after submitting proof of satisfactory completion and confirmation of 10 procedures under the supervision of an ophthalmologist or optometrist who is certified in lacrimal irrigation and dilation. Any optometrist who graduated from an accredited school of optometry on or after May 1, 2000, shall be exempt from the certification requirement contained in this paragraph.

(16) Use of mechanical lipid extraction of meibomian glands and nonsurgical techniques.

~~(17) Notwithstanding subdivision (b), administration of injections for the diagnoses or treatment of conditions of the eye and adnexa, excluding intraorbital injections and injections administered for cosmetic effect, provided that the optometrist has satisfactorily received four hours of continuing education on performing all injections authorized by this paragraph.~~

(d) In order to be certified to use therapeutic pharmaceutical agents and authorized to diagnose and treat the conditions listed in this section, an optometrist shall apply for a certificate from the board and meet all requirements imposed by the board.

(e) The board shall grant a certificate to use therapeutic pharmaceutical agents to any applicant who graduated from a California accredited school of optometry prior to January 1, 1996, is licensed as an optometrist in California, and meets all of the following requirements:

(1) Satisfactorily completes a didactic course of no less than 80 classroom hours in the diagnosis, pharmacological, and other treatment and management of ocular disease provided by either an accredited school of optometry in California or a recognized residency review committee in ophthalmology in California.

(2) Completes a preceptorship of no less than 65 hours, during a period of not less than two months nor more than one year, in either an ophthalmologist's office or an optometric clinic. The training received during the preceptorship shall be on the diagnosis, treatment, and management of ocular, systemic disease. The preceptor shall certify completion of the preceptorship. Authorization for the ophthalmologist to serve as a preceptor shall be provided by an accredited school of optometry in California, or by a recognized residency review committee in ophthalmology, and the preceptor shall be licensed as an ophthalmologist in California, board certified in ophthalmology, and in good standing with the Medical Board of California. The individual serving as the preceptor shall schedule no more than three optometrist applicants for each of the required 65 hours of the preceptorship program. This paragraph shall not be construed to limit the total number of optometrist applicants for whom an individual may serve as a preceptor, and is intended only to ensure the quality of the preceptorship by requiring that the ophthalmologist preceptor schedule the training so that each applicant optometrist completes each of the 65 hours of the preceptorship while scheduled with no more than two other optometrist applicants.

(3) Successfully completes a minimum of 20 hours of self-directed education.

(4) Passes the National Board of Examiners in Optometry's "Treatment and Management of Ocular Disease" examination or, in the event this examination is no longer offered, its equivalent, as determined by the State Board of Optometry.

(5) Passes the examination issued upon completion of the 80-hour didactic course required under paragraph (1) and provided by the accredited school of optometry or residency program in ophthalmology.

(6) When any or all of the requirements contained in paragraph (1), (4), or (5) have been satisfied on or after July 1, 1992, and before January 1, 1996, an optometrist shall not be required to fulfill the satisfied requirements in order to obtain certification to use therapeutic pharmaceutical agents. In order for this paragraph to apply to the requirement contained in paragraph (5), the didactic examination that the applicant successfully completed shall meet equivalency standards, as determined by the board.

(7) Any optometrist who graduated from an accredited school of optometry on or after January 1, 1992, and before January 1, 1996, shall not be required to fulfill the requirements contained in paragraphs (1), (4), and (5).

(f) The board shall grant a certificate to use therapeutic pharmaceutical agents to any applicant who graduated from a California accredited school of optometry on or after January 1, 1996, who is licensed as an optometrist in California, and who meets all of the following requirements:

(1) Passes the National Board of Examiners in Optometry's national board examination, or its equivalent, as determined by the State Board of Optometry.

(2) Of the total clinical training required by a school of optometry's curriculum, successfully completed at least 65 of those hours on the diagnosis, treatment, and management of ocular, systemic disease.

(3) Is certified by an accredited school of optometry as competent in the diagnosis, treatment, and management of ocular, systemic disease to the extent authorized by this section.

(4) Is certified by an accredited school of optometry as having completed at least 10 hours of experience with a board-certified ophthalmologist.

(g) The board shall grant a certificate to use therapeutic pharmaceutical agents to any applicant who is an optometrist who obtained his or her license outside of California if he or she meets all of the requirements for an optometrist licensed in California to be certified to use therapeutic pharmaceutical agents.

(1) In order to obtain a certificate to use therapeutic pharmaceutical agents, any optometrist who obtained his or her license outside of California and graduated from an accredited school of optometry prior to January 1, 1996, shall be required to fulfill the requirements set forth in subdivision (e). In order for the applicant to be eligible for the certificate to use therapeutic pharmaceutical agents, the education he or she received at the accredited out-of-state school of optometry shall be equivalent to the education provided by any accredited school of optometry in California for persons who graduated before January 1, 1996. For those out-of-state applicants who request that any of the requirements contained in subdivision (e) be waived based on fulfillment of the requirement in another state, if the board

determines that the completed requirement was equivalent to that required in California, the requirement shall be waived.

(2) In order to obtain a certificate to use therapeutic pharmaceutical agents, any optometrist who obtained his or her license outside of California and who graduated from an accredited school of optometry on or after January 1, 1996, shall be required to fulfill the requirements set forth in subdivision (f). In order for the applicant to be eligible for the certificate to use therapeutic pharmaceutical agents, the education he or she received by the accredited out-of-state school of optometry shall be equivalent to the education provided by any accredited school of optometry for persons who graduated on or after January 1, 1996. For those out-of-state applicants who request that any of the requirements contained in subdivision (f) be waived based on fulfillment of the requirement in another state, if the board determines that the completed requirement was equivalent to that required in California, the requirement shall be waived.

(3) The State Board of Optometry shall decide all issues relating to the equivalency of an optometrist's education or training under this subdivision.

(h) Other than for prescription ophthalmic devices described in subdivision (b) of Section 2541, any dispensing of a therapeutic pharmaceutical agent by an optometrist shall be without charge.

(i) Except as authorized by this chapter, the practice of optometry does not include performing surgery. "Surgery" means any procedure in which human tissue is cut, altered, or otherwise infiltrated by mechanical or laser means. "Surgery" does not include those procedures specified in subdivision (c). This section does not limit an optometrist's authority to utilize diagnostic laser and ultrasound technology within his or her scope of practice.

(j) In an emergency, an optometrist shall stabilize, if possible, and immediately refer any patient who has an acute attack of angle closure to an ophthalmologist.

SEC. 4. Section 3041.2 of the Business and Professions Code is repealed.

SEC. 5. Section 3041.2 is added to the Business and Professions Code, to read:

3041.2. (a) For purposes of this chapter, "glaucoma" means any of the following:

(1) All primary open-angle glaucoma.

(2) Exfoliation and pigmentary glaucoma.

(3) Increase in intraocular pressure caused by steroid ~~medication.~~ *medication prescribed by the optometrist.*

(4) Increase in intraocular pressure caused by steroid medication not prescribed by the optometrist, after consultation and treatment approval by the prescribing physician.

