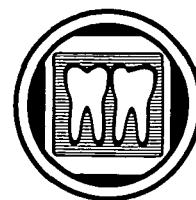


Dental Board of California

DBC—Executive Officer: Georgetta Coleman ♦ (916) 263-2300 ♦ Internet: www.dbc.ca.gov

COMDA—Executive Officer: Karen R. Wyant ♦ (916) 263-2595 ♦ Internet: www.comda.ca.gov



The Dental Board of California (DBC) is a consumer protection agency within the state Department of Consumer Affairs (DCA). DBC is charged with enforcing the Dental Practice Act, Business and Professions Code section 1600 *et seq.* The Board's regulations are located in Division 10, Title 16 of the California Code of Regulations (CCR).

DBC licenses dentists (DDS/DMD) and all categories of licensed dental auxiliaries, including registered dental assistants (RDA), registered dental assistants in extended functions (RDAEF), registered dental hygienists (RDH), registered dental hygienists in extended functions (RDHEF), and registered dental hygienists in alternative practice (RDHAP). Under Business and Professions Code section 1638 *et seq.*, the Board also issues oral and maxillofacial surgery (OMS) permits to qualified dentists and physicians.

The Board is authorized to establish standards for its approval of dental schools and dental auxiliary training programs; prescribe the subjects in which its licensees should be examined; license applicants who successfully pass the examinations required by the Board; set standards for dental practice; and enforce those standards by taking disciplinary action against licensees as appropriate. DBC is also responsible for registering dental practices (including mobile dental clinics) and corporations; establishing guidelines for continuing education requirements for dentists and dental auxiliaries; issuing special permits to qualified dentists to administer general anesthesia (GA), conscious sedation (CS), or oral conscious sedation (OCS) in their offices; approving radiation safety courses; and administering the Diversion Program for substance-abusing dentists and dental auxiliaries.

DBC's Committee on Dental Auxiliaries (COMDA) was created by the legislature "to permit the full utilization of dental auxiliaries in order to meet the dental care needs of all the state's citizens." COMDA is part of DBC, and assists the Board in regulating dental auxiliaries. Under Business and Professions Code section 1740 *et seq.*, COMDA has specified functions relating to the Board's approval of dental auxiliary education programs, licensing examinations for the various categories of auxiliaries, and applicants for auxiliary licensure. Additionally, COMDA advises DBC as to needed regulatory changes related to auxiliaries and the appropriate standards of conduct for auxiliaries. COMDA is a separate nine-member panel consisting of three RDHs (at least one of whom is actively employed in a private dental office), three RDAs, one DBC public member, one licensed dentist who is a mem-

ber of the Board's Examining Committee, and one licensed dentist who is neither a Board nor Examining Committee member.

DBC consists of fourteen members: eight practicing dentists, one RDH, one RDA, and four public members. The Governor appoints twelve of the Board's fourteen members (including all of the dentist members); the Senate Rules Committee and the Assembly Speaker each appoint one public member.

On February 25, 2000, the Senate Rules Committee appointed attorney Michael Pinkerton as a public member to DBC. Pinkerton is director of government affairs for the California Association of Insurance and Financial Affairs.

On March 7, 2000, Governor Davis announced the reappointment of Mark H. Goldenberg, DDS, and the appointment of Alan H. Kaye, DDS, to DBC. Dr. Goldenberg, who was first appointed to the Board in 1998 by then-Governor Wilson, has been a pediatric dentist in Beverly Hills since 1982. Dr. Kaye is an oral and maxillofacial surgeon who has practiced in Beverly Hills since 1977.

On May 26, 2000, Governor Davis announced the appointment of Katie Dawson, RDH, and LaDonna Drury-Klein, RDA, to the Board. Ms. Dawson is a past president of the California Dental Hygienists' Association and has been a practicing dental hygienist for 23 years. Ms. Drury-Klein is a faculty instructor with the Dental Assisting Department for Alameda Community College.

On April 27, 2001, Assembly Speaker Robert Hertzberg named David Baron of San Diego as a public member on DBC. Mr. Baron is director of government affairs for the Barona Band of Mission Indians. Previously, he served as a legislative aide to former Assemblymember Mike Gotch, who is now Governor Davis' Legislative Secretary.

MAJOR PROJECTS

DBC Sunset Review Yields

Reconstitution Recommendation

DBC's 2000-01 sunset review revealed great dissatisfaction in the Board's overall performance on the part of the public, the Joint Legislative Sunset Review Committee (JLSRC), and the Davis administration Department of Consumer Affairs. The process has resulted in SB 134 (Figueroa), which would abolish the existing Board, end the terms of its existing members and its executive officer, and simultaneously create a new board to regulate the dental profession in California.

DBC's 2000-01 sunset review has resulted in SB 134 (Figueroa), which would abolish the existing Board, end the terms of its existing members and its executive officer, and simultaneously create a new board to regulate the dental profession in California.

HEALTH CARE REGULATORY AGENCIES

◆ **DBC Sunset Report.** As required, the Board prepared and submitted its sunset report to the JLSRC in October 2000. After presenting background information about the profession and an overview of its regulatory programs, the Board's report discussed its progress on addressing issues remaining from the previous sunset review and new issues facing the Board.

After DBC's 1996-97 sunset review, the JLSRC identified several issues to be addressed: (1) whether DBC should continue to license dentists and all categories of dental auxiliaries; (2) the use of unlicensed dental assistants; (3) whether dental hygienists should be allowed to practice without the supervision of a licensed dentist; (4) whether the Board should continue to operate independently, or whether DCA should assume its functions; (5) whether a Board standing committee dealing with auxiliary matters should be allowed to review all COMDA recommendations; (6) whether the Board's authority to hire its own sworn investigators should be eliminated; and (7) whether the Board should continue to require out-of-state dentists to take the California examination or should permit "licensure by credential." DBC's report noted the actions taken by the legislature and the Board following the 1996 sunset review to address some of these issues. The report also identified several new issues confronting the Board, including specialty licensure, specialty advertising, the practice of dentistry through independent practice associations (IPAs) and dental management service organizations (DMSOs), the placement of antimicrobial and antibiotic medicaments by RDHs, and the dental materials fact sheet required by Business and Professions Code section 1648.10 (which was enacted in 1992).

After DBC submitted its report, JLSRC staff released a list of 19 issues that DBC should be prepared to address at the upcoming sunset hearing. These areas of inquiry included issues related to board composition and authority (including whether the supermajority of dentists on the Board should be reduced, and whether COMDA should be severed from DBC), licensing (including the fact that some OMS-permitted dentists exceed their scope of practice by performing cosmetic surgery that constitutes the practice of medicine), examinations (including the Board's failure to agree on a "licensure by credential" system), enforcement (including a significant reduction in the number of case closures, an increase in the length of time between transmittal of a completed investigation to the Attorney General's Office and the filing of the accusation, and a decrease in the amount of restitution made to consumers), and consumer outreach and education (as reflected in a high degree of dissatisfaction registered by consumers on the Board's consumer satisfaction surveys).

◆ **External Reports on DBC Performance.** In reviewing DBC, the JLSRC was assisted by the release of two external reports on various aspects of DBC performance in late 2000. First, in November 2000, the Bureau of State Audits (BSA) released a report on DCA and several of its constituent agencies, including DBC. Although DBC is reasonably

prompt in its processing and evaluation of applications for licensure, the auditors found excessive delay in the time it takes DBC to process consumer complaints. The Board takes about six months to resolve most mediation cases, and over a year to resolve more complicated cases requiring investigation. Further, the auditors found that DBC has failed to establish timelines or internal monitoring systems to detect backlogs in these processes. BSA found that most other DCA boards have at least established goals or timeframes for resolving disciplinary complaints, and that DBC's track record exceeds the goals established by other boards and bureaus. According to BSA, DBC's enforcement chief attributed the delay in case processing to 1997 legislation requiring DBC to reduce its sworn investigative staff from 17 to seven sworn investigators by July 1999.

Another report relating to DBC's enforcement program was released on November 30, 2000. This report, prepared by Sjoberg Evashenk Consulting, was required by AB 900 (Alquist) (Chapter 840, Statutes of 1999), a Board-sponsored urgency bill that increased the number of sworn investigators at DBC from seven to ten, authorized the DCA Director to designate seven additional DBC investigators as peace officers (sworn investigators) until July 1, 2002, and—in the meantime—required DBC to contract with an outside entity to conduct an independent study on the Board's need for sworn peace officer positions in its investigative unit.

The consultant's report concluded that while the nature of the cases and the workload justifies the Board's employment of its own staff of investigators, not all of the investigator positions need to be sworn peace officers. The report recommended that use of a mixture of sworn and non-sworn investigators would broaden the pool of candidates eligible to fill DBC's investigator positions and generate cost savings for the Board. The consultant further noted that it was unable to determine whether the backlog in cases and the increase in time needed to close investigations was caused by insufficient staffing or flaws in the investigative process because the Board lacks the management controls and data needed to assess these issues. The report recommended that the Board implement a time management system to track the use of investigative resources spent on each case, and implement performance measures to assess productivity, resource allocation, and case management.

◆ **Sunset Review Hearing.** On December 5, 2000, the JLSRC conducted a public hearing on the Board. At the hearing, DBC was represented by Board President Roger Simonian, DDS, and Executive Officer Georgetta Coleman. Under questioning by JLSRC Chair Liz Figueroa, Dr. Simonian defended the current composition of the Board as a "team approach" consisting of dentists, auxiliaries, and public members, and argued that the composition should remain unchanged. In response to calls for a more balanced composition, he stated that two auxiliaries could be added to the Board, for an "eight and eight split." Dr. Simonian also argued that "COMDA should remain an entity of the Board,"

HEALTH CARE REGULATORY AGENCIES

and that DBC (not COMDA) should remain responsible for the discipline of dental auxiliaries to promote consistency in enforcement for all dental professionals.

JLSRC members peppered Board representatives with questions regarding DBC's enforcement program. Assemblymember Dave Cox elicited testimony that of 3,000 complaints received each year, DBC files approximately 70 accusations, disciplines approximately 75 licenses per year, and revoked only 18 dental licenses in 1999-2000. Senator Figueroa questioned the amount of time the Board spends discussing enforcement issues at each meeting; Executive Officer Coleman responded that the Board decides individual enforcement cases for a few hours at each two-day meeting and that the majority of meeting time is spent discussing scope of practice and other issues related to dentists and auxiliaries. Dr. Simonian acknowledged a "sharp increase" in the time it takes the Attorney General's Office to file accusations, but stated this has occurred only within the past fiscal year and noted that DBC staff is working with the AG's Office to expedite the filing of DBC accusations. When asked about DBC's recent reduction in case closures and increase in overall cost per case, Enforcement Chief Jeff Wall stated that case closures are down because of the fluctuation in the number of sworn investigators employed by DBC due to SB 826 (Greene) (Chapter 726, Statutes of 1997). When questioned regarding dental office inspections, Wall noted that under Business and Professions Code section 1611.5, DBC may inspect an office only upon receipt of a complaint or report; DBC maintains only four inspector positions to cover 27,000 dentists licensed in California.

