

## **Final Minutes**

### **BOARD OF OPTOMETRY Public Meeting November 16, 2006**

#### **1. Call to Order**

The meeting was called to order at 9:10 a.m. by Dr. Goldstein and a quorum was established. Present were Ms. Galvan and Ms. Johnson, Mr. Vellanoweth, and Drs. Goldstein, Pollack, Simonds, and Yu. Also present were staff members Mr. Randolph, Mrs. McGavin, Ms. Eklund, Legal Counsel, Mr. Walker, and Executive Officer, Ms. Smith. Mr. Naranjo arrived at 9:45 a.m.

#### **2. President's Report**

Board President, Dr. Lee Goldstein, OD, provided a report of recent Board-related activities.

- Dr. Goldstein welcomed the Board's newest member Mr. Roberto Vellanoweth.
- Dr. Goldstein welcomed DCA's Director, Charlene Zettel; and, Chief of DCA's Division of Investigation, Kathy Door.

Dr. Goldstein also established a Legislative Committee consisting of Drs. Goldstein and Simonds and Ms. Johnson. The Committee will work with staff and members of the legislature to establish legislative priorities for the Board.

#### **3. Election of Secretary**

The Board Secretary, Audrey Noda separated from the Board on October 31, 2006. Therefore, the Board had to elect a new Secretary.

**Move to nominate Monica Johnson for Secretary. M – Simonds, S – Pollack, MSP – Unanimous.**

#### **4. Approval of Minutes from August 24, 2006 Board Meeting.**

The Board was asked to approve the minutes from the August 24, 2006 board meeting.

**Move to approve minutes as amended to reflect the Dr. Pollack was not present. M – Simonds, S – Johnson, MSP – Unanimous.**

**5. Consideration of Request for Approval from Association of Regulatory Boards in Optometry (ARBO) Regarding Online Optometric Education Tracker.**

The Association of Regulatory Boards of Optometry (ARBO) Director, Dr. Robert Sorrell, OD and John Kohler provided the Board with a presentation of ARBO's new Opt Education Tracker system.

The Opt Educational Tracker system was created two years ago for the purpose of establishing an effective database with a unique identifier measuring competency through continuing education. Mr. Kohler contended that through the Opt Educational Tracker system, the Board can determine if an OD is taking classes, what type of classes, completion of classes and establish more of an audited look into the individual level of competency.

Ms. Johnson presented the concern that liability issues could arise from erroneous information. Staff also expressed concerns regarding security of information and the possibility that there may be fees for licensees and/or CE providers for this service in the future.

**Move to continue discussion to the February 2007 Board Meeting. M – Rosas, S – Simonds, MSP – Unanimous.**

**6. Consideration of Request for Approval of Grand Rounds Program at Southern California College of Optometry.**

The Southern California College of Optometry (SCCO) has requested that the Board of Optometry review and approve a grand rounds course offered to optometrists to facilitate their meeting the requirements for glaucoma certification. The request was considered at the August Board meeting; however, a representative from SCCO was not in attendance. The Board elected to table the issue until the next meeting and ask SCCO to send a representative to attend the meeting and respond to questions from the Board.

**Background**

The requirements for glaucoma certification as set forth in Business and Professions Code Section 3041(f) are summarized below. The law took effect in 2001, but was not implemented until 2003. Since then, the Board has issued approximately 100 glaucoma certificates.

In November 2005, board staff discovered applications for glaucoma certification submitted by multiple optometrists who reported to have treated the same patients. It was also noted that the optometrists collaborated with the same ophthalmologist. The Board does not have a statute, regulation or policy regarding shared patients; therefore, the applicants were notified that the glaucoma certificate would not be issued.

The Board has identified five applications for glaucoma certification submitted from probable participants in the SCCO grand rounds program. Those applicants have been notified of the deficiency in their application. However, it is possible that up to 80 optometrists have participated in the program.

Dr. Klinger (from the California Academy of Ophthalmology) does not agree the Grand Rounds program meets legislative requirements. He contended it is assumed, a patient, who participates, has glaucoma which may bias clinical judgement. Other concerns presented included:

- Some optometrists who have received certification may not have met the legislative requirements of B&P Section 3041(f).
- The patients of licensees (certified in error) may be at risk.
- How to respond to licensees determined to have been incorrectly certified (i.e. certification rescinded).
- Does the Board have the authority to approve a program?
- Five years should be given to see if the law is going to work.
- Legislature should be asked to re-evaluate law.
- Legislative requirements are the larger issue.