(b) An optometrist certified pursuant to Section 3041.1 shall be certified for the treatment of glaucoma, as described in subdivision (a), in patients over 18 years of age after the optometrist meets the following applicable requirements:

(1) For licensees who graduated from an accredited school of optometry on or after May 1, 2008, submission of proof of graduation from that institution.

(2) For licensees who were certified to treat glaucoma under this section prior to January 1, 2009, submission of proof of completion of that certification program.

(3) For licensees who completed a didactic course of not less than 24 hours in the diagnosis, pharmacological, and other treatment and management of glaucoma, submission of proof of satisfactory completion of the case management requirements for certification established by the board.

(4) For licensees who graduated from an accredited school of optometry on or before May 1, 2008, and are not described in paragraph (2) or (3), submission of proof of satisfactory completion of the requirements for certification established by the board.

SEC. 6. Section 3041.3 of the Business and Professions Code is repealed.

SEC. 7. Section 3041.3 is added to the Business and Professions Code, to read:

3041.3. (a) For the purposes of this chapter, "anterior segment laser" means any of the following:

(1) Therapeutic lasers appropriate for treatment of glaucoma.

(2) Notwithstanding subdivision (a) of Section 3041.2, peripheral iridotomy for the prophylactic treatment of angle closure glaucoma.

(3) Therapeutic lasers used for posterior capsulotomy secondary to cataract surgery.

(b) An optometrist certified to treat glaucoma pursuant to Section 3041.2 shall be additionally certified for the use of anterior segment lasers after submitting proof of satisfactory completion

of a course that is approved by the board, provided by an accredited school of optometry, and developed in consultation with an ophthalmologist who has experience educating optometric students. *The board shall issue a certificate pursuant to this section only to an optometrist that has graduated from an approved school of optometry.*

(1) The board-approved course shall be ~~a minimum of 16~~ *at least 25* hours in length, and include a test for competency of the following:

(A) Laser physics, hazards, and safety.

(B) Biophysics of laser.

(C) Laser application in clinical optometry.

(D) Laser tissue interactions.

(E) Laser indications, contraindications, and potential complications.

(F) Gonioscopy.

(G) Laser therapy for open-angle glaucoma.

(H) Laser therapy for angle closure glaucoma.

(I) Posterior capsulotomy.

(J) Common complications of the lids, lashes, and lacrimal system.

(K) Medicolegal aspects of anterior segment procedures.

(L) Peripheral iridotomy.

(M) Laser trabeculoplasty.

(2) The school of optometry shall require each applicant for certification to perform a sufficient number of *complete* anterior segment laser procedures to verify that the applicant has demonstrated competency to practice independently. At a minimum, each applicant shall complete ~~14~~ *24* anterior segment laser procedures on live ~~humans.~~ *humans as follows:*

(A) Eight YAG capsulotomy procedures.

(B) Eight laser trabeculoplasty procedures.

(C) Eight peripheral iridotomy procedures.

(c) The board, by regulation, shall set the fee for issuance and renewal of a certificate authorizing the use of anterior segment lasers at an amount no higher than the reasonable cost of regulating anterior segment laser certified optometrists pursuant to this section. The fee shall not exceed one hundred fifty dollars ($150).

(d) An optometrist certified to use anterior segment lasers pursuant to this section shall complete four hours of continuing

education on anterior segment lasers as part of the required 50 hours of continuing education required to be completed every two years on the diagnosis, treatment, and management of glaucoma.

SEC. 8. Section 3041.4 is added to the Business and Professions Code, to read:

3041.4. (a) For the purposes of this chapter, "minor procedure" means either of the following:

(1) Removal, destruction, or drainage of lesions of the eyelid and adnexa clinically evaluated by the optometrist to be noncancerous, not involving the eyelid margin, lacrimal supply or drainage systems, no deeper than the orbicularis muscle, and smaller than five millimeters in diameter.

(2) Closure of a wound resulting from a procedure described in paragraph (1).

(3) Administration of injections for the diagnoses or treatment of conditions of the eye and adnexa authorized by this chapter, excluding intraorbital injections and injections administered for cosmetic effect.

(4) "Minor procedures" does not include blepharoplasty or other cosmetic surgery procedures that reshape normal structures of the body in order to improve appearance and self-esteem.

(b) An optometrist certified to treat glaucoma pursuant to Section 3041.2 shall be additionally certified to perform minor procedures after submitting proof of satisfactory completion of a course that is approved by the board, provided by an accredited school of optometry, and developed in consultation with an ophthalmologist who has experience teaching optometric students. *The board shall issue a certificate pursuant to this section only to an optometrist that has graduated from an approved school of optometry.*

(1) The board-approved course shall be ~~a minimum of 32 hours~~ *at least 25 hours* in length and include a test for competency of the following:

(A) Minor surgical procedures.

(B) Overview of surgical instruments, asepsis, and the state and federal Occupational Safety and Health Administrations.

(C) Surgical anatomy of the eyelids.

(D) Emergency surgical procedures.

(E) Chalazion management.

(F) Epiluminescence microscopy.

(G) Suture techniques.
(H) Local anesthesia techniques and complications.
(I) Anaphylaxsis and other office emergencies.
(J) Radiofrequency surgery.
(K) Postoperative wound care.
(L) Injection techniques.

(2) The school of optometry shall require each applicant for certification to perform a sufficient number of minor procedures to verify that the applicant has demonstrated competency to practice independently. At a minimum, each applicant shall *perform 32* complete ~~five~~ minor procedures on live humans.

(c) The board, by regulation, shall set the fee for issuance and renewal of a certificate authorizing the use of minor procedures at an amount no greater than the reasonable cost of regulating minor procedure certified optometrists pursuant to this section. The fee shall not exceed one hundred fifty dollars ($150).

(d) An optometrist certified to perform minor procedures pursuant to Section 3041.1 shall complete five hours of continuing education on the diagnosis, treatment, and management of lesions of the eyelid and adnexa as part of the 50 hours of continuing education required every two years in Section 3059.

~~SEC. 9. Section 3041.5 is added to the Business and Professions Code, to read:~~

~~3041.5. (a) An optometrist may independently initiate and administer vaccines listed on the routine immunization schedules recommended by the federal Advisory Committee on Immunization Practices (ACIP), in compliance with individual ACIP vaccine recommendations, and published by the federal Centers for Disease Control and Prevention (CDC) for persons three years of age and older.~~

~~(b) In order to initiate and administer an immunization described in subdivision (a), an optometrist shall do all of the following:~~

~~(1) Complete an immunization training program endorsed by the CDC or the Accreditation Council for Pharmacy Education that, at a minimum, includes hands-on injection technique, clinical evaluation of indications and contraindications of vaccines, and the recognition and treatment of emergency reactions to vaccines, and shall maintain that training.~~

~~(2) Be certified in basic life support for health care professionals.~~

~~(3) Comply with all state and federal recordkeeping and reporting requirements, including providing documentation to the patient's primary care provider and entering information in the appropriate immunization registry designated by the immunization branch of the State Department of Public Health.~~

SEC. 9. Section 3041.5 is added to the Business and Professions Code, to read:

3041.5. (a) The board shall grant to an optometrist a certificate for the use of immunizations described in subdivision (b), if the optometrist is certified pursuant to Section 3041.2 and after the optometrist meets all of the following requirements:

(1) Completes an immunization training program endorsed by the federal Centers for Disease Control (CDC) that, at a minimum, includes hands-on injection technique, clinical evaluation of indications and contraindications of vaccines, and the recognition and treatment of emergency reactions to vaccines, and maintains that training.