Concerning the scope of practice of oral and maxillofacial surgeons, Dr. Simonian noted that DBC sent a letter on January 24, 2000 to all licentiates clarifying DBC's position that the performance of freestanding cosmetic surgery procedures by OMS permittees violates the Dental Practice Act (see below).

Regarding the dental materials fact sheet required by Business and Professions Code section 1648.10, Dr. Simonian noted that one year earlier, in December 1999, the Board agreed to revise its existing fact sheet and decided to hire an outside vendor to draft the new fact sheet (see below). In 2000, the Board solicited bids and chose a vendor whose selection was then protested; that protest could take months to resolve. Senator Figueroa and Assemblymember Cox questioned the excessive length of time it has taken DBC to comply with the 1992 law that requires preparation and distribution of the fact sheet, which is intended to apprise consumers of the mercury content of dental amalgam. Although Assemblymember Cox pressed Ms. Coleman for a timeline

for completion of the fact sheet, Ms. Coleman could provide none because the protest was pending before the Department of General Services.

On the licensure by credential issue (which would permit qualified dentists who are licensed in other states to become licensed in California without taking this state's clinical examination), Dr. Simonian noted that "we looked at this quite a lot. I was on the Ad Hoc Committee that presented the issue to the full Board, which questioned whether patients would have as much protection from unqualified dentists as they do under the current system which requires all licensure applicants to take and pass an examination." He also stated that Board members feel licensure by credential will "create a two-tiered dental license, because graduates of unaccredited foreign dental schools who have taken an exam can be licensed here but will not be accepted in other jurisdictions because they have gone to an unaccredited dental school" (see below).

The JLSRC also received input from consumer advocacy organizations, including the Center for Public Interest Law (CPIL), Consumers for Dental Choice (CDC), and Citizens for Health Freedom (CHF). CPIL noted that DBC consists in "supermajority" of dentists regulating dental professionals, and called for conversion of the Board to a public member majority so that government decisions are not made by those with a vested interest in their own decisionmaking. CDC agreed, calling for a board composed of five consumers, five dentists, and two auxiliaries "so no one group is in charge." CHF argued that having a dental board dominated by dentists is like having a police review board composed of police officers.

CDC also complained about DBC's intransigence on preparing a fact sheet that adequately educates consumers about the risks inherent in the use of mercury amalgam fillings in dentistry, and noted that "no one defends the use of mercury in health care except the dental profession." CDC urged the JLSRC to require dentists to affirmatively warn patients of the risks of mercury amalgam and to prohibit the placement of mercury amalgam fillings in vulnerable populations such as children and pregnant women. CDC also called on the state to reimburse for non-amalgam fillings through its Denti-Cal program for low-income citizens; according to CDC, the Denti-Cal program reimburses only for amalgam fillings, which leaves low-income recipients with no choice. CHF agreed with CDC's recommendations on the use of mercury in dentistry, and argued that the state should elevate health factors over cost factors.

The California Dental Association (CDA) testified in opposition to any significant change in the composition of the Dental Board, arguing that DBC frequently looks at "sci-

JLSRC members peppered Board representatives with questions regarding DBC's enforcement program.

CDC also complained about DBC's intransigence on preparing a fact sheet that adequately educates consumers about the risks inherent in the use of mercury amalgam fillings in dentistry, and noted that "no one defends the use of mercury in health care except the dental profession."

HEALTH CARE REGULATORY AGENCIES

entific questions and public health matters that dentists are in a better position to understand." To the extent that DBC has problems with its enforcement program, CDA noted that no one has attributed those problems to a dentist majority on the Board. However, CDA stated it would advocate for the conversion of two existing dentist positions to two dentists who come from academia or public research. CDA also commented on the relationship between DBC and COMDA, which has denigrated into a narrow "duty of the month" focus as DBC feels compelled to examine each and every new function and product to determine whether it may be performed by auxiliaries and under what level of supervision by a dentist. Rather than establishing a "permissive" list of functions and duties that each level of auxiliary may perform, CDA recommended a more comprehensive "non-permissive" scope of practice model for auxiliaries that essentially permits supervising dentists to determine the duties that each employee is competent to perform. According to CDA, the current dental assistant regulatory scheme "is not working" because it does not meet the needs of dentists in various specialties.

CDA also commented on recent findings about the Board's enforcement program, and agreed that it should not take three years to resolve a disciplinary matter, because "that does not serve the public or remove the offender. Conversely, as a professional association, the idea that it takes up to two years for any individual to learn whether they are going to be the subject of an accusation is not acceptable. We need to take steps to ensure the turnaround time at the Board is accelerated." CDA stated that lack of resources is not the problem, because DBC's reserve fund has increased significantly since its last sunset review. CDA called on DBC to use that reserve fund to improve its enforcement program and to enhance its regulatory process, as rulemaking proceedings routinely take two years at DBC.

Finally, CDA observed that DBC has been preoccupied with "micro" issues, rather than "macro" issues, in dentistry. According to CDA, "the Board and COMDA have not addressed their various issues from a 'big picture' perspective but rather from a piecemeal perspective." CDA cited a number of "macro" issues that DBC has not addressed, including the appropriate distribution of dental manpower (especially in light of many underserved communities in California), the licensure of foreign-trained and other-state dentists, specialty licensure, ensuring a pool of adequately trained auxiliaries, and the high cost of dental education. CDA urged the JLSRC to encourage the Board to step back and create a "large context" vision that responds to the needs of all of its constituencies.

The California Dental Hygienists' Association expressed disappointment regarding DBC's response to AB 560 (Perata) (Chapter 753, Statutes of 1997), which established the registered dental hygienist in alternative practice (RDHAP) category. CDHA identified numerous "games" played by DBC in implementing the legislation which have had to be addressed either by DCA or the legislature's budget committee, and which have delayed prompt DBC implementation of the

legislature's intent. According to CDHA, "on January 1, 2001, it will be three years since the legislature passed that bill, and we do not have one new licentiate." CDHA asked the JLSRC to "consider allowing us to regulate ourselves. We are the only profession that is regulated by our employers. We are more than willing to work with CDA so we don't infringe upon the scope of practice of dentists." Further, CDHA urged codification of the scope of practice of auxiliaries in statute, and a change in DBC composition "to prevent a dental blockade." Several lobbyists for dental auxiliaries opined that many DBC dentist members are very patronizing toward auxiliaries (most of whom are women), and that approach has been reflected in longstanding Board opposition to RDHAP legislation and now to its implementation. They urged serious consideration of sunset and/or "strong structural changes" to DBC.

Following the December hearing, the JLSRC prepared draft findings and recommendations and forwarded them to DCA for a 90-day review. On April 4, 2001, DCA reported its recommendations concerning the Dental Board to the JLSRC in a public hearing. The Committee took a final vote on DCA and JLSRC recommendations on April 23, 2001. Those recommendations requiring legislative approval were incorporated into SB 134 (Figueroa) (see 2001 LEGISLATION).

◆ **Sunset Review Recommendations.** Although the JLSRC and DCA agreed that the dental profession should continue to be regulated because the practice of dentistry affects the health and safety of Californians and requires a high level of skill, the JLSRC made the following major recommendations regarding the Dental Board:

• Due to "longstanding dissatisfaction with the deliberations and actions of this Board by...various organizations," the JLSRC recommended that the legislature allow the current membership of the Board to sunset and "reconstitute" the Board as of July 1, 2002. In the meantime, the legislature should consider how the future membership of the board should be composed to assure adequate consumer and dental auxiliary representation and protection. In support of its recommendation, the JLSRC noted that the complaints and concerns expressed at DBC's 2000 sunset hearing were virtually identical to those expressed during DBC's first sunset review in 1996-97. The JLSRC also noted concerns identified in the recent BSA audit and in the independent study of the Board's enforcement program regarding the need for sworn investigators at DBC (see above).

Finally, the JLSRC identified specific issues in which the Board's performance has been substandard and which support its reconstitution recommendation: (1) DBC's recalcitrance and excessive delay in adopting regulations necessary to carry out enacted legislation—particularly when related to dental auxiliaries such as AB 560 (Perata), which created the RDHAP category in 1997 (see above); (2) ignoring the intent of the legislature in enacting legislation (including the RDHAP example); (3) delay and apparent ambivalence, at least initially, with the concerns of the legislature and others

HEALTH CARE REGULATORY AGENCIES

regarding the illegal practice of medicine by licensed dentists through the advertising and performance of elective cosmetic surgery; (4) excessive delay in the Board's enforcement (disciplinary) program, and an inability to identify the causes therefor and to develop and implement a plan to reduce the long periods of time involved at each stage of the disciplinary process; (5) apparent bias against dental auxiliaries—and particularly dental hygienists—as manifested by delay or failure to authorize them to practice procedures that are within their competence through their education and training; (6) excessive delay in revising and releasing the dental materials fact sheet mandated by 1992 legislation which would inform dental patients that dental amalgam contains mercury and the status of scientific findings regarding its use; and (7) the apparent failure of the Board, despite some recent efforts, to improve its case management system, and to recognize the need to implement a more detailed time management system for its investigative activities so that a proper assessment can be made of the productivity, workload, and need for having additional permanent sworn peace officers as its investigators.

• The JLSRC and DCA recommended that the scope of practice for dental auxiliaries (authorized duties) be moved from regulation into statute. While some authorized duties should continue to require the direct supervision of a dentist, others should be clearly delegated to specific categories of practice of the auxiliaries. According to DCA, the Board exercises too much control over the licensing, regulation, and practice of dental auxiliaries. DCA noted there is "a long history to the Board's restrictive actions toward the practices of dental auxiliaries." The Joint Committee and the Department also agreed that a system be established for easy determination of appropriate scope and standards of practice for dental auxiliaries which allows them to adopt and utilize new equipment and emerging technologies as they arise.

• The JLSRC and DCA recommended that DBC inform oral and maxillofacial surgeon permittees about the current statutory limitations on the services they are authorized to perform, and that violations of those limitations—such as advertising certain cosmetic surgery services that are not authorized under a dentist license—should be actively investigated and disciplined. In addition, the JLSRC and DCA recommended that the next occupational analysis of dentistry include a survey of the practices of oral and maxillofacial licensees and a report to the JLSRC on the findings of that analysis.

• The JLSRC and DCA recommended that the current lack of availability of RDHAP educational programs be reviewed, and suggested that current regulatory limitations requiring these programs to be affiliated with dental schools be revised so that certain programs qualify to provide the training required for RDHAP licensure.