**Comment from Director**

Ms. Zettel asked the Board to look at the law. The law is the Board's obligation.

**Move to continue instruct staff to write letters to applicants that have not been issued; request a legal opinion regarding the Board's authority to approve an individual program; and then discussion at the February 2007 Board Meeting. M – Rosas, S – Simonds, MSP – Unanimous.**

**7. Discussion and Possible Action on Implementation Plans for Changes in Law to Take Effect January 1, 2007**

Ms. Smith reported on new laws affecting Optometry.

- **Senate Bill 579 – Licensure by Endorsement, Advertising Free Eye Exams and Cardio-Pulmonary Resuscitation (CPR).**

**Licensure by Endorsement**

The Passing of Assembly Bill 579 will allow the Board to issue certificates of registration to practice optometry by endorsement. This law becomes effective January 1, 2007.

Staff have developed a draft application form and supplemental application used to certify that the applicant has at least 5,000 hours of optometric

experience as required. An informational fact sheet on licensure by endorsement will be made available on the Board's website.

After review, modification and/or approval, the Board is asked to instruct staff to begin the rulemaking process to amend the California Code of Regulations (CCR) to incorporate, by reference, the following forms: "Application For Licensure As An Optometrist By Endorsement" and "Certification of 5,000 Practice Hours."

**Move to instruct staff to move forward with regulatory process. M – Rosas, S – Johnson, MSP – Unanimous.**

**Advertising Free Eye Exams**

Board Staff have drafted a notice regarding the new laws which will be mailed to all licensed optometrists and posted on the Board's website.

**Elimination of CPR Requirement**

Board Staff have drafted a notice regarding the new laws that will be mailed to all licensed optometrists and posted on the Board's website. The renewal notices have also been updated to reflect the change in renewal requirements.

- **Assembly Bill 1382 - Plano Contact Lenses**

No action necessary at this time.

- **Assembly Bill 2256 - Elimination of Dual Registration for Optometric Corporations.**

Optometrists are currently required to register their professional optometric corporations with the Secretary of State and the Board of Optometry. However, with the passage of Assembly Bill 2256, optometric corporations will no longer be required to register with the State Board as of January 1, 2007.

The Board issues fictitious name permits (FNP) and branch office licenses (BOL) to CORs, as requested by the COR. Therefore, elimination of the COR makes it necessary to transfer all licenses, issued to CORs, to qualifying OPT licenses as identified by a qualified optometrist of the COR.

Staff will send a letter advising CORs that:

- 1) Professional optometric corporations are no longer required to register with the Board and all CORs will be cancelled.
- 2) Professional optometric corporations must continue to meet requirements

in Corporations Code Section 13400-13410 regarding the restrictions on how the corporation may be organized.

- 3) All FNPs or BOLs issued to a COR must be transferred to a qualified optometrist of their choice.
- 4) A grace period will be established in order to allow the license record to be updated as listed in number 3 above.

- **Assembly Bill 1476 - Extension of Sunset Date**

Sunset Date has been extended. No action is necessary at this time.

## **8. Discussion and Possible Action Regarding Future Board Sponsored Legislation**

The next legislative session begins in January 2007. In the past, the Board has identified necessary legislative changes and sponsored bills to effect those change.

This is an opportunity for Board members to begin the discussion regarding possible legislative efforts in the upcoming session. It is expected that the Board will have more detailed discussions regarding legislation via the Legislative Committee and strategic planning process.

Ms. Smith presented the following changes in law that have been identified by staff and/or discussed in previous Board meetings:

### **Fee Increase**

The Board's budget, and need for fee increases has been clearly identified and discussed over numerous board meetings. No further discussion at this time.

### **Temporary Practice Exemption**

The exemption would allow Optometrists to practice in locations, prior to notifying the Board, to compensate for application processing time. Currently, it takes 45 days, or longer, to complete the processing of an application to practice at a particular location.

Concern presented - Board may not have sufficient staff resources to regulate change.