(2) Is certified in basic life support.

(3) Complies with all state and federal recordkeeping and reporting requirements, including providing documentation to the patient's primary care provider and entering information in the appropriate immunization registry designated by the immunization branch of the State Department of Public Health.

(b) For the purposes of this section, "immunization" means the administration of immunizations for influenza, herpes zoster virus, and pneumococcus in compliance with individual Advisory Committee on Immunization Practices (ACIP) vaccine recommendations published by the CDC for persons 18 years of age or older.

(c) The board, by regulation, shall set the fee for issuance and renewal of a certificate for the use of immunizations at the reasonable cost of regulating immunization certified optometrists pursuant to this section. The fee shall not exceed one hundred dollars ($100).

SEC. 10. Section 3041.6 is added to the Business and Professions Code, to read:

3041.6. An optometrist licensed under this chapter is subject to the provisions of Section 2290.5 for purposes of practicing telehealth.

SEC. 11. Section 3041.7 is added to the Business and Professions Code, to read:

3041.7. Optometrists diagnosing or treating eye disease shall be held to the same standard of care to which physicians and surgeons and osteopathic physicians and surgeons are held. An optometrist shall consult with and, if necessary, refer to a physician and surgeon or other appropriate health care provider when a situation or condition occurs that is beyond the optometrist's scope of practice.

SEC. 12. Section 3041.8 is added to the Business and Professions Code, to read:

3041.8. It is the intent of the Legislature that the Office of Statewide Health Planning and Development, under the Health Workforce Pilot Projects Program, designate a pilot project to test, demonstrate, and evaluate expanded roles for optometrists in the performance of management and treatment of diabetes mellitus, hypertension, and hypercholesterolemia.

SEC. 13. Section 3110 of the Business and Professions Code is amended to read:

3110. The board may take action against any licensee who is charged with unprofessional conduct, and may deny an application for a license if the applicant has committed unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

(a) Violating or attempting to violate, directly or indirectly assisting in or abetting the violation of, or conspiring to violate any provision of this chapter or any of the rules and regulations adopted by the board pursuant to this chapter.

(b) Gross negligence.

(c) Repeated negligent acts. To be repeated, there must be two or more negligent acts or omissions.

(d) Incompetence.

(e) The commission of fraud, misrepresentation, or any act involving dishonesty or corruption, that is substantially related to the qualifications, functions, or duties of an optometrist.

(f) Any action or conduct that would have warranted the denial of a license.

(g) The use of advertising relating to optometry that violates Section 651 or 17500.

(h) Denial of licensure, revocation, suspension, restriction, or any other disciplinary action against a health care professional license by another state or territory of the United States, by any other governmental agency, or by another California health care professional licensing board. A certified copy of the decision or judgment shall be conclusive evidence of that action.

(i) Procuring his or her license by fraud, misrepresentation, or mistake.

(j) Making or giving any false statement or information in connection with the application for issuance of a license.

(k) Conviction of a felony or of any offense substantially related to the qualifications, functions, and duties of an optometrist, in which event the record of the conviction shall be conclusive evidence thereof.

(*l*) Administering to himself or herself any controlled substance or using any of the dangerous drugs specified in Section 4022, or using alcoholic beverages to the extent, or in a manner, as to be dangerous or injurious to the person applying for a license or holding a license under this chapter, or to any other person, or to the public, or, to the extent that the use impairs the ability of the person applying for or holding a license to conduct with safety to the public the practice authorized by the license, or the conviction of a misdemeanor or felony involving the use, consumption, or self-administration of any of the substances referred to in this subdivision, or any combination thereof.

(m) (1) Committing or soliciting an act punishable as a sexually related crime, if that act or solicitation is substantially related to the qualifications, functions, or duties of an optometrist.

(2) Committing any act of sexual abuse, misconduct, or relations with a patient. The commission of and conviction for any act of sexual abuse, sexual misconduct, or attempted sexual misconduct, whether or not with a patient, shall be considered a crime substantially related to the qualifications, functions, or duties of a licensee. This paragraph shall not apply to sexual contact between any person licensed under this chapter and his or her spouse or person in an equivalent domestic relationship when that licensee provides optometry treatment to his or her spouse or person in an equivalent domestic relationship.

(3) Conviction of a crime that requires the person to register as a sex offender pursuant to Chapter 5.5 (commencing with Section

290) of Title 9 of Part 1 of the Penal Code. A conviction within the meaning of this paragraph means a plea or verdict of guilty or a conviction following a plea of nolo contendere. A conviction described in this paragraph shall be considered a crime substantially related to the qualifications, functions, or duties of a licensee.

(n) Repeated acts of excessive prescribing, furnishing, or administering of controlled substances or dangerous drugs specified in Section 4022, or repeated acts of excessive treatment.

(o) Repeated acts of excessive use of diagnostic or therapeutic procedures, or repeated acts of excessive use of diagnostic or treatment facilities.

(p) The prescribing, furnishing, or administering of controlled substances or drugs specified in Section 4022, or treatment without a good faith prior examination of the patient and optometric reason.

(q) The failure to maintain adequate and accurate records relating to the provision of services to his or her patients.

(r) Performing, or holding oneself out as being able to perform, or offering to perform, any professional services beyond the scope of the license authorized by this chapter.

(s) The practice of optometry without a valid, unrevoked, unexpired license.

(t) The employing, directly or indirectly, of any suspended or unlicensed optometrist to perform any work for which an optometry license is required.

(u) Permitting another person to use the licensee's optometry license for any purpose.

(v) Altering with fraudulent intent a license issued by the board, or using a fraudulently altered license, permit certification or any registration issued by the board.

(w) Except for good cause, the knowing failure to protect patients by failing to follow infection control guidelines of the board, thereby risking transmission of bloodborne infectious diseases from optometrist to patient, from patient to patient, or from patient to optometrist. In administering this subdivision, the board shall consider the standards, regulations, and guidelines of the State Department of Public Health developed pursuant to Section 1250.11 of the Health and Safety Code and the standards, guidelines, and regulations pursuant to the California Occupational Safety and Health Act of 1973 (Part 1 (commencing with Section 6300) of Division 5 of the Labor Code) for preventing the

transmission of HIV, hepatitis B, and other bloodborne pathogens in health care settings. As necessary, the board may consult with the Medical Board of California, the Board of Podiatric Medicine, the Board of Registered Nursing, and the Board of Vocational Nursing and Psychiatric Technicians, to encourage appropriate consistency in the implementation of this subdivision.

(x) Failure or refusal to comply with a request for the clinical records of a patient, that is accompanied by that patient's written authorization for release of records to the board, within 15 days of receiving the request and authorization, unless the licensee is unable to provide the documents within this time period for good cause.