Finally, the JLSRC identified specific issues in which the Board's performance has been substandard and which support its reconstitution recommendation.

• The JLSRC and DCA recommended that dentists be required to provide the dental materials fact sheet discussing possible health risks related to mercury amalgams to all patients prior to the performance of any dental restoration that could involve the use of dental amalgam. Dentists should also be required to make the fact sheet available in their offices in a prominent location.

• The JLSRC and DCA recommended that educational requirements be implemented for infection control and CPR on an ongoing basis; and completion of dental jurisprudence coursework should be required on a one-time basis for RDAs and RDHs.

• The JLSRC and DCA recommended that the DCA Director appoint an Enforcement Program Monitor at DBC no later than January 31, 2002. The monitor's duties would include monitoring and evaluating DBC's discipline system and reporting his/her findings to DCA and the legislature. This kind of project has been utilized at other occupational licensing agencies, including the Contractors State License Board (see report on CSLB for further information) and the State Bar. [11:4 CRLR 1; 7:3 CRLR 1]

• In response to the fact that dentists are currently practicing through independent practice associations (IPAs) and dental management service organizations (DMSOs) that are not currently regulated by DBC or the Department of Managed Health Care, the JLSRC recommended that the Board provide it with specific information regarding the activities or services provided by DMSOs and IPAs, the legal relationship between the DMSOs or IPAs and individual dentists and dental patients; why the Board believes that existing dental licensing or health care service licensing laws are inadequate to protect the public; and to sponsor or support relevant legislation.

• The JLSRC recommended that the Board closely monitor the occurrence of problems, morbidity, and mortality resulting from the administration of general anesthesia and oral conscious sedation in dental offices, particularly with respect to minors, to determine the specific cause or causes of injury; whether those causes relate to competency, procedures, equipment, support staff, or facilities; and then take action via regulation, legislation, or otherwise to eliminate those problems.

• Finally, the JLSRC recommended that the Board consider supporting licensure by credential legislation for out-of-state licensed dentists who have met education, training, and examination requirements that are equivalent to California's standards.

At the JLSRC's April 4, 2001 hearing, DBC representatives Kit Neacy, DDS, and Georgetta Coleman urged the Joint Committee not to reconstitute the Board. Neacy noted that the terms of many sitting DBC members are expiring soon,

The JLSRC and DCA recommended that the DCA Director appoint an Enforcement Program Monitor at DBC no later than January 31, 2002.

HEALTH CARE REGULATORY AGENCIES

and stated that prompt attention to these vacancies by the Governor would result in a largely new board without legislative reconstitution. Neacy also characterized DBC's problematic relationship with COMDA and dental auxiliaries as "unfortunate." She noted that "in the real world, the team effort in dentistry makes it work, but in the political arena, it gets to be an 'us vs. them' scenario." She urged the Joint Committee not to sunset the Board because "it does too much good to be sunsetted." Coleman responded to several issues raised by the JLSRC including the dental materials fact sheet issue, and promised that the fact sheet would be issued by the end of the 2000-01 fiscal year.

At this writing, SB 134 (Figueroa) remains pending in the legislature.

COMDA Completes Sunset Review

COMDA submitted its own sunset review report to the JLSRC in October 2000, and was the subject of a separate sunset hearing in December 2000. In its report, COMDA addressed several issues raised by the JLSRC. On the issue whether a new board separate from DBC should be created to regulate dental auxiliaries, COMDA stated that "it has not taken a position on such legislation in the past and does not intend to do so if similar legislation is introduced in the future, for two primary reasons": (1) COMDA support of a new board might be perceived as self-serving; and (2) by statute, COMDA is a committee of DBC, and historically "has not taken public positions that may be contradictory to those of its statutory board."

In April 2001, the JLSRC and DCA released the following major recommendations regarding COMDA and the regulation of dental auxiliaries:

- The JLSRC and DCA recommended that dental auxiliaries should continue to be regulated.

- The JLSRC recommended that the status of the COMDA as a statutorily-created committee of the Dental Board should not be changed at the present time, given its proposed changes to the Dental Board's structure and regulatory authority over dental auxiliaries (see above). If these changes are not enacted or are not successful in improving the Dental Board's representation of the interests of the public and dental auxiliaries, then further consideration should be given to transforming COMDA into an independent licensing agency for dental auxiliaries.

- The JLSRC and DCA recommended that a more structured framework be applied to define the scope of practice for dental auxiliaries and that the scope of practice be based on a general range of duties (rather than an individualized treatment of product or function). According to the Committee and the Department, DBC's current approach fails to provide the flexibility to train and allow dental assistants and

hygienists to perform new functions. In addition, limiting the practice of dental auxiliaries by function and product requires COMDA to continually review and attempt to persuade DBC to update its existing regulations to conform to the standard of practice as it evolves.

- The JLSRC and DCA recommended that all RDAs and applicants for RDA licensure should be required to complete approved courses in radiation safety and coronal polishing to ensure consumer protection.

- The JLSRC recommended that the on-the-job training experience requirement for becoming an RDA should be reduced, as proposed by COMDA, from 18 months to 12 months via any necessary amendment to the current statutory limits.

DBC Grants Petition to Revise Dental Materials Fact Sheet

At its December 1999 meeting, the Board held a public hearing on a petition from Consumers for Dental Choice, a coalition of several national organizations and individuals concerned about potential health risks associated with the use of mercury amalgams in dental fillings, concerning the Board's "dental materials fact sheet" required by Business and Professions Code section 1648.10, and its policy on mercury fill-

ings. CDC's petition noted that section 1648.10—enacted in 1992 under SB 934 (Watson) (Chapter 801, Statutes of 1992)—required DBC to prepare and distribute a fact sheet comparing the risks and benefits of the most commonly used dental restorative materials. In May 1993, DBC developed and distributed a two-page fact sheet that was subsequently found to be

"probably misleading" by DCA [13:2&3 CRLR 6], but was never revised by DBC. In its petition, CDC charged that the 1993 fact sheet violates the statute in at least two respects: (1) it fails to advise dentists of the importance of discussing with patients the full range of choices available; and (2) although it discloses that amalgam contains mercury, the fact sheet fails to disclose that California listed mercury as a toxic substance under Proposition 65 in 1990, and in fact states that the preponderance of scientific evidence fails to show that exposure to mercury from amalgam restoration poses a health risk, except for a small number of allergic and/or sensitive patients. CDC's petition asked the Board to revise the fact sheet to rid it of misleading language on mercury amalgam; meet all existing statutory requirements under section 1648.10; include in the fact sheet the last six years of research documenting the hazards of mercury amalgam; and give dentists guidance on properly warning patients and staff regarding the reproductive toxicity of mercury contained in amalgam. [17:1 CRLR 21-23]

Following a presentation by CDC's Charles Brown and supportive testimony provided by Julie D'Angelo Fellmeth

CDC's petition asked the Board to revise the fact sheet to rid it of misleading language on mercury amalgam; meet all existing statutory requirements under section 1648.10; include in the fact sheet the last six years of research documenting the hazards of mercury amalgam; and give dentists guidance on properly warning patients and staff regarding the reproductive toxicity of mercury contained in amalgam.

HEALTH CARE REGULATORY AGENCIES

of the Center for Public Interest Law, DBC voted to approve staff's recommendation to revise the fact sheet. DBC decided to contract with an outside consultant to complete the revision; staff advised that it would present a proposal for this project to DBC at its March 2000 meeting. The Board agreed to: (1) rid the fact sheet of misleading language; (2) include in the fact sheet all of the statutory requirements regarding the dentist's responsibility to fully inform the patient of the available options for dental restorative materials and encourage dentists to discuss with their patients the advantages and disadvantages of the various dental filling materials; (3) include in the revised fact sheet the past six years of research on the hazards of all dental filling materials; and (4) provide dentists with guidance on warning patients about the reproductive toxicity of the mercury contained in amalgam. The Board also approved a recommendation that the fact sheet address ways in which practitioners may determine patient sensitivity to mercury (for example, a comprehensive health questionnaire).

CDC's petition also asked DBC to revise its California law examination to include questions regarding section 1648.10, to ensure that dentists know of its requirements; the Board approved this request as well. Further, the petition sought inclusion of required coursework on the hazards of mercury exposure to dental office personnel and patients in DBC's continuing education requirements; with Mr. Brown's consent, DBC deferred this issue.

Next, the petition requested the Board to require dentists to advise patients about different types of filling materials. The Board approved a staff recommendation to include a comprehensive discussion of all restorative materials in the revised fact sheet. As an interim measure, DBC agreed to include an article in its licensee newsletter encouraging dentists to discuss the different filling materials with patients. The petition also asked DBC to require its licensees to advise patients and staff that amalgam is 50% mercury, a substance designated under Proposition 65 as a toxic substance. The Board stated it is not authorized to require licensees to post Proposition 65 warnings, but voted to approve a staff recommendation that the newsletter article include a suggestion that dentists discuss with patients the facts that amalgam is 50% mercury and that mercury is a substance designated under Proposition 65 as a toxic substance.

CDC's petition also sought to require dentists to inquire as to whether patients are allergic or sensitive to mercury prior to placing an amalgam filling. The Board agreed to recommend that dentists discuss potential sensitivity and allergic or adverse reactions to mercury with patients. In addition, the petition asked DBC to require dentists to provide the revised fact sheet to any patient who is eligible for a filling. In response, the Board voted to approve a staff recommendation to distribute the revised fact sheet to all licensed dentists and to include in the newsletter article a statement encouraging dentists to discuss their choice of restorative materials with their patients.

Finally, CDC asked that the Board clarify its position on the permissibility of advertising and maintaining a "mercury-free" dental practice, and to refrain from taking disciplinary action against dentists who advocate mercury-free dentistry. [17:1 CRLR 30; 16:2 CRLR 22-23] The Board agreed to publish a newsletter article clarifying that it has no position on the use of dental restorative materials. The article was to clearly state that dental professionals are free to decide what type of restorative materials they will use and to encourage an open discussion of the same with patients.

At DBC's March 2000 meeting, Executive Officer Georgetta Coleman presented a draft request for proposals (RFP) for revision of the dental materials fact sheet by an independent vendor for the Board's approval. Under the RFP, the fact sheet would be completed and submitted to the Board by November 2000, and available to dentists by December 2000. CDC submitted a letter expressing several concerns regarding the RFP: (1) the proposal's breadth fell short of the language of the statute; (2) citizen input was not addressed in the RFP; (3) the RFP failed to require the vendor to address particularly vulnerable sub-populations including pregnant women; (4) the RFP appeared to limit participation to firms that specialize in writing projects for government, whereas scientists who have researched the issues involved in the RFP should also be eligible to bid even if they have not done similar projects; and (5) the RFP did not include a conflict of interest provision.