### **Require Optometrists to Respond to Requests for Information**

Staff does not always receive compliance when requesting information that is requested in response to complaints. Staff has discussed the idea of making it a citable offense to fail to respond to requests for information. This would require a change in law.

**Enhance Mandatory Reporting Requirements for Malpractice Settlements**

Currently, there is a general provision of the Business and Professions Code which points to all health care boards. If a licensee enters into a malpractice settlement for over \$30,000, the licensee and the insurance company must report this to the Board within 30 days.

At this time, the Board does not have sufficient enforcement authority on this requirement.

Dr. Goldstein suggested working with the committees to place priorities to these subjects and discuss more fully, in terms of strategic planning.

**Remove “Optometry” – “Optometric” as Requirements for FNPs**

This is an issue that arises frequently when dealing with applicants.

**Retention of Patient Records**

The discussion of clarifying requirements (or establishing new requirements) for the retention of patient records is a matter that arises periodically. This matter requires further discussion to determine if it is a legislative requirement for the Board.

**9. Discussion and Possible Action on Enforcement Program Procedures with Regard to Investigations and Probation Monitoring.**

The Board of Optometry, like many other regulatory programs within the Department of Consumer Affairs (DCA), utilizes the services of sworn peace officers employed by DCA’s Division of Investigation (DOI) to conduct formal investigations on behalf of the Board.

Kathy Door, Chief of the Division of Investigation, presented an update on the status of DOI with respect to the Board’s investigations. DOI is, currently, experiencing a shortage of investigators. DOI has seven office locations, statewide; and, three of the seven offices; which, are located in the most populated areas, have the fewest investigators. When Ms. Door came on board, as Chief of DOI, in March 2005, DOI had 1049 open, active cases and 35 investigators. Today, DOI has over 14,000 open cases and 25 investigators. Due to this shortage, it is necessary for DOI to key priority caseloads based on allegation type. Criminal, sexual mis-conduct, and patient harm are high priority cases and expedites are given to cases of this type.

In September of this year, DOI issued a memo to all of its DCA clients advising that the Division is experiencing an unprecedented high caseload and low staffing levels. The memo establishes guidelines for reviewing cases before referring them to DOI for formal investigation. DOI recommendations and Board Staff

Responses are as follows:

DOI Recommendation

Licensed probation checks should not be referred to DOI. However Board staff are welcome to use DOI field offices to conduct probation checks.

DOI also suggest the Board use retired DOI investigators to conduct probation interviews.

Board Staff Response

The Board stopped using DOI for probation checks for most probationers as a cost savings measure in August of 2004. The Board developed an in-house probation monitoring program that diverted the workload away from DOI and onto Board staff. The workload was absorbed. There was no increase in staff resources at the time.

In recent months, the in-house probation monitor program has been reasonably successful in identifying non-compliant probationers and bringing them into compliance.

Under the new probation monitoring program, the Board continued to use DOI to monitor probationers charged with sexual misconduct or substance abuse. The reasoning for this was the necessity to conduct face-to-face interviews and to observe such probationers in their working environment.

DOI suggests the board send a staff member to the DOI field offices to conduct the quarterly monitoring interviews or that the Board hire retired DOI investigators to conduct the interviews. Neither of the suggested alternatives is budgeted. Board staff is in the process of reviewing feasibility of these options.

Ms. Smith expressed she is not comfortable with the idea of sending out board staff to conduct on-site interviews.

DOI has extended their end-of-year probation monitoring cut-off for an additional six months to allow time for board staff to adjust their workload.

Ms. Smith reported - it has (for years) been taking a very long time to achieve resolution of cases. One problem area, identified by board staff, (as discussed during agenda item 7) is non-compliance with providing requested information. Board staff has been exploring ways to improve methods of collecting information (i.e. cite & fine for non-compliance). Ms. Smith advised the Board - The Director has broad authority to issue administrative subpoenas. Ms. Zettel is exploring options for making the process (of getting subpoenas issued) easier for the boards & bureaus by delegating that authority and designating certain staff to become sufficiently trained.

DOI Recommendation

Complaints by anonymous victims regarding unprofessional conduct, and negligence/incompetence should not be referred to DOI.

Complaints of unlicensed activity by anonymous persons should not be referred to DOI. Board staff may consider sending an informational notice, warning or citation and fine to the subject.

