BOARD OF CHIROPRACTIC EXAMINERS

Executive Director: Vivian R. Davis (916) 739-3445

In 1922, California voters approved an initiative which created the Board of Chiropractic Examiners (BCE). Today, the Board's enabling legislation is codified at Business and Professions Code section 1000 *et seq.*; BCE's regulations are located in Division 4, Title 16 of the California Code of Regulations (CCR). The Board licenses chiropractors and enforces professional standards. It also approves chiropractic schools, colleges, and continuing education courses.

The Board consists of seven members, including five chiropractors and two public members.

MAJOR PROJECTS:

OAL Approves Board's Scope of Practice Amendments. On October 23, the Office of Administrative Law (OAL) approved an amended version of section 302, Title 16 of the CCR, which BCE adopted pursuant to the settlement agreement in *California Chapter of the American Physical Therapy Ass'n, et al. v. California State Board of Chiropractic Examiners, et al.*, Nos. 35-44-85 and 35-24-14 (Sacramento County Superior Court). In early 1991, the court approved a settlement reached by the parties in their long-running dispute over the validity of section 302, which defines the scope of chiropractic practice. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 195; Vol. 11, No. 3 (Summer 1991) pp. 183–83; and Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 199 for extensive background information on this case and new section 302.)

On October 17, the Board approved modified language of new section 317(v), and released copies of the modified text for an additional public comment period which lasted until December 5, when the Board held a public hearing on the modified text. Also compelled by the settlement agreement in the litigation, the amended version of proposed section 317(v) would make it unprofessional conduct for a chiropractor not to refer a patient to an appropriate physician, surgeon, podiatrist, or dentist if, in the course of a diagnostic evaluation, the chiropractor detects an abnormality that indicates that the patient has a physical condition, disease, or injury that is not subject to appropriate management by chiropractic methods and techniques and if that patient is not already under the care of an appropriate physician, surgeon, podiatrist, or dentist for that physical condition, disease, or injury. At this writing, the Board has not yet submitted section 317(v) to OAL for approval.

Board Revises Examination Requirement Proposal. On December 5, the Board substantially revised its proposed amendments to regulatory section 349(b), which sets forth BCE's examination requirements. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 195 for background information.) Under the new version of proposed section 349(b), effective January 1, 1993, BCE would require all applicants for California licensure to submit proof to the Board of successful completion of Parts I and II of the National Board Examination prior to being eligible to sit for California practical examinations; under the Board's originally proposed version of section 349(b), BCE would have required successful completion of all three parts of the National Board Examination, including physiotherapy. BCE decided to delete Part III and physiotherapy as requirements after learning that it lacks sufficient statutory authority to require them. Due to this substantial modification in language, the Board plans to republish notice of its intent to amend section 349(b) and commence a new rulemaking process.

OAL Rejects Board's Proposed Regulation Governing Out-of-State Licensees. On December 2, OAL rejected the Board's proposed adoption of section 312.3, regarding the ability of chiropractors licensed in other states to render professional services and/or evaluate or judge any person in California; this regulatory action was originally the subject of a December 1990 public hearing. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 196; Vol. 11, No. 3 (Summer 1991) p. 183; and Vol. 11, No. 1 (Winter 1991) p. 136 for background information.) Section 312.3 would have provided that an unlicensed chiropractor must actively consult with a chiropractor licensed in California each time professional services are rendered to a person in California, and defined the term "professional services" to include the rendering of professional judgments and/or evaluations regarding any person for insurance purposes. OAL found that the rulemaking record on section 312.3 failed to comply with the authority, consistency, necessity, and clarity standards of Government Code section 11349.1, and that the Board failed to adequately respond to public comments.

According to OAL, the Board's initial statement of reasons (ISR) indicated that the proposed regulation was "intended to restrict a chiropractor unlicensed in California from reviewing patient records for . . . insurance purposes." OAL found that "[a]lthough the Board has the authority to regulate the licensing of chiropractors, it does not have the authority to establish new grounds for the violation of the Chiropractic Act nor does it have authority to regulate insurance companies' review of claims under health benefit plans." OAL stated that California courts have interpreted the Chiropractic Act to define the term chiropractic to mean a "system of therapeutic treatment for various diseases, through the adjusting of articulation of the human body, particularly those of the spine, with the object of relieving pressure or tension upon nerve filaments. The operations are performed with the hands, no drugs being administered." OAL opined that this definition of chiropractic (and thus the extent of the Board's regulatory authority) implies actual physical relationship with a patient, as opposed to the review or evaluation of a patient's record. Thus, OAL found that the "definition of review and examination of insurance claims as practice of chiropractic is in conflict with the intent of the Chiropractic Act."

OAL also found that the Board's intent as stated in its ISR—"to prohibit a chiropractor not licensed in the State of California from rendering professional services to a patient in California unless he/she is consulting with the treating chiropractor who has a California license"—does not correspond to the proposed text, which does not specify that the California chiropractor must be the chiropractor who is treating the patient.

The Board attempted to justify the necessity of the proposed regulation by stating that "insurance companies utilize out-of-state consultants to review patient records and report their findings back to the insurance companies as they pertain to length of treatment, type of treatment, and fees." OAL stated that the implication in the Board's factual basis is that an out-of-state chiropractor will have a direct influence on the type of treatment to be received by a patient in California. According to OAL, this line of reasoning "misses the point because a chiropractor employed by an insurance company to review patient records cannot really prevent the treatment of a patient in California. It is not the chiropractor reviewing the insurance record that prescribes treatment, it is the California chiropractor that is actually treating the patient." Further, the Board argued that the chiropractor reviewing the insurance claim has not seen the patient or possibly the patient's X-rays and there-

fore does not have adequate information with which to make a proper determination. OAL noted that the proposed regulation "does not really address that issue because it only restricts unlicensed chiropractors and does not apply to chiropractors in California."