(y) Failure to refer a patient to an appropriate ~~physician in either of the following circumstances:~~

~~(1) Where~~ *physician if* an examination of the eyes indicates a substantial likelihood of any pathology that requires the attention of that physician.

~~(2) As required by subdivision (c) of Section 3041.~~

~~SEC. 13.~~

SEC. 14. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

O

SB-622 Optometry. (2015-2016)

Text | Votes | History | Bill Analysis | Today's Law As Amended | Compare Versions | **Status** | Comments To Author

Senate: Int 1st Cmt 2nd Cmt 2nd 3rd Pass

Assembly: 1st Cmt

Bill Status	
Measure:	SB-622
Lead Authors:	Hernandez (S)
Principal Coauthors:	-
Coauthors:	-
Topic:	Optometry.
31st Day in Print:	04/01/15
Title:	An act to amend ~~Section~~ *Sections* 3041 *and 3110* of, to add Sections 3041.4, 3041.5, 3041.6, 3041.7, and 3041.8 to, and to repeal and add Sections 3041.1, 3041.2, and 3041.3 of, the Business and Professions Code, relating to optometry, and making an appropriation therefor.
House Location:	Assembly
Last Amended Date:	05/04/15
Committee Location:	Asm Business and Professions

Type of Measure
Active Bill - In Committee Process
Majority Vote Required
Appropriation
Fiscal Committee
State-Mandated Local Program
Non-Urgency
Non-Tax levy

Last 5 History Actions

Date	Action
07/14/15	July 14 set for second hearing canceled at the request of author.
07/07/15	July 7 set for first hearing canceled at the request of author.
06/11/15	Referred to Com. on B. & P.
05/22/15	In Assembly. Read first time. Held at Desk.
05/22/15	Read third time. Passed. (Ayes 33. Noes 4. Page 1070.) Ordered to the Assembly.

Date of Hearing: July 14, 2015

ASSEMBLY COMMITTEE ON BUSINESS AND PROFESSIONS
Susan Bonilla, Chair
SB 622(Hernandez) – As Amended May 4, 2015

SENATE VOTE: 33-4

SUBJECT: Optometry

SUMMARY: This bill expands the scope of practice for optometrists to include the expanded ability to order Clinical Laboratory Improvement Amendments (CLIA)-waived tests, use noninvasive, nonsurgical technology to treat a condition authorized by the Optometric Act (Act), perform laser and minor procedures, and administer certain vaccines.

EXISTING LAW:

1) Establishes the California Board of Optometry (Board), within the Department of Consumer Affairs (DCA), which licenses optometrists and regulates the practice of optometry. (BPC § 3010.5)

2) Authorizes the Board to establish educational and examination requirements for licensure. (BPC § 3041.2)

3) Defines the practice of optometry as follows: (BPC § 3041)

   a) Prevention and diagnosis of disorders and dysfunctions of the visual system;

   b) Treatment and management of certain disorders and dysfunctions of the visual systems;

   c) Provision of rehabilitative optometric services;

   d) Examination of the human eyes;

   e) Determination of the powers or range of human vision;

   f) Prescribing or directing the use of any optical device in connection with ocular exercises, visual training, vision training or orthoptics;

   g) Prescribing of contact lenses and glasses; and,

   h) Use of topical pharmaceutical agents for the purpose of the examination of the human eye or eyes for any disease or pathological condition.

4) Specifies that an optometrist who is certified to use therapeutic pharmaceutical agents may also diagnose and treat the human eye or eyes or any of its appendages for the following conditions: (BPC § 3041(b)(1))

   a) Infections;

b) Ocular allergies;
c) Ocular inflammation, non-surgical in cause except when co-managed with the treating physician and surgeon;

d) Traumatic or recurrent conjunctival or corneal abrasions and erosions;

e) Corneal surface disease and dry eyes;

f) Ocular pain, non-surgical in cause except when co-managed with the treating physician and surgeon; and,

g) Glaucoma in patients over the age of 18.

5) Permits optometrists to use the following therapeutic pharmaceutical agents: (BPC § 3041(c))

a) Topical miotics;

b) Topical lubricants;

c) Anti-allergy agents;

d) Topical and oral anti-inflammatories;

e) Topical antibiotic agents;

f) Topical hyperosmotics;

g) Topical and oral anti-glaucoma agents;

h) Non-prescription medications;

i) Oral antihistamines;

j) Prescription oral non-steroidal anti-inflammatory agents;

k) Oral antibiotics for treatment of ocular disease;

l) Topical and oral antiviral medication for treatment of:

i) Herpes;

ii) Viral Keratitis;

iii) Herpes Simplex Viral conjunctivitis;

iv) Periocular herpes simplex viral dermatitis;

v) Varicella zoster viral keratitis;

vi) Varicella zoster viral conjunctivitis; and,

vii) Periocular varicella zoster viral dermatitis;

m) Oral analgesics that are not controlled substances; and,

n) Codeine with compounds and hydrocodone with compounds with specific restrictions regarding usage timeframe.

6) Specifies that an optometrist who is certified to use therapeutic pharmaceutical agents may also perform the following: (BPC § 3401(e))

a) Corneal scraping with cultures;

b) Debridement of corneal epithelia;

c) Mechanical epilation;

d) Venipuncture for testing patients suspected of having diabetes;

e) Suture removal, with prior consultation with the treating physician and surgeon;

f) Treatment or removal of sebaceous cysts by expression;

g) Administration of oral fluorescein to patients suspected as having diabetic retinopathy;

h) Use of an auto-injector to counter anaphylaxis;

i) Ordering of smears, cultures, sensitivities, complete blood count, mycobacterial culture, acid fast stain, urinalysis, tear fluid analysis and X-rays necessary for the diagnosis of conditions or diseases of the eye or adnexa;

j) A clinical laboratory test or examination classified as waived under CLIA necessary for the diagnosis of conditions and diseases of the eye or adnexa;

k) Punctal occlusion by plugs, excluding laser, diathermy, cryotherapy or other means constituting surgery;

l) The prescription of therapeutic contact lenses, including lenses or devices that incorporate a medication or therapy the optometrist is certified to prescribe or provide;

m) Removal of foreign bodies from the cornea, eyelid and conjunctiva with any appropriate instrument other than a scalpel or needle; and,

n) Lacrimal irrigation and dilation, excluding probing of the nasal lacrimal tract for patients over 12 years of age.

THIS BILL:

1) Requires the Board to establish educational and examination requirements by regulation for licensure to ensure the competence of optometrists to practice pursuant to the Act, except as specified in the sections related to certification for minor procedures and lasers.

2) Adds "habilitative services" to the definition of the practice of optometry.

3) Authorizes the Board to promulgate regulations authorizing optometrists to use noninvasive, nonsurgical technology to treat a condition authorized by the Act. To qualify to use each new technology authorized, the Board shall require a licensee to take a minimum of four hours of education and perform an appropriate number of complete clinical procedures on live human patients.

4) Removes referral requirements related to the treatment of ocular inflammation, as specified.

5) Allows an optometrist to treat hypotrichosis and blepharitis.