Board Staff Response

The Board (as a rule) does not open formal investigations of anonymous complaints, as there is nobody to interview or documents to collect.

DOI Recommendation

Depending on the severity of the incident, cases where the incident has occurred one year prior to the request for service should be not be referred.

Board Staff Response

Board staff are concerned with this recommendation. The Board often learns of cases of insurance fraud or that an optometrist potentially deviated from the standard or of care well after one year from the date of occurrence. Simple passage of time should not preclude the Board from taking action.

Therefore, if DOI will not accept these cases, Board staff will conduct its own investigation according to the provisional plan outlined in this document.

Ms. Smith believes board staff can work with DOI regarding this recommendation.

DOI Recommendation

Prior to referring negligence/incompetence cases to DOI, board staff should obtain the complainant's patient records and have them reviewed by the Board consultant to determine the need for further investigation.

Board Staff Response

Board staff currently consults with expert witnesses on an informal basis when determining whether to pursue an investigation.

Ms. Smith advised the Board - Upon board staff obtaining patient records and sending them to our expert witness – this has, frequently, been sufficient for them to produce a report for staff to pass on where appropriate.

DOI Recommendation

Criminal cases, cases of sexual misconduct, drug diversion and serious injury should continue to be referred.

Board Staff Response

Board staff concurs with this recommendation



Mr. Vellanoweth presented some “red flag” concerns (from the “State’s perspective”):

- We may be overstepping our role vs having the Department assume responsibility.
- We are a board vs an investigative division.
- We are increasing our workload.
- We may need to begin preparing budget change proposals to address this.
- Will certain staff need to be certified as peace officers?

Ms. Smith responded to concerns. Board staff is aware of these issues and understands the BCP process and rigorous review. Staff is in process of collecting data to demonstrate that there is a workload and a need; which, hopefully will justify any kind of BCP changes needed. Ms. Smith does not envision the Board employing peace officers for face-to-face on-site interviews. Rather, she envisions, resolution of cases at the lowest level.

Dr. Goldstein clarified that the Board’s goal has not been to create more cases; but rather to ensure enforcement matters are resolved in a more efficient, timely manner; and, ensure that appropriate complaints are addressed by enforcement.

#### **10. Executive Officer’s Report**

Ms. Smith provided a report on current staff activities and changes.

##### **Online Complaint History**

Board staff are working with the Department’s information technology staff to automate the information regarding the disciplinary histories of licensees on the Board’s website. Currently, licensing information such as issue and expiration date, address of record, and associated licenses, are available online (see attached printout). Inquirers are instructed to contact the Board via email for information regarding disciplinary history. Staff responds to approximately 100 inquiries a month by looking up the licensees’ discipline and responds via email.

The information displayed online will soon indicate whether or not the licensee has a disciplinary history. If there is none, the website will state, “A search of our records indicates that this optometrist does not have any reportable disciplinary history.” If there is disciplinary history, a message will be displayed indicating that, “A search of our records reveals that this optometrist may have been involved in a complaint that resulted in disciplinary action or a citation and provides instruction on how to obtain more information.” In such cases, enforcement staff will search our records and respond via email. It is anticipated the workload will be reduced from 100 per month to less than 5 per month.

##### **Automated Email**

There are now over 600 email addresses on the Board’s mass email list. Notices are sent whenever major changes are posted on the Board’s website.

### **Automated Voice Repose System**

Board staff is working with telecommunications staff at the Department of Consumer Affairs to take advantage of features available with the new phone system, which was installed when the Board relocated to its current offices. Currently, the Board uses a separate stand alone automated voice response system at a monthly cost of \$700. The new computer-based telephone system provides an automated voice response at no additional cost. Telecommunications staff just completed a training program on how to program this feature in the phone system. Board staff is working on the updated scripts and will begin working with telecommunications staff on implementation next month. This is expected to save the Board approximately \$8,400 annually.

### **Notice Regarding Changes in Laws and Regulations**

A notice was mailed to all California licensed optometrists advising that the Board requires optometrists to post a consumer notice regarding prescription release and the Board's decision to accept child and elder abuse detection courses for continuing education credit.

The publisher of the Board's law book, Lexis Nexis, is going to mail a notice to all California licensed optometrists regarding changes in the laws that take effect 2007 at no cost to the Board. In addition to providing a brief overview of the new laws and regulations, the notice will advise the licensees that they can purchase the law book from Lexis Nexis.