DCA legal counsel Anita Scuri advised the Board that her understanding of the Board's December 1999 actions was that public input would be considered regarding this draft RFP, and that the contract would then be let and a draft product received, at which time additional public input on the draft would be considered. Scuri stated that Mr. Brown's other concerns are valid and should be considered by the Board. The Board voted to amend the RFP to address CDC concerns (1), (3) and (4). With respect to the conflict of interest provision, the Board voted to require bidding applicants to list any contracts they have with manufacturers or manufacturer organizations, licentiate organizations, parent associations, or affiliates.

In an article in DBC's June 2000 newsletter, Board President Roger Simonian, DDS, described the actions taken by the Board concerning CDC's petition. The article included a statement that each dentist is free to decide what type of restorative materials he/she will use in practice, and that the Board encourages dentists to discuss the choice of restorative materials with patients. Dr. Simonian also noted that the Board had agreed to revise the fact sheet and distribute it to all licensed dentists, and stated the Board's goal to make the fact sheet available by December 2000.

At its December 2000 meeting, DBC reported that it had approved a vendor to revise the fact sheet in June 2000. The contract was awarded, but a protest was filed in October 2000. At its February 2001 meeting, the Board reported that the protest had been resolved and that it was working with the

HEALTH CARE REGULATORY AGENCIES

consultant to prepare the draft fact sheet. Executive Officer Coleman stated that staff intended to have a draft fact sheet and research report delivered to the Board by March 16, 2001. However, no draft was available in March 2001. At the JLSRC's April 2001 hearing, Coleman promised the fact sheet would be revised by the end of the 2000-01 fiscal year. At this writing, the draft fact sheet has been placed on the agenda for DBC's May 2001 meeting, but no revised version has been released for public review or comment.

Ad Hoc Committee on Oral and Maxillofacial Surgery

At DBC's May 1999 meeting, Board President Robert Christoffersen, DDS, announced the appointment of an Ad Hoc Committee on Oral and Maxillofacial Surgery. The Ad Hoc Committee was charged with providing DBC with the most current definition of the specialty of oral and maxillofacial surgery (OMS), and identifying specific procedures in which dentists who complete approved OMS educational programs are trained. In October 1999, the Ad Hoc Committee submitted a report to the Board's Executive Committee. In its report, the committee defined the term "dentistry" as "the evaluation, diagnosis, prevention and/or treatment (nonsurgical, surgical or related procedures) of diseases, disorders and/or conditions of the oral cavity, maxillofacial area and/or the adjacent and associated structures and their impact on the human body provided by a dentist, within the scope of his/her education, training and experience, in accordance with the ethics of the profession and applicable law." The Ad Hoc Committee further defined oral and maxillofacial surgery as "the specialty of dentistry which includes the diagnosis, surgical and adjunctive treatment of diseases, injuries and defects involving both the functional and esthetic aspects of the hard and soft tissues of the oral and maxillofacial region." The Ad Hoc Committee also compiled a list of specific procedures in which dentists completing an OMS program are trained, including procedures to treat traumatic injuries, pathologic conditions, and reconstructive, orthognathic, and cosmetic procedures (including cosmetic surgeries on the nose, face, neck, eyelids, skin, and ears). [17:1 CRLR 23]

At its November 5, 1999 meeting, the Executive Committee considered the Ad Hoc Committee's report and reviewed a recent legislative change in Oregon, which has expanded the scope of practice of dentistry in that state and has allowed Oregon's dental board to determine the list of procedures which OMSs are permitted to provide. The Executive Committee adopted the Ad Hoc Committee's recommendation that DBC appoint a new ad hoc committee, which would include representatives of DBC, CDA, and OMS societies, to "study potential solutions between the discrepancy between training and licensure, considering current law."

At DBC's December 1999 meeting, however, Dr. Christoffersen noted that he had received a letter from Senator Figueroa after having attended the Executive Committee's November meeting. In her letter, the Senator expressed concern about DBC's failure to enforce existing law restricting single-degreed OMSs to the scope of practice defined in Business and Professions Code section 1625. Dr. Christoffersen recommended that the Board reject the Executive Committee's report. A motion to accept the Executive Committee's report failed for lack of a second. Instead, the Board voted to instruct staff to look at methods to improve enforcement efforts regarding advertising by OMS permittees (especially via the Internet) of improper cosmetic surgery services and report back to the Board at its January 2000 meeting. The Board also voted to direct staff to remind all licensees of the current scope of practice of dentistry, and directed legal counsel to study existing law and report ways of improving enforcement in the area of plastic surgery.

On January 24, 2000, DBC mailed a letter to licensees clarifying the scope of practice of a dental license, particularly with respect to performing cosmetic surgery procedures. DBC stated that California law currently prohibits a dentist from performing cosmetic procedures that are not part of the treatment, by surgery or other methods, of disease, lesions, or the correction of malpositions of the human teeth, alveolar process, gums, jaws, or associated structures; "this includes unrelated cosmetic procedures." DBC also noted that cosmetic procedures performed on the

On January 24, 2000, DBC mailed a letter to licensees clarifying the scope of practice of a dental license, particularly with respect to performing cosmetic surgery procedures.

body are clearly medical in nature and not within the scope of practice of dentistry; and rhinoplasty and septoplasty are medical procedures not within the scope of practice of dentistry unless directly

related to and part of treatment for a dental condition, such as facial trauma or congenital maxillofacial anomalies.

At its March 2000 meeting, DBC's Enforcement Committee reviewed a legal memorandum prepared by DCA counsel Anita Scuri outlining enforcement options available to the Medical Board of California (MBC) and the Dental Board to address the issue of dentists who perform cosmetic surgery procedures beyond the scope of a dental license. In her memo, Scuri set forth four options for action by the Medical Board: (1) MBC could issue a citation for the unlicensed practice of medicine and false or misleading advertising; the memo noted that a citation for unlicensed practice of medicine would greatly facilitate DBC in taking action against a dentist's license because it would establish a violation of Division 2 of the Code, which is grounds under Business and Professions Code section 1680(n) for DBC to discipline a dental licentiate for unprofessional conduct; (2) MBC could ask a district attorney to bring an action under Business and Professions Code Section 17200, the state's unfair competition law; (3) MBC may provide assistance to DBC in locating the necessary medical experts to establish

HEALTH CARE REGULATORY AGENCIES

a violation of law; and/or (4) MBC might seek criminal prosecution of unlicensed practice of medicine as a misdemeanor (the memo noted this is not a viable enforcement option due to the difficulty in persuading district attorneys to prosecute such cases criminally).

Scuri's memorandum also identified two enforcement options directed at the Dental Board: (1) the Board could bring an action for unprofessional conduct under Business and Professions Code section 1680(n), particularly if MBC has already cited the dentist for unauthorized practice of medicine; or (2) DBC may bring an enforcement action against the dentist for false and misleading advertising under sections 651 and 1680(k) of the Business and Professions Code. The memorandum stated that a dentist who advertises that he/she performs cosmetic surgery that is unrelated to and not part of treatment for a dental condition implies that he/she may do so legally, which is false and misleading.

The DCA memorandum also recommended that both boards jointly send a letter to residency programs at all California universities that provide oral and maxillofacial residencies. The letter would inform each university as to the scope of practice of a dental license in California, and ask the university to give each of its OMS residents a letter explaining the scope of a dental license with respect to cosmetic surgery procedures. Scuri concluded by recommending that DBC refer all complaints regarding cosmetic surgery by a dentist not related to a dental condition to the Medical Board for issuance of a citation for unauthorized practice of medicine and that this citation be followed by an accusation by the Dental Board charging unprofessional conduct.

Following discussion, the Enforcement Committee voted to make several recommendations to DBC, which the full Board accepted with several modifications. DBC agreed to the following: (1) DBC should refer all complaints regarding cosmetic surgery by a dentist to MBC for possible issuance of a citation for unlicensed practice; (2) should MBC issue a citation, it may be followed by an accusation by DBC charging the licensee with unprofessional conduct; (3) MBC and DBC should send a joint letter to all accredited OMS residency programs and to new California licensees regarding the OMS scope of practice in California; and (4) DBC should investigate any advertising by a dentist advertising cosmetic surgery and issue a citation where warranted.

At DBC's May 2000 meeting, CDA asked the Board to reconsider its decision to send a joint letter from DBC and MBC to all dental residency programs regarding California law relating to dentists performing cosmetic surgery procedures which exceed the scope of practice under the Dental Practice Act. CDA argued that sending this letter to out-of-state schools is unnecessary and that the issue is better addressed by ensuring that dentists applying for licensure in California are aware of California law. After considerable discussion, DBC voted 6-5 not to send the letter.

Licensure By Credential

Under the concept of "licensure by credential," qualified dentists licensed in another state could become licensed in California without taking this state's clinical examination. Since 1998, the Board, its Examination Committee, and an Ad Hoc Committee have studied the concept, which is in place in 33 other jurisdictions and is supported by the American Dental Association (ADA) and CDA. [16:2 CRLR 15]

At its December 1999 meeting, DBC considered the Ad Hoc Committee's recommendation that it sponsor legislation to create a licensure by credential opportunity for an out-of-state dentist who: (1) has been in clinical practice for at least five years (with a minimum of 1,000 hours in each year) immediately preceding the date of application; (2) has passed Parts I and II of the National Board of Dental Examiners' Examination; (3) has graduated from a dental school accredited by the ADA's Commission on Dental Accreditation, or completed a supplementary predoctoral education program of at least two academic years in an accredited dental school and provides certification by the dental school dean that the candidate has achieved the same level of didactic and clinical competence as expected of a graduate of the school's predoctoral program, or verifies having successfully met the requirements for licensure in another state and holds a valid license to practice dentistry in that state; (4) has passed a state or regional clinical licensure examination; (5) holds a current, valid, active, and unrestricted license in another state; (6) presents verification from each state board where he/she is now, or has ever been, licensed, including the status of any past, pending, or active disciplinary actions; (7) submits releases to DBC allowing disclosure of information from the National Practitioner Data Bank and the Drug Enforcement Administration; (8) has no physical or psychological impairment that would adversely affect the ability to safely deliver dental care; (9) provides documentation of 50 units of continuing education earned in the two years preceding application, including any courses required by California; (10) successfully passes an examination on California dental law and ethics; (11) has not failed the California Dental Licensure Examination more than once; (12) has not, within the past five years, failed the California Dental Licensure Examination; and (13) provides other information as is normally requested from applicants for licensure (e.g., fingerprints). [17:1 CRLR 27] Because five members of DBC were not present at the December 1999 meeting, the Board deferred the issue to its January 2000 meeting.