6) Adds "conjunctival" to the types of surface diseases that an optometrist who is certified to use therapeutic pharmaceutical agents may diagnose and treat.

7) Removes exceptions to the types of infections of the anterior segment and adnexa that an optometrist may treat.

8) Removes referral protocols for the use of certain drugs.

9) Expands ability to order CLIA waived tests.

10) Extends from three to five days the time that codeine with compounds and hydrocodone with specified compounds may be used.

11) Allows an optometrist to collect a blood specimen by finger prick method.

12) Permits an optometrist to perform a skin test on the superficial layer of the skin to diagnose ocular allergies.

13) Allows an optometrist to prescribe biological or technological corneal devices.

14) Allows an optometrist to use a needle to remove objects from the cornea, eyelid, and conjunctiva.

15) Authorizes an optometrist to use mechanical lipid extraction on meibomian glands and nonsurgical techniques.

16) Authorizes an optometrist, as part of additional "minor procedures," to administer injections for the diagnosis or treatment of conditions of the eye and adnexa

authorized by the Act, excluding intraorbital injections and injections administered for cosmetic effect.

17) Expands the definition of glaucoma to include an "increase in intraocular pressure caused by steroid medication," but specifies that an optometrist may only treat this type of glaucoma if the optometrist has prescribed the steroid, or has consulted with and received approval from the prescriber.

18) Expands the definition of glaucoma to include an "increase in intraocular pressure caused by steroid medication."

19) Establishes a certification process for an optometrist to perform certain laser procedures, requiring 25 hours of education and 24 complete clinical procedures on live human patients.

20) Establishes continuing education hours for optometrists certified to perform laser procedures.

21) Establishes a certification course for an optometrist to perform minor procedures.

22) Defines minor procedures as removal, destruction, or drainage of lesions of the eyelid and adnexa clinically evaluated by the optometrist to be non-cancerous, not involving the eyelid margin, lacrimal supply or drainage systems, no deeper than the orbicularis muscle, and smaller than five millimeters in diameter, and closure of a wound, as specified. Specifies that minor procedures do not include blepharoplasty or other cosmetic surgery procedures that reshape normal structures of the body in order to improve appearance and self-esteem.

23) Requires 25 hours of education and 32 complete clinical procedures on live human patients.

24) Establishes continuing education requirements for optometrists certified to perform minor procedures.

25) Authorizes an optometrist to earn a certificate to administer immunizations for influenza, herpes zoster, and pneumococcus if the optometrist does all of the following:

a) Completes an immunization training program endorsed by the Centers for Disease Control and Prevention, or the Accreditation Council for Pharmacy Education that, at a minimum, includes hands-on injection technique, clinical evaluation of indications and contraindications of vaccines, and the recognition and treatment of emergency reactions to vaccines, and shall maintain that training;

b) Is certified in basic life support for health care professionals; and,

c) Complies with all state and federal recordkeeping and reporting requirements, including providing documentation to the patient's primary care provider and entering information in the appropriate immunization registry designated by the immunization branch of the State Department of Public Health.

26) Defines unprofessional conduct to include failure for an optometrist to refer a patient to an appropriate physician if an examination of the eyes indicates a substantial likelihood of any pathology that requires the attention of that physician.

FISCAL EFFECT: According to the May 4, 2015 Senate Appropriations Committee analysis, this bill will result in costs of less than $150,000 to develop and update regulations by the Board. The bill will also result in minor costs to grant certifications to certain optometrists and enforce licensing regulations on those optometrists. The Board anticipates that a small number of optometrists will seek additional, post-graduate certification to perform additional procedures under the bill. Therefore, the additional licensing cost to issue those certifications and any additional enforcement activities relating to those new duties are expected to be minor. Minor costs are also anticipated for the Office of Statewide Health Planning and Development (OSHPD) to oversee a future Health Workforce Pilot Project relating to optometry. Under current practice, the costs of developing and managing a pilot project are borne by the sponsoring academic institution. The costs to the OSHPD to authorize and review any new pilot project are minor.

COMMENTS:

Purpose. This bill is sponsored by the author. According to the author, "While merely 16 of California's 58 counties meet the needed supply range for primary care physicians, we do have a robust network of providers that are well-trained, evenly distributed throughout the state, regulated by the [DCA] and well positioned to pay particular attention to currently underserved areas. Optometrists are one such provider group who receive a doctorate level training preparing them to be primary eye care providers, and independently diagnose and treat conditions of the eye. [This bill] will remove restrictions in current law to permit optometrists to examine, prevent, diagnose, and treat conditions and disorders of the visual system and the human eye to the full extent of their training. This includes the use of two types of therapeutic lasers by optometrists with postdoctoral advanced certification that have been developed for treatment of glaucoma and post-surgical cataract care, conditions that disproportionately affect patient groups that generally lack sufficient access to physicians. [This bill] is a limited expansion of scope for optometrists that is consistent with their education and training, and is a logical advancement of the profession that has been proven safe in other states. Moreover, the educational requirements contained in this bill are substantially greater than those required of optometrists in other states and exceed the minimum number of these procedures required for ophthalmologists by the Accreditation Council for Graduate Medical Education."

Background. According to a report prepared by the Center for the Health Professions at the University of California San Francisco, the number of optometrist licenses in California has declined, but the number of licensees with a secondary practice location has increased. According to the Board, there are approximately 7,565 licensed optometrists in California, the largest population of optometrists in the United States. Approximately 7,500 of these optometrists are certified to administer diagnostic pharmaceutical agents. The majority of the licensed optometrists are generally concentrated in coastal counties, the Bay Area and counties in the Sacramento region. Several counties have no licensed optometrists with an address of record in those counties, and a number of other counties have ratios that indicate there is approximately one optometrist for every 10,000 people.

Optometrists' and Ophthalmologists' Education, Training and Scope. This bill would expand the types of procedures an optometrist is authorized to perform. This would include some tasks that have been traditionally performed by ophthalmologists. As such, the current education, training and scope of each profession is outlined below.

Optometrists. Optometrists are trained to diagnose mild to severe eye problems such as serious eye infections, inflammations of the eye, trauma, foreign bodies and glaucoma. They also examine the eye for vision prescription and corrective lenses.

After completion of an undergraduate degree, optometrists complete four years of and accredited optometry college after which they are awarded the Doctor of Optometry degree. Some optometrists also undertake an optional one year non-surgical residency program to enhance their experience in a particular area. Students graduate with 2500 to 3000 patient encounters; these include a mix of post-surgical, medical and routine visits.

Optometrists who graduated from an accredited school or college of optometry on or after May 1, 2008 receive certifications to use diagnostic pharmaceutical agents (DPA); to administer therapeutic pharmaceutical agents (TPA); to perform lacrimal irrigation and dilation (TPL); and to diagnose and treat primary open angle glaucoma (TLG). Optometrists who did not receive these certifications upon licensure may apply for these certifications after meeting the necessary requirements. In order to be certified, the optometrist must pass an exam, obtain a license to practice optometry, be certified by and accredited school of optometry that they are competent in the diagnosis, treatment and management of ocular systemic disease and complete 10 hours of experience with an ophthalmologist.