### **Web Updates**

The following information has been posted on the Board's website:

- Information regarding the Board's efforts to recruit expert witnesses for enforcement cases
- A "Consumer Guide to Health Information Privacy in California," which is published by the Department of Consumer Affairs' Office of Privacy Protection.
- National Standards to Protect the Privacy of Personal Health Information , which is published by the Department of Health and Human Services
- Report of Settlement, Judgment or Arbitration Award form
- Six new fact sheets on licensing issues (see Licensing Program section of this report for details)

### **Licensing Activity**

Ms. Smith provided a table of licensing activity (from August 1 to October 31, 2006) and a "pending applications" update table (from August 2005 to November 2006).

In order to reduce the amount of time taken by Board staff to assist candidates who had forgotten their California Law Exam test ID numbers, the Board approached the NBEO in June with a proposal that each candidate be provided a

test ID number card which would be handed out at the beginning of the August 2006 law exam, and be kept by the candidate for future reference. On the card would be listed the candidate's test ID number, the date when the test results would be released, and where on the Board's web-site a candidate could locate their test score. Prior to this proposal, each candidate was required to remember his or her test ID number. Consequently the Board was deluged with calls and emails asking what their ID numbers were.

The NBEO summarily endorsed the proposal and agreed that it would be advantageous to the candidates who were concerned about not remembering their ID numbers. They also stated that this policy would have no effect on testing procedures.

This change in policy has had a positive effect on Board staff as the Board received only 2 requests for test scores for the August exam. Of those 2, one had the ID card in hand and had just failed to read it. The success of this policy change will enhance future test examinations and provide a more simplistic method by which California Law Exam candidates may access their test score.

In an effort to document board laws and policies regarding some of the more frequently asked questions, Board staff has completed fact sheets on the following subject areas:

- Glaucoma Certification
- TPA Certification Requirements
- Continuing Optometric Education
- Inactive Optometrist License
- Lacrimal Irrigation and Dilation Certification
- Licensure by Endorsement

These fact sheets will be posted on the Board's website and mailed to anyone who requests information on the subject areas.

The staff position that processes Statement of Licensure applications was vacant from September 1, 2006 through October 10, 2006. The position was a part-time position, which was insufficient to keep up with the workload. Therefore, the Board hired a full-time employee to process these applications. The new employee has been in training and processing only the simplest transactions. In the past three months, staff has processed approximately 40 more applications than received. This suggests that the backlog may be corrected within 5 months.

#### **Licensing Exam Development and Validation**

In August 2006, Board staff met with the State Office of Examination Resources (OER) to discuss a strategy for revising the current California Laws and Regulations Examination, passage of which is required for licensure as an

optometrist in California (California Code of Regulations §1523(e) and Business and Professions Code §3046).

The Board initiated the meeting with OER as a result of OER's recommendations in recent Test Scoring and Item Analysis Reports that some of the items on the California Laws and Regulations Exam should be replaced and/or revised and that the current California Laws and Regulations Exam does not reflect the scope of practice expansion.

Additionally, the National Board of Examiners in Optometry (NBEO) completed a national study of clinical practice of doctors of optometry, which the Board received in March 2006. The current occupational analysis (OA) for the optometry profession in California was completed in 2001, and does not include the expansion of the scope of practice that was enacted in 2001.

The Board is required to be in compliance with the Business and Professions Code, Section 139, which requires all of the Boards and Bureaus within DCA to conduct occupational analyses and exam validation studies in a psychometrically sound manner on a regular basis. In order to meet the requirements set forth in B&P 139, a new OA should be performed that will reflect the current optometry profession in California. After the OA for California practice is completed, a comparison of the NBEO profiling report and the California OA should be completed, which will result in a new examination plan for the California Laws and Regulations Exam.

An exam development and validation plan was presented at the August board meeting, with the caveat that it was contingent upon identifying and/or obtaining funds to pay for the exam development and validation services. The Board requested approval to pursue a budget enhancement for Fiscal Year 2007/08, which was denied due to the Board's inadequate fund condition.