On January 14, 2000, Dr. Christoffersen reported the findings of the Ad Hoc Committee. It was moved and seconded to refer the matter to staff for reassessment; the motion failed. Since this meeting, there has been no further discussion of the issue by the Board. However, CDA is sponsoring legislation to bring licensure by credential to California (see 2001 LEGISLATION).

DBC Approval of Foreign Dental Schools

In 1997, the legislature passed AB 1116 (Keeley) (Chapter 792, Statutes of 1997), which—effective January 1, 2003—revises California’s licensure requirements for foreign-trained dentists and requires the Board to establish a process for the evaluation and approval of foreign dental schools. Specifically, the bill added section 1636.4 to the Business and Professions Code, which “recognizes the need to ensure that graduates of foreign dental schools who have received an education that is equivalent to that of accredited institutions in the United States and that adequately prepare their students for the practice of dentistry shall be subject to the same licensure requirements as graduates of approved dental schools or colleges.” Section 1636.4(b) charges DBC with approving foreign dental schools; in carrying out this function, DBC may contract with outside consultants or a national professional association to survey and evaluate foreign dental schools. Section 1636.4(c) requires the Board to establish a technical advisory group (TAG) to review and comment on the survey and evaluation of a foreign dental school contracted for pursuant to subsection 1636.4(b), and specifies the composition of the TAG. Section 1636.4(d) requires any foreign school wishing to be approved to apply to the Board for approval, and establishes criteria that must be evaluated—including curriculum, faculty qualifications, student attendance, plant and facilities, and other relevant factors—in determining whether the educational program of a foreign school is equivalent to that of accredited institutions in the United States. Subsection (d) charges the Board, “with the cooperation of the technical advisory group,” with identifying in regulation the standards, review procedures, and methodology to be used in the approval process. Section 1636.4(e) requires the Board to make periodic surveys and evaluations of all approved schools to ensure continued compliance with the standards, and permits DBC to grant “provisional” and “full” approval to foreign dental schools.

In 1997, the legislature passed AB 1116 (Keeley) (Chapter 792, Statutes of 1997), which—effective January 1, 2003—revises California’s licensure requirements for foreign-trained dentists and requires the Board to establish a process for the evaluation and approval of foreign dental schools.

At DBC’s January 2000 meeting, Board member Robert Christoffersen, DDS, reported that he and staff had drafted regulations to implement section 1636.4, and recommended that DBC appoint an interim TAG consisting of himself, UCLA School of Dentistry Associate Dean Bob Lindemann, and two members to be identified at a later time. The interim TAG would review the preliminary standards drafted by Board staff, consider input from schools requesting approval, hold informational hearings, and present the Board with its recommendations on regulations, standards, and processes that should be adopted. DBC approved this recommendation.

Throughout 2000, the TAG held informational hearings and meetings to formulate uniform standards for the evaluation of foreign dental schools. Dr. Christoffersen presented draft regulatory language to DBC at its August 2000 meet-

ing, and the Board voted to publish the regulations for a public hearing at its December 2000 meeting.

On October 13, 2000, DBC published notice of its intent to amend section 1000, repeal existing section 1024.1, and adopt new sections 1024.1 and 1024.3–.12, Title 16 of the CCR, to implement AB 1116. DBC proposes to amend section 1000 to define numerous terms used in its new regulations. New section 1024.1 would define required dental school institutional standards in the areas of mission, purpose, objectives, admissions policies, curriculum, faculty and staff, plant and facilities, patient care services, research, ownership and management, administration, school catalog, student records, and maintenance of records. New sections 1024.3–.5 would identify the application form which a foreign school seeking DBC approval must complete and set forth procedures and timeframes for DBC’s processing of an application. Under section 1024.9, an application that has not been completed by the applicant within one year after it was initially filed is considered abandoned.

New section 1024.6 would require a five-member onsite inspection and evaluation team to make a “comprehensive, qualitative onsite review of each institution that applies for approval not later than 180 days after the board’s receipt of a complete application.” The site team, to be appointed by DBC, shall consist of one DBC dentist member, one member of DBC’s staff, and “three recognized U.S. dental educator consultants expert in accreditation, one of whom shall be designated by the board from a list of three nominees submitted by the school seeking evaluation. This nominee shall not be affiliated in any way with the applicant. The board shall make every effort to include on the team one member who has knowledge of the country’s culture and educational processes.” Section 1024.6 would also set forth the duties of the site team, including preparation of a report (with specified contents) for submission to the TAG. The TAG will review the site team’s report and make a recommendation to DBC, which shall decide whether to approve the school. Under section 1024.10, DBC may grant “provisional approval” to a foreign school that is substantially in compliance with its requirements but has specific deficiencies or weaknesses that are of such a nature they can be corrected within a reasonable period of time.

Section 1024.7 would establish an application fee of \$1,000 and a renewal fee of \$500, and require the foreign school to pay all reasonable costs incurred by Board staff and the site visit team. Section 1024.8 would require an approved foreign school to notify DBC of any changes in its location, mission or purpose, name, and shift or change in control. Section 1024.11 would require an approved institution to submit a renewal application prior to expiration of its approval, and establish that the institution remains in compliance with

HEALTH CARE REGULATORY AGENCIES

these requirements. Section 1024.12 would authorize DBC to withdraw its approval of an institution that no longer meets applicable requirements at any time, so long as it first sends the institution a written statement specifying its deficiencies and gives the institution 120 days in which to respond. At this point, a TAG will be convened to review DBC's allegations and the institution's response, and make a written recommendation to the Board.

Following its December 2000 public hearing, DBC approved the proposed regulations and forwarded them to the Office of Administrative Law (OAL) on January 3, 2001. However, on April 5, 2001, DBC withdrew the regulations from OAL because the Department of Finance will not approve a five-member site team. At this writing, DBC is re-writing the regulations for resubmission.

"Personal Attendance" Requirement

Prior to 2001, the Dental Practice Act required that a dentist with more than one office location be at each practice at least 50% of the time that the practice is open for the practice of dentistry. AB 497 (Gallegos) (Chapter 224, Statutes of 2000) repeals this requirement (see 2000 LEGISLATION). On October 13, 2000, the Board published notice of its intent to repeal section 1046, Title 16 of the CCR, to bring its regulations into conformity with the new law. Following a public hearing at its December 2000 meeting, DBC approved the proposed repeal. OAL approved the repeal on April 2, 2001.

Fee for Oral Conscious Sedation Certificate

On May 15, 2000, OAL approved DBC's emergency amendments of section 1021, Title 16 of the CCR, to establish a \$200 application fee and a \$200 renewal fee for a certificate authorizing oral conscious sedation of patients under the age of 13 on an outpatient basis. The amendments became effective immediately for a 120-day period. On June 23, 2000, DBC published notice of its intent to permanently adopt the amendments, but reduced the renewal fee to \$75 because of objections raised by CDA. DBC held a public hearing on the proposed amendments at its August 2000 meeting, after which the Board adopted the proposed regulatory changes. OAL approved the amendments on October 18, 2000.

Application Deadlines for Auxiliary Examinations

On June 23, 2000, in response to a COMDA recommendation considered by DBC at its May 2000 meeting, the Board published notice of its intent to amend section 1076, Title 16 of the CCR, to change the deadlines for the filing of applications to sit for the RDH, RDAEF, and RDHEF examinations. Under the amendments, candidates wishing to sit for those exams must submit a completed application no later than 45 days prior to the scheduled date of the exam. Following a public hearing at its August 2000 meeting, DBC approved the regulatory language. OAL approved the amendments on February 22, 2001.

Other DBC Rulemaking

The following is an update on other rulemaking proposals published and considered by DBC in recent months, some of which are described in more detail in Volume 17, No. 1 (Winter 2000) of the *Reporter*:

◆ **RDHAP Program Regulations.** In 1998, DBC adopted regulations to implement AB 560 (Perata) (Chapter 753, Statutes of 1997), which created a new category of licensure for the registered dental hygienist in alternative practice (RDHAP). Under Business and Professions Code section 1768 *et seq.*, a licensed RDHAP may practice as an employee of a dentist or of another RDHAP, as an independent contractor, or as a sole proprietor of an alternative dental hygiene practice. An RDHAP may perform duties to be established by DBC in the following settings: residences of the homebound, schools, residential facilities and other institutions, and dental health professional shortage areas certified as such by the Office of Statewide Health Planning and Development. An RDHAP may only perform services for a patient who presents a written prescription for dental hygiene services issued by a licensed dentist or physician who has performed a physical examination and rendered a diagnosis of the patient prior to providing the prescription; the prescription is valid for no more than 15 months from the date it was issued. DBC adopted new sections 1073.2, 1073.3, 1079.2, 1090, and 1090.1, Title 16 of the CCR, to implement AB 560. [16:2 CRLR 17] In August 1999, the Office of Administrative Law (OAL) disapproved these regulations, citing DBC's failure to satisfy the clarity requirements under Government Code section 11349.1 and failure to follow the procedural requirements of the Administrative Procedure Act. [17:1 CRLR 26-27] The Board was granted an extension until February 7, 2000 to correct these deficiencies and resubmit the rulemaking file to OAL.

At a February 4, 2000 teleconference meeting, the Board approved modifications to the language of new sections 1073-1090.1. Citing concerns raised by the author of AB 560 (Perata), the Board severed section 1090(d) from the rulemaking file; section 1090(d) dealt with the required contents of a prescription for RDHAP services. The Board then approved the remaining regulations as modified. OAL approved the regulations as modified on May 31, 2000, and they became effective on June 30, 2000.

In a subsequent rulemaking proceeding published on March 24, 2000, the Board proposed to amend section 1090(c) to define the information required in a prescription for dental hygiene services to be performed by an RDHAP without supervision by a dentist. Proposed section 1090(c)(1) requires all prescriptions authorizing unsupervised RDHAP services to include (a) the preprinted name, address, license number, and signature of the prescribing dentist or physician; (b) the name, address, and phone number of the patient; and (c) the date the services are prescribed and the expiration date of the prescription. The prescription shall be for dental hygiene ser-

HEALTH CARE REGULATORY AGENCIES

VICES and, if necessary, shall include special instructions for the care of that patient. After a public hearing on May 12, 2000, the Board adopted the proposed regulatory language; OAL approved the amendments to section 1090 on August 15, 2000.