Ophthalmologists. The central focus of ophthalmology is surgery and management of complex eye diseases. An ophthalmologist specializes in the refractive, medical and surgical care of the eyes and visual system and in the prevention of disease and injury.

After obtaining an undergraduate degree, ophthalmologists complete four years at an accredited medical school and earn a Medical Degree. This is followed by a one year internship and a three or four year surgical residency. Many ophthalmologists pursue additional fellowship training in specialized areas such as retina, glaucoma or cornea. Ophthalmologists may become certified by the American Board of Ophthalmology, which requires, serving as primary surgeon or first assistant to the primary surgeon on a minimum of 364 eye surgeries.

Changes to Current Scope of Practice. This bill would expand the scope of practice for optometrists. The following chart illustrates some of the salient changes that would be made to the current scope of practice for optometrists.

Current Scope	Proposed Scope
Defines the practice of optometry to include, among other things, the prevention and diagnosis of disorders and dysfunctions of the visual system, examination of the eyes, determination of the powers or range of human vision and prescribing of contact and spectacle lenses.	**Adds the provision of habilitative optometric services** to the definition of the practice of optometry.
Limits the conditions of the eye and visual system that can be diagnosed and treated by a TPA certified optometrist.	Allows TPA certified optometrists to **treat conjunctival surface disease, hypotrichosis (via Latisse) and blepharitis.** Authorizes optometrists to **perform all CLIA waived in office testing** if the optometrist becomes registered as a lab director with the Department of Public Health.
Specifies that an optometrist **must consult with an ophthalmologist** if an ocular inflammation, non-surgical in cause, and other diseases recur within one year of initial occurrence.	**Deletes these requirements.**
Limits treatment of ocular pain, non-surgical in cause, except when co-managed with the treating physician and surgeon, associated with conditions optometrists are authorized to treat.	**Allows for treatment of all ocular pain**, non-surgical in cause, except when co-managed with the treating physician and surgeon.

Allows **removal of foreign bodies** from cornea, eyelid, and conjunctiva with any appropriate instrument other than a scalpel or needle.	Allows optometrists the **use of a needle to remove foreign bodies** from the eye.
Limits prescriptions to Schedule III drugs, codeine with compounds and hydrocodone and limits the use of these to **3 days** with a referral to an ophthalmologist if the pain persists.	Changes the use to **5 days**.
Limits the definition of glaucoma.	**Adds to the definition of glaucoma** : "increase in intraocular pressure caused by steroid medication prescribed by optometrist or prescribing physician"**.**
Specifies that **an optometrist cannot treat the lacrimal gland, the lacrimal drainage system and the sclera** in patients younger than 12.	**Deletes this requirement**.
Allows optometrists to perform venipuncture for testing patients suspected of having diabetes.	Amends the language to allow optometrists "**to collect blood specimen by the finger prick method"** to test for diabetes.
No post-graduate certifications are required.	Establishes **three new post-graduate certifications**: 1) anterior segment laser, 2) minor procedures and 3) immunization.
Specifies what diagnoses specify the use of steroid medication and that an optometrist should **consult with an ophthalmologist and/or appropriate physician and surgeon** if a patient's condition worsens 72 hours after being diagnosed.	**Deletes this requirement.**
Specifies that the optometrist shall **refer the patient to an ophthalmologist** if requested by the patient or if angle closure glaucoma develops. If the glaucoma patient also has diabetes, the optometrist shall **consult with the physician** treating the patient's diabetes in developing the glaucoma treatment plan and shall inform the physician in writing of any changes in the patient's glaucoma medication.	**Deletes these requirements.**
Specifies that if the patient has been diagnosed with a central corneal ulcer and the central corneal ulcer has not improved 48 hours after diagnosis, the **optometrist shall refer the patient to an ophthalmologist**. Specifies that if the patient has been diagnosed with preseptal cellulitis or dacryocystitis and the condition has not improved 48 hours after diagnosis, the **optometrist shall refer the patient to an ophthalmologist**.	**Deletes these requirements.**
Specifies that if the patient has been diagnosed with herpes simplex keratitis or varicella zoster viral keratitis and the patient's condition has not improved seven days after diagnosis, or has not resolved three weeks after diagnosis the **optometrist shall refer the patient to an ophthalmologist** Specifies that if the patient has been diagnosed with herpes simplex viral conjunctivitis, herpes simplex viral dermatitis, varicella zoster viral conjunctivitis, or varicella zoster viral dermatitis, and if the patient's condition worsens seven days after diagnosis, or has not resolved three weeks after diagnosis, the **optometrist shall consult with and refer the patient to an ophthalmologist**.	**Deletes these requirements.**
Requires that in any case where an optometrist is required to consult with an ophthalmologist, the optometrist shall **maintain a written record in the patient's file** of the information provided to the ophthalmologist, the ophthalmologist's response, and any other relevant information. Upon the consulting ophthalmologist's request and with the patient's consent, the **optometrist shall furnish a copy of the record to the ophthalmologist**.	**Deletes this requirement.**
	Allows the Board to **authorize the use of new non-invasive technology**, after completion of a minimum of four hours of education courses on the new technology, and perform an appropriate number of complete clinical procedures on live human patients.
	Adds the ability for optometrists to **perform skin tests** to diagnose ocular allergies and limits these tests to the superficial lawyer of the skin.
	Adds the use of **mechanical lipid extraction** of meibomian glands and **non-surgical techniques**
	Defines minor procedures: "Minor procedures" does not include blepharoplasty or other cosmetic surgery procedures that reshape normal structures of the body in order to improve appearance and self-esteem.

Other States. Since 1997, there have been over 45 attempts in over 20 states by optometry associations to expand the scope of practice for optometrists including legislating surgery privileges. However, with the exception of Oklahoma and West Virginia, most states continue to prohibit optometrists from performing surgery, and their statutes specify that the license to practice optometry does not include the right to practice medicine. States such as Colorado and North Carolina specifically exclude surgery from their definition of the practice of optometry. Other states have statutes that delineate between laser and non-laser surgery. Optometrists are authorized to prescribe oral medications in all 50 states, they may prescribe oral steroids in 34 states, injections in 15 states and use lasers in 1 state.

Prior Related Legislation. SB 492 (Hernandez) of 2013, would have permitted an optometrist to diagnose treat and manage additional conditions with ocular manifestations, directed the California Board of Optometry to establish educational and examination requirements and would have permitted optometrists to perform vaccinations and surgical and non-surgical primary care procedures. *NOTE: This bill died on the Assembly inactive file.*

SB 668 (Polanco) Chapter 13, Statutes of 1996, expanded the scope of practice of optometrists to provide for the diagnosis and treatment of specified conditions or diseases of the human eye or its appendages, and to use other therapeutic pharmaceutical agents.

SB 929 (Polanco) Chapter 676, Statutes of 2000, expanded the scope of lawful practice for optometrists by specifying additional diseases and conditions that optometrists may treat (in particular certain types of glaucoma) with specified medications, and by specifying the extent of physician involvement that is required under various circumstances.