Acknowledging the importance of proper a proper exam program, OER has agreed to provide their expertise at a reduced rate. Staff is moving ahead with plans to conduct the exam development and validation workshops (as outlined in Phase I below) according to the following schedule:

Reclassification:	March 4-5, 2007
Item Writing:	March 18-19, 2007
Item Review:	April 1-2, 2007
Exam Construction	April 15-16, 2007
Passing Score:	June 10-11, 2007

While this plan is an important step toward validating the California Laws and Regulations Exam, it does not include a schedule or funds to conduct an occupational analysis of optometric practice in California as outlined in Phase II. It will be necessary to pursue a budget enhancement to complete the exam

validation process on an ongoing basis. If successful, the budget augmentation would take affect in Fiscal Year 2008/09.

To bring the Board into compliance with the Business and Professions Code, Section 139, a two-phase strategy is planned:

**Phase I to begin April / May 2007 pending funding**

1. The Board will verify whether the expansion of the scope of practice is included in the NBEO exam.
2. The Board will begin to recruit licensees who are in good standing with the Board as subject matter experts (SMEs). The SMEs will participate in workshops to update the current California Laws and Regulations Exam.
3. SMEs should be from different geographical areas within the state, should represent various specialties and work settings (if any), and should demonstrate an experience mix within the profession. Half the SMEs should have no more than five years of licensed experience so that the perspective of the newly licensed optometrist is maintained. Six to nine SMEs are required for each examination development workshop. Examination development workshops typically last two to three days.
4. OER will assist the Board in updating the current California Laws and Regulations Exam by validating the current exam with the 2001 OA and including the expansion of scope, if necessary. Items will be validated to the new exam plan and problematic items will be reviewed or replaced, and new items will be written. An item bank will be created and maintained by OER. OER, with the assistance of SMEs, will construct one to two forms of the California Laws and Regulations Exam and conduct a passing score workshop. The plan is to begin work on this step in April 2007.

**Phase II to begin FY 2007/08 pending funding**

5. The OER will conduct a new OA and compare the NBEO report to arrive at a new examination plan for the California Laws and Regulations Exam through a series of workshops.
6. The OER will work with the Board to develop two California Laws and Regulations Exam forms every fiscal year. This work will include the one or more of the following workshops: item writing, item review, exam construction, and passing score.

**Applicant Tracking System (ATS)**

The Board was scheduled to begin converting its manual application review process to an automated system, known as the Applicant Tracking System (ATS), in July 2006. However, due to workload issues within the Department of Consumer

Affairs' Office of Information Services, which oversees the ATS system, the implementation date has been delayed until November 2006. Board staff will meet with the Department's ATS experts to begin the implementation of ATS the week of November 27, 2006.

ATS is a comprehensive program that interfaces with our automated system for tracking licenses. Multiple regulatory programs within the Department of Consumer Affairs already use ATS. Implementing ATS is another effort to make the Licensing Program more efficient and eliminate the backlogs. The \$70,000 set up cost is built into the operating budget for Fiscal Year 2006/07.

### *iLicensing*

The Board is scheduled to begin implementation of the Department of Consumer Affairs' iLicensing program, which is an on automated *online* service that accepts credit card payments and requests for the following functions:

- Initial license applications
- License renewal
- Address changes
- Requests for duplicate licenses
- Cashiering and reports

The Board is scheduled to begin implementation in Phase 4, which will take place January – April of 2009. Although the launch date is scheduled three years away, Board staff will be working with DCA staff to identify baseline requirements to be built into the system. The Board's budget for iLicensing over the next three years is reflected below:

Fiscal Year 2006/07	\$5,000
Fiscal year 2007/08	\$17,000
Fiscal Year 2008/09	\$13,000

The Board recruited expert witnesses to act as consultants for the Enforcement Program last year. Ten applications have been received to date. At the February 2005 Board meeting, the Board instructed staff to work with Board member(s) to develop a test enforcement case. The applicants would then be asked to review the test case and prepare an expert witness report of findings. The reports will be reviewed for demonstrated knowledge of standard of care, optometric practice, and applicable laws. Additional factors will include analytical and writing skills.

Test case development was placed on hold pending the success of the Board-sponsored legislation to recast and revise the enforcement statutes in the Optometry Practice Act (Assembly Bill 488 (Bermudez)). The bill was signed into law and took effect January 1, 2006. The applicants, as well as existing experts, will have to be informed of the changes before they are tested on their knowledge of the laws.