◆ **Specialty Advertising.** At its August 1999 meeting, DBC adopted sections 1054, 1054.1, 1054.2, and 1054.3, Title 17 of the CCR, to implement Business and Professions Code section 651, which limits the right of some dentists to advertise their credentials and specializations. Essentially, these regulations permit dentists to advertise credentials and specialty certifications conferred by specialty boards recognized by the ADA. If a specialty board is not recognized by the ADA, a certified dentist is prohibited from advertising certification unless the board requires, for certification, the successful completion of (a) a formal advanced education program at or affiliated with an accredited dental or medical school equivalent to at least one academic year beyond the predoctoral curriculum, (b) an oral and written examination based on psychometric principles, and (c) training and experience subsequent to successful completion of (a) and (b) above to assure competent practice in the dental discipline as determined by the private or public board or parent association which grants the credentials. Further, a dentist certified by a board not recognized by the ADA and who advertises that certification in California must include the following statement: “[name of announced dental discipline] is a discipline not recognized as a dental specialty by the Dental Board of California,” and must disclose that he/she is a “general dentist” in any advertising which references the dentist’s credential. [17:1 CRLR 24–25]

On January 26, 2000, OAL disapproved the Board’s regulations because DBC failed to adequately respond to public comment; did not properly incorporate by reference the guidelines developed by the Commission on Dental Accreditation; and added supporting materials to the rulemaking record without providing notice of that addition and making those materials available for public comment.

After correcting the deficiencies identified by OAL, DBC resubmitted the rulemaking package to OAL on April 20, 2000; OAL approved the regulatory package on April 24, 2000. However, one portion of these regulations was subsequently found to be invalid because it violates dentists’ commercial speech rights under the first amendment. In *Bingham, et al. v. Hamilton*, a federal court invalidated subsection 1054.1(b)(1)(A), which required dentists certified by boards not recognized by DBC to have completed (as part of their board certification requirements) at least one year of formal advanced education at an accredited dental or medical school before they may advertise their certification in California (see LITIGATION). In light of the court’s ruling, the Board repealed subsection 1054.1(b)(1)(A) effective November 15, 2000. As such, dentists who are certified by a board not recognized by the ADA may not advertise that certification un-

less the board requires, for certification, the successful completion of an oral and written examination based on psychometric principles, and training and experience subsequent to passage of the exam to assure competent practice in the dental discipline as determined by the private or public board or parent association which grants the credentials. Such a dentist must also include the disclosures required by section 1054.1.

◆ **Placement of Antimicrobial or Antibiotic Medicaments by an RDH.** In May 1999, COMDA recommended that section 1088, Title 16 of the CCR, be amended to allow an RDH—at the instruction and under the general supervision of a licensed dentist—to place antimicrobial or antibiotic medicaments (such as a chlorhexidine chip called the “periochip”) which do not later have to be removed. After extended public comment in which the safety of the chip to patients was questioned by the California Society of Periodontists (CSP) and defended by a representative of a chip manufacturer, a motion to adopt COMDA’s recommendation was defeated, as was a second motion to allow the proposed duty under direct supervision. The Board said it needed additional time for research and would revisit the proposal in a year. [17:1 CRLR 27]

At DBC’s August 1999 meeting, Board President Christoffersen noted that the Board had received about 75 letters prompted by the May decision to reject COMDA’s recommendation; many of the letters questioned whether, in refusing to permit RDHs to place antimicrobial and antibiotic medicaments, the Board was essentially disallowing all subgingival irrigation by RDHs. [17:1 CRLR 27] In order to clarify this issue, the Board decided to amend section 1088 to clarify that RDHs may—under the general supervision of a licensed dentist—irrigate subgingivally with an antimicrobial and/or antibiotic liquid solution (such as peridex). On November 26, 1999, the Board published notice of its intent to so modify section 1088; following a public hearing at its January 2000 meeting, DBC adopted the proposed amendment. OAL approved it on April 25, 2000.

The Board returned to the issue of the placement of chips and other medicaments at its March 2000 meeting, when a representative of a chip manufacturer made a presentation to the Board (including a demonstration of the placement of the chip) and stressed that the chip has been approved by the U.S. Food and Drug Administration; as such, he urged the Board to focus on who may place the chip rather than the safety of the chip. At its May 2000 meeting, the Board reconsidered its decision concerning the proposed RDH duty, and—over the objection of CSP—voted to hold an informational hearing at its August 2000 meeting. Following that hearing, the Board directed the staff to prepare regulatory language to amend section 1088 to allow RDHs to place antimicrobial or antibiotic medicaments which do not later have to be removed under the direct supervision of a dentist.

Thus, on December 22, 2000, DBC published notice of its intent to so amend section 1088. Following a public hear-

HEALTH CARE REGULATORY AGENCIES

ing at its February 2001 meeting, the Board again rejected the proposed amendment, citing concerns about the safety and efficacy of the products to be used in performing this duty. During the public comment period at the February 2001 meeting, Board member Katie Dawson, RDH, requested that the May 2001 Board meeting agenda include an item adopting an emergency regulation prohibiting any licensed dentist from placing any antimicrobial or antibiotic subgingival medicaments that do not have to be removed. In written testimony filed with the Board in February 2001, JoAnn Galliano of the California Dental Hygienists' Association agreed with Dawson, noting that "it was evident from the Board's decisions, based on the testimony from the members of CSP and members of the faculty at USC, that there is great concern about untold consumer harm from the use of such medicaments. Therefore, CDHA is in agreement with Ms. Dawson that if consumer harm could result from the placement of such products despite FDA approval, then the Board should restrict all practitioners from using them." Subsequently, Board member Christoffersen called for reconsideration of the vote on subgingival placement of such products by RDHs; at this writing, that vote is scheduled for the Board's May 2001 meeting.

◆ **Expansion of RDA Functions.** After a public hearing at its December 1999 meeting, the Board approved its proposed amendment of section 1086, Title 16 of the CCR, which sets forth the functions that may be performed by RDAs. The amendments permit RDAs—under the direct supervision of a dentist—to bleach teeth with non-laser light-curing devices and to fabricate temporary crowns. [17:1 CRLR 25] OAL approved these amendments on January 24, 2000, and they became effective on February 23, 2000.

◆ **New Component of RDA Practical Examination.** After a public hearing at its December 1999 meeting, DBC approved its proposed amendment to section 1081.1, Title 16 of the CCR, which sets forth the required components of the RDA practical exam. The amendment adds fabrication of a temporary crown to the list of required components of the exam. [17:1 CRLR 25; 16:2 CRLR 16] OAL approved the amendment on March 9, 2000.

◆ **Expansion of RDAEF/RDHEF Functions.** Following a public hearing at its December 1999 meeting, DBC approved amendments to sections 1087 and 1089, Title 16 of the CCR; these amendments allow extended function auxiliaries to remove excess cement from subgingival tooth surfaces with a hand instrument, and apply etchant for bonding restorative materials. [17:1 CRLR 25–26] OAL approved these amendments on April 27, 2000; they became effective on May 27, 2000.

◆ **Regulations Governing Oral Conscious Sedation on Children.** On March 14, 2000, OAL approved DBC's adop-

tion of new sections 1044, 1044.1, 1044.2, 1044.3, 1044.4, and 1044.5, Title 16 of the CCR. These regulations implement the requirements of AB 2006 (Keeley) (Chapter 513, Statutes of 1998), which prohibits dentists from administering or ordering the administration of oral conscious sedation on an outpa-

tient basis to a patient under the age of 13 unless the dentist holds either a GA permit issued by the Board under Business and Professions Code section 1646.1, a CS permit from the Board under section 1647.2, or a new "oral conscious sedation certificate" created

by the bill. [17:1 CRLR 24; 16:1 CRLR 40] Because the Board was not able to adopt these regulations prior to the original effective date of AB 2006 (Keeley), CDA sponsored AB 869 (Keeley) in 2000 to delay the implementation date of AB 2006 to December 31, 2000 (see 2000 LEGISLATION).

2000 LEGISLATION

AB 497 (Gallegos), as amended June 28, 2000, repeals the requirement that a dentist with more than one office be personally present at each practice location at least 50% of the time that it is open for the practice of dentistry; and instead provides that the Dental Practice Act does not prohibit a dentist from maintaining more than one office practice location provided that dentist does all of the following: (a) assumes legal responsibility and liability for the dental services rendered in each location, in addition to any existing legal responsibility or liability; (b) ensures that each office complies with the supervision requirements of the Dental Practice Act; and (c) posts a sign with the dentist's name, mailing address, telephone number, and dental license number in an area likely to be seen by all patients. This bill was signed by the Governor on August 22, 2000 (Chapter 224, Statutes of 2000).

AB 869 (Keeley), as amended January 24, 2000, delays the implementation date of AB 2006 (Keeley) (Chapter 513, Statutes of 1998) from January 1, 2000 until December 31, 2000. AB 2006 prohibits a dentist from administering or ordering the administration of oral conscious sedation on an outpatient basis to a patient under the age of 13 unless the dentist holds either a GA permit issued by the Board under Business and Professions Code section 1646.1, a CS permit from the Board under section 1647.2, or a new "oral conscious sedation certificate" created by AB 2006. [16:1 CRLR 40] CDA sponsored AB 869 because DBC's rulemaking proceeding to adopt regulations implementing AB 2006 was not complete by January 1, 2000 (see MAJOR PROJECTS); the bill is intended to provide dentists with more time to comply with California's oral conscious sedation certification law. As an urgency measure, AB 869 became effective immediately upon being signed by Governor Davis on April 5, 2000 (Chapter 9, Statutes of 2000).

AB 2381 (Longville), as amended August 8, 2000, would have required the state Department of Health Services to study

Board member Katie Dawson, RDH, requested that the May 2001 Board meeting agenda include an item adopting an emergency regulation prohibiting any licensed dentist from placing any antimicrobial or antibiotic subgingival medicaments that do not have to be removed.

HEALTH CARE REGULATORY AGENCIES

pathogenic bacteria in fluid dispensing devices, including dental office waterlines, to determine whether they cause disease manifestation and are a threat to public health. Although DBC voted to support this bill, the Governor vetoed it on September 25, 2000. According to the Governor's veto message, "the public health risk from dental office waterlines has already been studied. Indeed, the federal Centers for Disease Control and Prevention found the risk to be minimal and has published guidelines to safeguard public health by using simple disinfecting control practices. These guidelines are already incorporated into California Dental Board regulations."

AB 2394 (Firebaugh), as amended August 30, 2000, establishes a Task Force on Culturally and Linguistically Competent Physicians and Dentists. The bill names the DBC Executive Officer as a member of the Task Force, along with at least 13 others. Duties of the Task Force include developing recommendations for continuing education programs that include language proficiency standards; identifying key cultural elements necessary to meet cultural competency; assessing the need for voluntary certification standards; holding hearings and meetings to obtain input from ethnic minority groups; and reporting its findings to the legislature by January 1, 2003. The bill also creates a subcommittee of the Task Force, which must examine the feasibility of establishing a pilot program that would allow Mexican and Caribbean physicians and dentists to practice in nonprofit community health centers in California's medically underserved areas. The subcommittee must report its findings to the Task Force by March 1, 2001, and the Task Force must forward that report and any additional comments to the legislature by April 1, 2001. Finally, this bill requires DBC and the Medical Board to pay for the administrative costs created by this bill. AB 2394 was signed by the Governor on September 28, 2000 (Chapter 802, Statutes of 2000).