SB 1406 (Correa) Chapter 352, Statutes of 2008, specified permissible procedures for certified optometrists, and created the Glaucoma Diagnosis and Treatment Advisory Committee to establish glaucoma certification requirements.

ARGUMENTS IN SUPPORT:

The Board of Optometry supports the bill and writes, "The Board is supportive of the intent and direction of the bill, specifically the utilization of the extensive training an education of optometrists to expand access to health care for millions of Californians."

The California Association for Nurse Practitioners supports the bill and writes, "This bill would allow optometrists to practice more consistently with their education and training by authorizing them to treat and manage additional visual system conditions, administer flue, pneumonia and shingles vaccinations, and perform certain noninvasive procedures."

The United Nurses Associations of California/Union of Health Care Professionals supports the bill and writes, "[This bill] is a very modest expansion of the types of services that an optometrist can provide and ensures that only qualified, trained and competent O.D.s are permitted to offer the expanded services. [This bill] specifically prohibits O.D.s from performing surgery, and instead authorizes O.D.s only to perform relatively minor procedures."

ARGUMENTS IN OPPOSITION:

The California Academy of Eye Physicians and Surgeons opposes the bill and writes in their letter, "We are particularly concerned that the bill has moved away from the 'comprehensive'

concept of a single certification in 'advanced procedures.' We believe someone training to be a surgeon needs to develop the surgical judgment common to performing all surgical procedures: understanding when (and when not to) do surgery, being able to anticipate, avoid, and recognize complications, and knowing how to address these complications when they do happen. It is unreasonable to expect these skills to be developed after the minimal experience called for in [this bill]."

The California Medical Association opposes the bill and writes, "The CMA opposes [this bill] because patient safety and quality of care demand that patients be assured that individuals who perform invasive procedures have appropriate medical education and education. The safe use of lasers and scalpels requires extensive medical education and training… In addition, the safe administration of immunizations requires extensive education, training, experience and the ability to monitor for side effects that far exceed an optometrist's training in visual systems."

The Medical Board of California also opposes this measure. They write in their opposition letter, "Although the services that optometrists are authorized to provide have been narrowed down compared to SB 492 from last year, the Board still has concerns with the length of additional training and the number of procedures required. The 25 hours of training and the specified number of procedures required by this bill are not enough to ensure that consumers are protected and that certified optometrists are properly trained."

AMENDMENTS:

1. The following technical amendments should be made:

   On page 7, line 34 strike: ~~lawyer~~ and insert: *layer*

   On page 14, line 17, strike: ~~"injections"~~ and after "intraorbital" insert: *injections, intraocular injections*

   On page 7, lines 9, strike*: ~~a~~, strike: ~~specimen~~, strike: ~~finger prick method~~* and insert*: skin puncture*

2. In order to ensure that this bill will not expand the scope of laboratory tests that an optometrist can order, the following amendment should be made:

   On page 7, line 30 after "CLIA" insert: *and designated as waived in paragraph (9)*

3. A complete minor procedure includes: 1) injections of medication, 2) removal or destruction of lesions and 3) any required wound closures. This bill defines minor procedures to be "either" of the 3 previously listed. The following amendment should be made in order to ensure that a complete procedure includes numbers 1 through 3 above:

   On page 14, line 6, amend the bill as follows: For purposes of this chapter, "minor procedure" means *completion of all* of the following

4. In order to ensure that the courses outlined in this bill are taken post-graduation, the following amendment should be made:

   On page 12, line 38, amend the bill as follows:

(b) An optometrist certified to treat glaucoma pursuant to Section 3041.2, *after successful completion of a degree from an approved school of optometry,* shall be additionally certified for the use of anterior segment lasers after submitting proof of satisfactory completion of a course that is approved by the board, provided by an accredited school of optometry, and developed in consultation with an ophthalmologist who has experience educating optometric students. The board shall issue a certificate pursuant to this section only to an optometrist that has graduated from an approved school of optometry.

5. In order to ensure that inspection authority for the Board of Optometry is consistent with other DCA healing arts boards' inspection authority, the following should be added to the bill:

   The board may at any time inspect any place of practice in which optometry is being practiced. The board's inspection authority does not extend to premises that are not registered with the board. Nothing in this section shall be construed to affect the board's ability to investigate alleged unlicensed activity or to inspect place of practice for which registration has lapsed or is delinquent.

REGISTERED SUPPORT:

Blue Shield of California
Board of Optometry
California Association for Nurse Practitioners
California Optometric Association
United Nurses Associations of California/Union of Health Care Professionals

REGISTERED OPPOSITION:

Academy of Eye Physicians and Surgeons
American Academy of Dermatology Association
American Academy of Ophthalmology
American Academy of Pediatrics
American Association of Orthopaedic Surgeons
American Association for Pediatric Ophthalmology and Strabismus
American College of Surgeons
American Glaucoma Society
American Medical Association
American Osteopathic Association
American Society of Cataract and Refractive Surgery
American Society of Ophthalmic Plastic and Reconstructive Surgery
American Society of Retina Specialists
Blind Children's Center
California Academy of Eye Physicians and Surgeons
California Academy of Family Physicians
California Association for Medical Laboratory Technology
California Black Health Network
California Educators of Ophthalmology for Quality Care
California Medical Association
California Society of Dermatology and Dermatologic Surgery

California Society of Plastic Surgeons
Latino Physicians of California
Lighthouse for Christ Mission
Medical Board of California
Union of American Physicians and Dentists
Ventura County American Chinese Medical Dental Association
Over 600 physicians and individuals

Analysis Prepared by: Le Ondra Clark Harvey, Ph.D. / B. & P. / (916) 319-3301

SENATE COMMITTEE ON APPROPRIATIONS
Senator Ricardo Lara, Chair
2015 - 2016 Regular Session

SB 622 (Hernandez) - Optometry

Version: May 4, 2015
Urgency: No
Hearing Date: May 18, 2015

Policy Vote: B., P. & E.D. 9 - 0
Mandate: Yes
Consultant: Brendan McCarthy

This bill does not meet the criteria for referral to the Suspense File.

Bill Summary: SB 622 would expand the scope of practice for optometrists by authorizing specially certified optometrists to perform certain tests, provide certain immunizations, and to use lasers for certain procedures.

Fiscal Impact:
- Costs of less than $150,000 to develop and update regulations by the Board of Optometry (State Optometry Fund).

- Minor costs to grant certifications to certain optometrists and enforce licensing regulations on those optometrists (State Optometry Fund). The Board of Optometry anticipates that a small number of optometrists will seek additional, post-graduate certification to perform additional procedures under the bill. Therefore, the additional licensing cost to issue those certifications and any additional enforcement activities relating to those new duties are expected to be minor.

- Minor costs for the Office of Statewide Health Planning and Development to oversee a future Health Workforce Pilot Project relating to optometry. Under current practice, the costs of developing and managing a pilot project are borne by the sponsoring academic institution. The costs to the Office to authorize and review any new pilot project are minor.

Background: Under current law, optometrists are licensed and regulated by the California Optometry Board. Current law establishes the scope of practice for optometrists and indicates what services an optometrist is authorized to provide to patients. In general, optometrists are trained and authorized to diagnose mild to severe eye problems, to prescribe corrective lenses, and provide other, specified services. An optometrist may apply for certification to provide certain additional services, such as the treatment of primary open angle glaucoma.