Staff was instructed to develop training sessions to educate investigators on the practice of optometry and the laws regulating it. The sessions will be held at Southern California College of Optometry and Berkeley School of Optometry. The training was originally envisioned to take place this summer, but it was postponed pending the outcome of AB 488 (Bermudez). In the meantime, staff started working with DOI and the schools to develop the training program and projected costs associated with the training. The Board's Liaison to the Attorney General's Office will assist with training content and presentation. Expert witnesses will also be invited to attend the training.

*Note: These projects were placed on hold due to staff changes in the Enforcement Program. The new Enforcement Manager reported to work for the board in March of this year and has begun working on the test case for expert witnesses. A notice that the Board is recruiting expert witnesses has also been placed on the Board's website. However, the training program continues to be on hold due to staff turnover at the Division of Investigation.*

#### **Board of Optometry's Budget**

The Board's reserve fund continues to shrink. As previously reported and discussed, a fee increase will be necessary. The only question is when it should be pursued. Budget estimates for Fiscal Year 2006/07 initially indicated an immediate need for a fee increase. However, it has since been determined that the savings generated by the reduced use of investigators from the Division of Investigations are sufficient to delay pursuit of a fee increase until the 2006/07 legislative session.

Fee increases are notoriously difficult to implement via legislation and always require cooperation from the Administration, the Legislature and the profession. Staff has met on numerous occasions with representatives from the Administration to discuss the Board's budget and will continue to do so. Board staff has also discussed this issue with staff from policy committees in the Assembly and Senate. The California Optometric Association has already indicated they would support the Board's efforts to increase revenue. Staff will continue to monitor the situation for the best time to go forward with a fee increase.

#### **Pending Litigation**

##### **Consumer Cause v. National Vision**

On March 4, 2004, the California Supreme Court ordered depublishation of the Second District's decision in Consumer Cause v. National Vision. The Consumer Cause case had held that the Knox-Keene Act exempted registered dispensing opticians from complying with Business and Professions (B&P) Code Section 655 and 2556, thereby allowing them, among other things, to maintain optometrists on or near their premises.

##### **People v. Cole National Corporation; Pearle Vision, Inc.**

On the same date the Consumer Cause decision was issued, the California Supreme Court also granted Pearle Vision's petition for review in the Cole National v. Hamilton Case. Cole National decision held that the Knox-Keene Act **does not** exempt opticians from complying with B&P Sections 655 and 2556.

Due to the diametrically opposed published decisions from two California Court of Appeals, the California Supreme Court granted a review of the Cole National case. The Court limited this issue for review to whether or not the Knox-Keene Act exempts providers from complying with the B&P Sections 655 and 2556.

The California Supreme Court heard oral arguments on this case on April 5, 2005 at 9:00 a.m. The Court's written decision was filed on June 12, 2006.

*N.A.A.O, LensCrafters Inc., et al, v. Bill Lockyer and Kathleen Hamilton*

On March 8, 2004, the Attorney General's Office argued that the Federal Court should abstain in the NAOO case until the California Supreme Court makes a decision on the Knox-Keene issues. The Judge stayed all of the proceeding in the case and agreed that a decision from the California Supreme Court could have significant effect upon the issues.

It may be a year or longer before the proceedings before the California Supreme Court are completed, after which the Federal Court trial may be put back on calendar.

On April 6, 2004, the Medical Board of California (MBC) denied six applications by Lenscrafters for registration as a dispensing optician. Lenscrafters then filed a motion with the court seeking an order compelling the MBC to withdraw the denials or lifting the stay. The court denied this motion. The court, however, indicated that Lenscrafters could re-file its motion for a stay if it requested an administrative hearing on the denial of the applications, Lenscrafters requested the ALJ to stay the administrative proceedings, and the ALJ denied the request. Lenscrafters recently requested administrative hearings, and the Attorney General's office has filed and served Statements of Issues.

*Medi-Cal Re-Enrollment Project*

On May 30, 2006, the Department of Health Services informed the board that it is currently re-enrolling 571 optometrist in Los Angeles County for the purpose of authorizing Medi-Cal services at the addresses listed on their applications. At that time 58 of the 107 renewal applications being reviewed showed addresses not registered with the board and that 85% are in need of a Fictitious Name Permit.