SB 1889 (Figueroa), as amended August 23, 2000, clarifies Business and Professions Code section 27, which currently requires DBC and other DCA agencies to post certain information on the Internet regarding their licensees. SB 1889 requires DBC to allow its licensees who use their home address as their official "address of record" to provide a post office box or other alternate address which will be posted on the Internet. The bill also specifies that it does not preclude an agency from also requiring a licensee who has provided an alternative mailing address as his/her address of record to also provide a physical business address or residence address only for the agency's internal administrative use and not for disclosure as the licensee's address of record or disclosure on the Internet. This bill was signed by the Governor on September 29, 2000 (Chapter 927, Statutes of 2000).

The following bills reported in Volume 17, No. 1 (Winter 2000) died in committee or otherwise failed to be enacted during 2000: **AB 1065 (Ducheny)**, which would have required DHS to create a pilot project to increase dental services for Medi-Cal eligible infants and children; **SB 292 (Figueroa)**, which would have required dental insurers and HMOs to af-

ford second opinions to their enrollees; **SB 1259 (Brulte)**, which would have required dental health plans to cover dental services legally rendered by an RDHAP; **SB 1215 (Perata)**, which would have created a Board of Dental Allied Health Professionals; and **AB 498 (Longville)**, which would have made it unprofessional conduct for a dentist to allow a dental unit waterline to become contaminated, as specified.

2001 LEGISLATION

SB 134 (Figueroa) is DBC's sunset bill (see MAJOR PROJECTS). As amended April 30, 2001, SB 134 would allow the provisions creating the existing Dental Board and its executive officer position to sunset on July 1, 2002; and would simultaneously create a new board with a new sunset date of July 1, 2005. The bill would extend the existence of COMDA to July 1, 2005.

The bill would also require the DCA Director to appoint a Dental Board Enforcement Program Monitor no later than January 31, 2002, to monitor and evaluate the Board's discipline system and to report his/her findings to DCA and to the legislature every six months for a two-year period.

SB 134 would also require DBC to inform all oral and maxillofacial surgery permittees of existing statutory limitations on the services permitted under the authority of a dentist license, and shall advise the permittees that violations of those limitations, including but not limited to advertising certain cosmetic surgery services not authorized by a dentist license, shall be actively investigated and disciplined by DBC.

Finally, prior to the performance of a dental restoration that could involve the use of dental amalgam, SB 134 would require dentists to provide their patients with the dental materials fact sheet required by Business and Professions Code section 1648.10, and to discuss the possible health risks related to mercury amalgam. [A. B&P]

SB 724 (Committee on Business and Professions), as introduced February 23, 2001, is a DCA omnibus bill that would make the following changes to the Dental Board's statutes: (1) repeal a subsection of Business and Professions Code section 1647.12 that allows a dentist to be certified in oral conscious sedation for pediatric patients by submitting documentation that he/she has successfully performed ten oral conscious sedations on minors; (2) add new section 1621 to the Business and Professions Code, requiring DBC to use, in the administration of its licensure examinations, only examiners whom it has appointed and who meet specified criteria; (3) provide for a disabled inactive status and reduce the license fee for any licensee who can demonstrate that he/she is unable to practice dentistry due to a disability; and (4) repeal various sunset dates on the GA permit requirement. [A. Appr]

SB 826 (Margett), as amended April 5, 2001, would extend the DCA Director's authorization to designate an additional seven peace officers to be assigned to the Dental Board until January 1, 2003. The Director's current authorization is effective only through July 1, 2002. [A. B&P]

HEALTH CARE REGULATORY AGENCIES

AB 564 (Lowenthal) as amended April 17, 2001, would make it unprofessional conduct for a dentist to fail to notify the Board orally within 48 hours, and in writing within seven days, when a patient dies or is admitted to a hospital as a result of dental treatment, and would allow the Board to inspect a dental office upon receipt of a report if the Board finds it necessary. The bill would also authorize the Board to conduct an inspection upon receipt of a report of any incident involving oral sedation that required medical assistance. AB 564 would also require the Board to submit a report to the legislature on or before January 1, 2003, regarding reports it receives on deaths or hospitalizations as a result of dental treatment. [A. Appr]

AB 447 (Firebaugh), as amended April 2, 2001, would require that a faculty member of any dental college and a dentist who practices in a community clinic each be considered for appointment to the Board. This bill is sponsored by CDA (see MAJOR PROJECTS). [A. Health]

AB 269 (Correa), as amended April 5, 2001, would create the Division of Enforcement Oversight within DCA. Under the direction of the DCA Director, the Division would monitor and evaluate the consumer complaint and discipline system of each DCA board (including DBC). Further, the bill would require the executive officer of each DCA board to be appointed by a three-member panel comprised of a representative of the board, the DCA Director, and the Governor's appointments secretary. [A. B&P]

AB 1045 (Firebaugh). AB 2394 (Firebaugh) (Chapter 802, Statutes of 2000) established the Task Force on Culturally and Linguistic Competent Physicians and Dentists (see above). As introduced February 23, 2001, AB 1045 is a spot bill that would require the Task Force subcommittee's report on the feasibility of a pilot program allowing Mexican and Caribbean licensed physicians and dentists to practice in non-profit community health centers in medically underserved areas in California to be incorporated into law by the enactment of a statute. [A. Health]

SB 573 (Chesbro), as amended April 16, 2001, would authorize the Board to issue a special permit to practice dentistry in community or nonprofit clinics to dentists licensed to practice in other states and who meet specified criteria. [A. B&P]

AB 668 (Chan), as amended March 27, 2001, would require the Office of Statewide Health Planning and Development to create and administer the California Dentist Loan Forgiveness Program for dentists who agree to practice in underserved areas, and would provide that the program be implemented only for those years in which a general fund appropriation is made to fund the activities required by the bill. [A. Appr]

AB 1428 (Aanestad), as amended April 18, 2001, would authorize the Board to issue a license to a dentist who is cur-

rently licensed to practice in another state without satisfying examination or other requirements, provided that dentist submits the following: (1) a completed application and all required fees; (2) proof of a currently valid dental license issued by another state; (3) proof that the applicant has been in clinical practice for at least five years before applying; (4) proof that the applicant has not been subject to disciplinary action by any state in which he/she has been licensed; (5) a signed release allowing disclosure of specified information from national databanks; (6) proof that the applicant has not failed the California examination in the last five years; and (7) documentation of completion of 50 units of continuing education within the last two years. This bill is sponsored by CDA to implement licensure by credential, upon which DBC has been unable to agree for several years (see MAJOR PROJECTS). [A. Appr]

AB 1026 (Oropeza), as introduced February 23, 2001, would authorize a dentist to advertise that his/her practice is limited to a specific field if the dentist is certified or meets certification requirements, or the advertisement discloses that he/she is a general dentist. It would also authorize a dentist who has credentials from a specialty board recognized by the American Dental Association to advertise as a specialist; dentists with credentials from a private or public board or parent association not recognized by the ADA may advertise those credentials only under specified circumstances. [A. Health]

AB 1360 (Pescetti), as amended April 18, 2001, would require dentists to disclose to their patients whether they carry professional liability insurance, require a signed disclosure form to be placed in the patient's record, and authorize DBC to prescribe the form for the disclosure. [A. Appr]

LITIGATION

On May 15, 2000 in *Bingham v. Hamilton*, 100 F. Supp. 2d 1233 (E.D. Cal. 2000), a federal court ruled that DBC's regulations banning the advertisement of certain credentials violate its licensees' commercial speech rights under the first amendment.

Licensee Perry Bingham and the American Academy of Implant Dentistry (AAID) challenged section 1054.1, Title 16 of the CCR, one provision of DBC's advertising regulations under Business and Professions Code section 651. As noted above (see MAJOR PROJECTS), section 1054 of DBC's advertising regulations permits licensees to advertise

On May 15, 2000 in *Bingham v. Hamilton*, a federal court ruled that DBC's regulations banning the advertisement of certain credentials violate its licensees' commercial speech rights under the first amendment.

specialty certifications and credentials if they have been granted by specialty boards recognized by the ADA. Section 1054.1 applies to specialty certifications and credentials awarded by specialty boards not recognized by the

ADA, and prohibits California licensees from advertising those certifications and credentials unless the specialty board requires, for certification, the successful completion of (a) a formal advanced education program at or affiliated with an

HEALTH CARE REGULATORY AGENCIES

accredited dental or medical school equivalent to at least one academic year beyond the predoctoral curriculum, (b) an oral and written examination based on psychometric principles, and (c) training and experience subsequent to successful completion of (a) and (b) above to assure competent practice in the dental discipline as determined by the private or public board or parent association which grants the credentials. Further, a dentist certified by a board not recognized by the ADA and who advertises that certification in California must include the following statement: “[name of announced dental discipline] is a discipline not recognized as a dental specialty by the Dental Board of California,” and must disclose that he/she is a “general dentist” in any advertising which references the dentist’s credential.

Plaintiff Bingham is a licensed California dentist practicing general dentistry. He is member of AAID, which is not recognized by the ADA, and has been awarded the “Fellow” and “Diplomate” rankings in implant dentistry from AAID. Bingham wants to advertise his AAID credentials but is barred from doing so under section 1054.1 because AAID does not require at least one academic year of coursework at a dental or medical school for certification.

The court noted that plaintiffs’ challenge arises from the interaction of four sets of facts and circumstances: (1) any dentist with a general license to practice as a dentist may practice implant dentistry in California; there is no requirement for any special training or education beyond that required for the license to practice as a dentist; (2) implant dentistry is not one of the eight specialties recognized by the ADA; (3) AAID arguably fills the gap between the general dentist and the ADA specialist by awarding the credentials of “Fellow” and “Diplomate” in implant dentistry to licensed dentists who have completed certain requirements, including testing, several hundred hours of continuing education in implant dentistry, and clinical experience in implant dentistry; and (4) California law delegates specialty board approval (for purposes of advertising) to DBC, and DBC’s newly-adopted regulations bar Bingham from advertising his AAID credentials. In their lawsuit, plaintiffs challenged only section 1054.1(b)(1)(A)’s requirement of one year of education; they did not challenge the disclosure requirements or the testing, training, and experience requirements of other subsections of section 1054.1.