Proposed Law: SB 622 would expand the scope of practice for optometrists by authorizing specially certified optometrists to perform certain tests, provide certain immunizations, and to use lasers for certain procedures.

Specific provisions of the bill would:
- Add the provision of habilitative services to the practice of optometry;
- Authorize the Board of Optometry to allow optometrists to use nonsurgical technology to treat any authorized condition under the Optometry Practice Act;

- Authorize an optometrist certified to use therapeutic pharmaceutical agents to collect a blood specimen, perform skin tests, and to use mechanical lipid extraction of certain glands;
- Require the Board to grant an optometrist certified to treat glaucoma a certificate for the use of specified immunizations;
- Authorize an optometrist to be certified to use anterior segment lasers and to be certified to perform minor procedures;
- Require the Board to charge specified fees to cover its costs;
- State legislative intent that the Office of Statewide Health Planning and Development authorize a health workforce pilot project relating to expanded roles for optometrists with respect to diabetes, hypertension, and hypercholesterolemia.

Related Legislation: SB 492 (Hernandez, 2014) would have created an advance practice certificate for optometrists, allowing certificated optometrists to perform additional procedures. That bill died on the Assembly Floor.

Staff Comments: By expanding the scope of practice for optometrists, this bill will allow optometrists to provide more care to patients. Additional care provided by optometrists may increase overall utilization of health care, to the extent that patients are currently unable to get care from other practitioners, such as ophthalmologists or primary care physicians. On the other hand, patients may substitute care from an optometrist for care from another practitioner. In addition, to the extent that patients are currently unable to access primary care services, those patients may ultimately end up receiving care in another setting, such as an emergency room, urgent care facility, or community clinic. Care provided in those settings is likely to be more costly than primary care (for those patients who require such care). The overall impact on health care spending (including for state-funded programs) from this bill is not likely to result in significant costs or savings.

-- END --

Business and Professions Code Section 2556.1:
All licensed optometrists in a setting with a registered dispensing optician shall report the business relationship to the State Board of Optometry, as determined by the board. The State Board of Optometry shall have the authority to inspect any premises at which the business of a registered dispensing optician is co-located with the practice of an optometrist, for the purposes of determining compliance with Section 655. The inspection may include the review of any written lease agreement between the registered dispensing optician and the optometrist or between the optometrist and the health plan. Failure to comply with the inspection or any request for information by the board may subject the party to disciplinary action. The board shall provide a copy of its inspection results, if applicable, to the Department of Managed Health Care.

Proposed Regulation:
1514.1. A licensed optometrist providing optometric services in a setting with a registered dispensing optician shall report the business relationship on a form (O-RDO, Rev. 1/16), hereby incorporated by reference. The form shall be filed with the board within 30 days of the optometrist entering into the business relationship.

CALIFORNIA STATE BOARD OF OPTOMETRY

STATE BOARD OF OPTOMETRY
2450 DEL PASO ROAD, SUITE 105, SACRAMENTO, CA 95834
P: (916) 575-7170 F: (916) 575-7292 www.optometry.ca.gov

Optometrist/Registered Dispensing Optician Co-Location Form

All licensed optometrists in a setting with a registered dispensing optician (RDO) shall report the business relationship to the Board within 30 days of entering into said business relationship. (Business and Professions Code (BPC) §2556.1, Title 16, California Code of Regulations §1514.1). BPC §655 governs the terms of the lease agreement between optometrists and RDOs.

Optometrist Information

License Number: _____ Business Name: _____

First Name: _____ Last Name: _____ Middle Initial: ____

Address of Record

Street Address: _____ City: _____ State: ____ Zip: _____

Phone Number: _____ Email Address: _____

RDO Information

Registration Number: _____ Registered Business Name: _____

Address of Record

Street Address: _____ City: _____ State: ____ Zip: _____

Phone Number: _____ Email Address: _____

Lease Information

Execution Date: _____ Duration and/or Termination Date: _____
(Can be no less than 1 year, BPC §655)

Employer Information

Employer Name: _____

Street Address: _____ City: _____ State: ____ Zip: _____

Phone Number: _____ Email Address: _____

Signature: _____ Date: _____

I certify, under penalty of perjury under the laws of the State of California that the forgoing information is true and correct.

For more information on the laws governing the practice of optometry, please visit www.optometry.ca.gov.

Board of Optometry

Proposed amendments are shown by strikeout for deleted text and underline for new text.

§ 1399.260. Registered Dispensing Optician Fees.

~~(a) The initial registration fee shall be $75.00.~~

~~(b)~~ (a) For a license that expires before July 1, 2017, ~~T~~the renewal fee shall be $75.00.

(b) For a license that expires on or after July 1, 2017, the renewal fee shall be $100.

Note: Authority cited: Section 2558, Business and Professions Code. Reference: Section 2565, Business and Professions Code.

§ 1399.261. Contact Lens Dispenser Fees.

~~(a) The initial registration fee shall be $75.00.~~

~~(b)~~ (a) For a license that expires before July 1, 2017, ~~T~~the biennial renewal fee shall be $~~75~~100.00.

(b) For a license that expires on or after July 1, 2017, the renewal fee shall be $100.

Note: Authority cited: Section 2558, Business and Professions Code. Reference: Section 2566, Business and Professions Code.

§ 1399.263. Spectacle Lens Dispenser Fees.

~~(a) The initial registration fee shall be $75.00.~~

~~(b)~~(a) (a) For a license that expires before July 1, 2017, ~~T~~the renewal fee shall be $~~75~~100.00.

(b) For a license that expires on or after July 1, 2017, the renewal fee shall be $100.

Note: Authority cited: Section 2558, Business and Professions Code. Reference: Section 2566.1, Business and Professions Code.

CALIFORNIA STATE BOARD OF OPTOMETRY

Memo

2450 Del Paso Road, Suite 105
Sacramento, CA 95834
(916) 575-7170, (916) 575-7292 Fax
www.optometry.ca.gov

To: Board Members **Date:** November 20, 2015

From: Madhu Chawla, OD
Board President **Telephone:** (916) 575-7170

Subject: **Agenda Item 15 – Suggestions for Future Agenda Items**

The Board may discuss and decide whether to place a matter on the agenda of a future meeting. Future agenda items currently include, but are not limited to, the following:

- Update on Out of State Travel Request for attendance to the Association of Regulatory Boards of Optometry 2016 Annual Meeting
- Staff Outreach for CE at schools
- Control over scope of practice – what other states are doing
- Blue ribbon panel on children's vision
- TPA certification; discussion on minimum certification to practice
- Revising Business and Profession Code Section 3077: Branch Office License

Memo

2450 Del Paso Road, Suite 105
Sacramento, CA 95834
(916) 575-7170, (916) 575-7292 Fax
www.optometry.ca.gov

To: Board Members

Date: November 20, 2015

From: Madhu Chawla, OD
Board President

Telephone: (916) 575-7170

Subject: **Agenda Item 16 – Adjournment**