DHS and the Board are working cooperatively to notify the optometrists that they are not in compliance with registration requirements, which will delay their re-enrollment.



California Code of Regulations Section 51000.5(f) & 51000.5(g)(2) states that the provider [Optometrist] has 35 days to resubmit the application with all deficiencies corrected or they will be deactivated. What this means is that they must be in compliance with the Board before the Health Services will authorize them to provide Medi-Cal services.

Because of the immediate time frame involved, the Department of Health Services has requested that the Optometry Board expedite applications to correct or update these deficiencies. As of August 22, 2006, DHS reports that there may be up to 60 optometric applications for re-enrollment that may be required to correct their records with the Board before the re-enrollment process is completed. To date, Board staff has corrected about 15 of the deficiencies.

On May 30, 2006, the Department of Health Services informed the board that it is currently re-enrolling 571 optometrist in Los Angeles County for the purpose of authorizing Medi-Cal services at the addresses listed on their applications. At that time 58 of the 107 renewal applications being reviewed showed addresses not registered with the board and that 85% are in need of a Fictitious Name Permit.

DHS and the Board are working cooperatively to notify the optometrists that they are not in compliance with registration requirements, which will delay their re-enrollment.

California Code of Regulations Section 51000.5(f) & 51000.5(g)(2) states that the provider [Optometrist] has 35 days to resubmit the application with all deficiencies corrected or they will be deactivated. What this means is that they must be in compliance with the Board before the Health Services will authorize them to provide Medi-Cal services.

Because of the immediate time frame involved, the Department of Health Services has requested that the Optometry Board expedite applications to correct or update these deficiencies. As of August 22, 2006, DHS reports that there may be up to 60 optometric applications for re-enrollment that may be required to correct their records with the Board before the re-enrollment process is completed. To date, Board staff has corrected about 15 of the deficiencies.

#### **Disaster Preparedness/Risk Assessment**

The changing threat paradigm and recent emergencies, including localized acts of nature, accidents, technological emergencies, and military or terrorist attack-related incidents, have shifted awareness to the need for viable plans to ensure the capability of state agencies to continue their essential functions. On April 18, 2006, the Governor issued Executive Order S-04-06 (Attached), which mandates that all state agencies prepare Continuity of Operations/Continuity of Government plans. The Governor's Office of Emergency Services has published a template plan to assist state agencies when developing a continuity plan. The Board developed its own continuity plan, based on the aforementioned template, and

submitted it on September 1, 2006. Board staff will participate in the Department of Consumer Affairs' working group to review and update these plans.

**11. Strategic Planning Update**

At the last Board meeting, it was determined that the Board would contract with a strategic planning expert to facilitate the revision of the Board's strategic plan.

With the assistance of the Board President, staff has identified a consultant who is proficient at planning for non-profit organizations at a very reasonable cost. The consultant will conduct a survey of key stakeholders and pre-meeting interviews with the Board President, Executive Officer and other identified leaders. On the day of the planning session, the consultant will facilitate the meeting, which will be held during open public session. Board members, all Board staff and members of the public will be encouraged to participate in the planning process. The consultant will also assist with the final preparation of the revised strategic plan.

The planning session is scheduled to take place on February 8, 2007 in Sacramento. The Board will conduct a regular business meeting on February 9, 2007.

**12. Petition for Reinstatement**

An Administrative Law Judge was present to conduct a hearing to consider a Petition for Reinstatement submitted from Larry Franklin Thornton, OD. Dr. Thornton did not appear for the hearing; however, the Board considered the petition in Thornton's absence. The proposed decision will be drafted by the Judge and presented to the Board for consideration via mail vote.

**13. Future Meeting Dates**

Future Board Meeting dates are scheduled as follows:

- February 8, 2007 (Sacramento)
- May 17, 2007 (LA or San Francisco – to be determined)
- August 16, 2007 (LA or San Francisco – to be determined)
- November 15, 2007 (San Diego)

**13. Closed Session**

**14. Open Session**

**15. Public Comment**

No Comment

16. **Future Agenda Items**

Agenda Items tabled, at this time, will be discussed at the February 2007 Board Meeting.

17. **Adjournment**

The meeting was adjourned at 3:30.

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Monica Johnson, Secretary

\_\_\_\_\_  
Date