Once it reached the merits of the case, the court ruled that plaintiffs’ advertisement of AAID credentials is commercial speech protected under the first amendment. Under longstanding caselaw, states may prohibit false, deceptive, or misleading advertising. Commercial speech that is not false, deceptive, or misleading may be restricted, but only if the state demonstrates that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest. Citing *Peel v.*

Attorney Registration & Disciplinary Comm’n of Illinois, 496 U.S. 91 (1990), the court found that the advertisement of specialties or credentials from professional organizations is not inherently misleading to the public; “even if the public might potentially be misled..., less restrictive regulations requiring disclosure could address this potential well short of an outright prohibition.” Citing *Ibanez v. Florida Dep’t of Business and Professional Regulation*, 512 U.S. 136 (1994), the court ruled that the mere claim that commercial speech may be potentially misleading does not satisfy the state’s burden to demonstrate that the harm to the public is real and that restricting speech will alleviate the harm. Applying these principles, the court said that the Dental Board’s prohibition on advertising AAID credentials could be sustained only if there is a demonstrable potential that the public may be misled and that a flat prohibition, rather than less restrictive measures, is needed to address the problem.

According to the court, “the Dental Board’s contention that the advertisement of AAID credentials will mislead members of the public is not persuasive...[A]s in *Peel*, there is nothing inherently or necessarily misleading about the advertisement of the AAID’s credentials.” DBC did not contend that AAID’s credentials are meaningless or that they are a sham; nor did it argue that one year of postgraduate education is required to perform implant dentistry. DBC’s primary contention was that “consumers assume that professional credentials are backed by at least one year of postgraduate academic work,” and consumers might believe that the creden-

tials are in some way sponsored by the Dental Board. According to the court, “while plausible concerns, the Dental Board has virtually no evidence beyond conjecture that any of these concerns has real substance. The only evidence that the Dental Board offers...is

conclusory, anecdotal, and speculative.”

The court went on to say that, even if the Board had shown the potential for deception, it failed to show that a complete prohibition on the advertising is necessary. The Board’s concerns could be addressed by requiring the advertisements to say that AAID credentials are not recognized by the Board or the ADA; and the remaining portion of the regulation already requires the advertising to state that implant dentistry is not a recognized specialty of DBC. Thus, the court invalidated section 1054.1(b)(1)(A) of the Board’s regulations as unconstitutional. DBC later repealed that subsection of its regulations (see MAJOR PROJECTS).

In *Lin v. State of California*, 78 Cal. App. 4th 931 (2000), the Fourth District Court of Appeal held that dentists are not entitled to an administrative hearing on regulations which require state authorization prior to services being rendered to Denti-Cal patients. Appellants are approved Denti-Cal providers; Denti-Cal patients comprise 85% of their practice, and the majority of the dental services provided by appellants are

In *Lin v. State of California*, the Fourth District Court of Appeal held that dentists are not entitled to an administrative hearing on regulations which require state authorization prior to services being rendered to Denti-Cal patients.

HEALTH CARE REGULATORY AGENCIES

restorative services (dental fillings). The controversy arose when the state Department of Health Services (DHS), which administers Denti-Cal, notified appellants by letter that they must obtain prior authorization from DHS prior to performing restorative services, and that failure to do so would result in denial of payment for said services. DHS sent its letter after performing a utilization review and determining that, among other things, appellants were billing for services not performed. The preauthorization requirement was to remain in effect for one year, and did not preclude the dentists from treating Denti-Cal patients.

Appellants petitioned the superior court for a writ of administrative mandate, contending that the prior authorization requirement would result in "approximately 75%" of their patients not returning due to delay, the closure of their business, and the inability to gain employment elsewhere as the prior authorization requirement would follow them to a new job. Appellants also alleged that DHS failed to comply with section 51455(c), Title 22 of the CCR, by not informing them of the nature, type, and extent of services determined to have been unnecessary. DHS responded that appellants have no proprietary interest in continuing as Denti-Cal providers. Moreover, DHS characterized appellants' argument as not constitutionally significant as they presented no evidence that they could not continue their practices without Denti-Cal, nor is it the court's role to ensure that appellants continue to make money. The trial court initially found that DHS' prior authorization notice did not comply with the applicable regulations and stayed the prior authorization requirement, continued the hearing, and ordered DHS to provide appellants with details of the dental care determined to be unnecessary. DHS complied, giving appellants a detailed list of patients and procedures. The trial court then dissolved the stay and denied the petition.

On appeal, appellants argued that DHS' refusal to provide a hearing on the issue of prior authorization deprived them of due process. The Fourth District stated that due process rights attach only to recognized liberty or property interests and noted that providers of Medicare services and related programs have no protected interest in continued participation in such programs. The court cited *Margulis v. Myers*, 122 Cal. App. 3d 335 (1981), a similar California case in which a physician was held not to have a right to a hearing prior to the imposition of preauthorization requirements. In *Margulis*, the court found there is no state or federal statute or regulation that requires a state agency to afford providers of services an administrative hearing before implementing a prior authorization policy; therefore, the physician was not entitled to such a hearing. Here, as in *Margulis*, appellants' relationship with Denti-Cal had not been terminated, and appellants may continue to provide services to Denti-Cal patients subject to the inconvenience of obtaining prior authorization. The appellate court went on to say that appellants have no entitlement to continued participation in the Denti-Cal program. Thus, there was no deprivation of due process, and the Fourth

District affirmed the trial court's denial of the writ.

On remand from the U.S. Supreme Court, the U.S. Ninth Circuit Court of Appeals held, in *California Dental Association v. Federal Trade Commission*, 224 F.3d 942 (2000), that the Federal Trade Commission (FTC) failed to prove that the advertising restrictions imposed on dentists by CDA are anticompetitive. The FTC alleged that CDA's advertising guidelines are being applied in a way that restricts truthful, nondeceptive advertising in violation of 15 U.S.C. section 45.

Part of the American Dental Association, CDA is a non-profit trade association for licensed dentists in California; about 75% of dentists licensed in California belong to CDA. In exchange for membership fees, CDA members are provided with a variety of services, including lobbying, marketing and public relations, seminars on practice management, and continuing education courses. CDA also has several for-profit subsidiaries from which members can obtain liability and other types of insurance, financing for equipment purchases, long distance calling discounts, auto leasing, and home mortgages. As a condition of membership, dentists agree to follow CDA's Code of Ethics, including detailed advertising guidelines which purportedly help members comply with California law.

The FTC filed a complaint against CDA, alleging that its application of its advertising guidelines restricts truthful, nondeceptive advertising—a violation of federal antitrust law and the FTC Act. After a trial by an administrative law judge, the Commission found that (1) the FTC has jurisdiction over CDA; (2) CDA's restrictions on price advertising were unlawful *per se*, and (3) CDA's non-price advertising guidelines were unlawful under the abbreviated "quick look" rule of reason analysis. The Commission issued a cease and desist order restricting CDA from enforcing its advertising guidelines. On appeal, the U.S. Ninth Circuit Court of Appeals affirmed the FTC's jurisdiction over CDA, disagreed that CDA's restrictions are unlawful *per se*, but found them unlawful under the "quick look" rule of reason analysis. [16:2 CRLR 22–23; 16:1 CRLR 42] On a 5–4 vote, the U.S. Supreme Court upheld the FTC's jurisdiction over CDA but held that whether CDA's advertising restrictions are anticompetitive must be decided under a full "rule of reason" analysis and not under the "quick-look" analysis applied by the lower courts. [17:1 CRLR 29–30]

The rule of reason analysis consists of three components: (1) the persons or entities to the agreement intend to harm or restrain competition; (2) an actual injury to competition occurs; and (3) the restraint is unreasonable as determined by balancing the restraint and any justifications or procompetitive effects of the restraint.

The Ninth Circuit looked first to determine whether CDA intended to harm or restrain competition. The court reexamined the record and found that the evidence allegedly showing intent was ambiguous, and that CDA had offered plausible, if self-serving, procompetitive justifications for the restrictions. Therefore, the court said, the issue of intent dropped

HEALTH CARE REGULATORY AGENCIES

out of the rule of reason inquiry, and the case would hinge on the actual economic consequences of the association's restrictions.

The Ninth Circuit then examined several factors identified by the Supreme Court as having a potentially procompetitive, rather than anticompetitive, effect: (1) misleading advertising for professional services might be particularly harmful to consumers because of inherent difficulties in obtaining accurate information about service quality (*i.e.*, information asymmetries); (2) consumers are relatively loyal to the professionals who have treated them previously; (3) the restrictions at issue here are much less severe than a complete ban on advertising; (4) some advertising methods prohibited by the restrictions might, in the long run, drive consumers away from dentists; (5) the advertising restrictions might prevent consumers from being misled into believing that they are receiving more of a bargain than they are actually receiving; and (6) the advertising restrictions might amount to no more than a procompetitive ban on puffery.

The Ninth Circuit then examined the evidence presented by the FTC and by CDA on these issues to determine whether the net effect of the advertising restrictions was anticompetitive or procompetitive. In order to prevail under rule of reason analysis, the FTC must show that CDA's restrictions engendered a net harm to competition in the California dental services market.

The FTC presented a report containing empirical evidence that somewhat comparable time, place, and manner restrictions on legal advertising are thought to raise the price of legal services; however, this evidence was found of limited cross-profession applicability by the authors of the report. Case law usually requires the antitrust plaintiff to show some relevant data from the precise market at issue in the litigation—dental services in this case. According to the Ninth Circuit, the FTC did not prove that dentists who advertise lower prices (through methods prohibited by the regulations) offer below-average prices, or that dentists who advertise the high quality of their services are superior to those dentists

who do not. Finally, the FTC failed to quantify any increase in price or reduction in output of dental services resulting from CDA's restrictions.

The court then examined the record for evidence that the advertising restrictions had an actual procompetitive effect, and found that (1) full disclosure of prices corrects for informational asymmetries between dentists and patients over price; (2) full disclosure of prices allows for easier comparative shopping by price-conscious consumers; (3) the ban on across-the-board discount advertisements prevents dentists from misleading their patients into believing that their services are a better bargain than they really are; and (4) the restrictions on quality advertising may make it more difficult for dentists to manipulate their patients' assessments of care quality. The court found that CDA's arguments were supported by expert testimony and anecdotal evidence from individual dentists practicing in California. This analysis led the court to conclude that the FTC failed to demonstrate substantial evidence of a net anticompetitive effect. The court vacated the judgment and remanded the case to the FTC with instructions to dismiss the case.

RECENT MEETINGS

At its December 1999 meeting, DBC elected Roger Simonian, DDS, as President; Kit Neacy, DDS, as Vice-President; and Richard Benveniste, DDS, as Secretary. COMDA elected Bobbi d'Arc, RDA, as Chair; Rhona Lee, RDHEF, as Vice-Chair; and Patricia Morris, RDA, as Secretary.

At its December 2000 meeting, DBC elected Kit Neacy as President; Richard Benveniste as Vice-President; and Mark Goldenberg, DDS, as Secretary. COMDA elected Rhona Lee as Chair; Patricia Morris as Vice-Chair; and Stephanie Lemos, RDH, as Secretary.

FUTURE MEETINGS

2001: May 10–11 in San Diego; August 3 in Oakland; November 29–30 in Sacramento.

2002: To be announced.