The Board has until April 1 to appeal OAL's decision or modify and resubmit section 312.3 to OAL for approval.

Board Revises "No-Out-of-Pocket Expense" Advertising Regulation. On October 17, the Board held a public hearing on its proposed amendments to section 317(u), which would prohibit chiropractors from entering into agreements with patients to waive, abrogate, or rebate the deductible and/or co-payment amounts of any insurance policy by forgiving any of the patient's obligation or payment, unless the insurer is notified in writing in each such instance. Where a chiropractor uses "no-out-of-pocket-expense" as an advertising or marketing procedure, section 317(u) sets forth the language of a required disclosure which must be included on the chiropractor's statement and insurance billing, to enable the insurer to adjust its payment if necessary. (See CRLR Vol. 11, No. 3 (Summer 1991) p. 183; Vol. 11, No. 1 (Winter 1991) p. 136; and Vol. 10, No. 4 (Fall 1990) p. 166 for background information.)

Following the hearing, the Board made minor revisions to the proposal and released the modified text for an additional 15-day public comment period, which expired on November 15. On December 5, the Board adopted the amendments, which await review and approval by OAL.

Mid-Level Review Panel Regulations Rejected Again. On October 16, OAL again rejected BCE's proposed adoption of section 306.1, which would have authorized the Board to create Mid-Level Review Panels as part of its discipline system, and section 306.2, which would have provided legal representation by the Attorney General's office in the event that a person hired by or under contract to the Board to provide expertise to BCE, including a Mid-Level Review Panel member, is named as a defendant in a civil action. (See CRLR Vol. 11, No. 4 (Fall 1991) pp. 195–96; Vol. 11, No. 3 (Summer 1991) p. 183; and Vol. 11, No. 2 (Spring 1991) p. 167 for background information.)

In rejecting the regulatory package, OAL noted that the submitted version of section 306.1 has been revised three times by the Board and has "changed so dramatically from that which the Board originally proposed that members of the public were not adequately placed on notice that the final regulation could have resulted from that originally proposed," in violation of Government Code section 11346.8(c). Specifically, OAL noted that the originally-noticed version of section 306.1 stated that chiropractors under review by a Mid-Level Review Panel would participate on a voluntary basis, and that records of Panel proceedings would not be subject to discovery or subpoena. However, the version adopted by BCE and submitted to OAL mandates licensees' participation, under threat of unspecified "administrative action," in a process which is no longer confidential and may result in the use of materials in further, more formal disciplinary proceedings.

In addition, OAL found that "section 306.1 is unclear in that it: (a) differs from the Board's description of its intended effect; (b) is hard to understand; (c) is not a complete regulatory scheme; and (d) contains ambiguous and undefined terms." OAL also found that section 306.2 is unclear in that it differs from the description of its intended effect and contains ambiguous terms.

The Board has 120 days from the date of OAL's disapproval to appeal the decision or submit a revised rulemaking package on these proposals.

"Adjustment" Definition Regulation Proposed. On December 5, the Board approved draft language of proposed section 310.3, Title 16 of the CCR, which would define adjustment and/or manipulation of hard tissues as manually or mechanically moving hard tissues beyond their passive physiological range of motion by applying a forceful thrust. According to the Board, such a definition is necessary for the proper enforcement of existing regulations, such as section 312, which prohibits the unlicensed practice of chiropractic in California. At this writing, BCE has not yet published the language for public comment.

Continuing Education. In December, BCE submitted to OAL its proposed regulatory amendment to section 356, which would specify that four hours of each licensee's annual twelve-hour continuing education requirement must be completed in adjustive technique, and must be satisfied by lecture and demonstration. (See CRLR Vol. 11, No. 3 (Summer 1991) p. 183 and Vol. 11, No. 2 (Spring 1991) pp. 166–67 for background information.) At this writing, the Board is awaiting OAL's decision.

Board Issues Warning to Licensees. In an October 8 letter to all California chiropractors, BCE noted that various devices being used or offered for use by chiropractors in the treatment and diagnosis of their patients have not been generally recognized as safe or effective and have not been approved in California through the necessary approval process. Such devices, which are considered to be "new devices" within the meaning of Health and Safety Code section 26020, include electroacupuncture diagnostic devices, cold helium-neon laser stimulation devices, magnets, and ion pumps. According to BCE, such devices may not be legally sold or administered within this state. BCE also notes that it is against the law to advertise or deliver any device which is falsely advertised, including representing as safe or effective a new device which has not been approved for sale within this state.

However, the letter also referred to the federal Investigational Device Exemption regulations, which permit a device that otherwise would be required to comply with performance standards or undergo premarket approval to be shipped lawfully for the purpose of conducting investigations of that device (21 C.F.R. Part 812.1). The letter states that chiropractors "are hereby cautioned that representing as safe and effective such new devices described above as an inducement for sale, or administering such devices without due consideration of the Investigational Device Exemption regulations will be considered and pursued as a violation of California law."

LEGISLATION:

AB 316 (Epple), as amended April 23, would provide that, notwithstanding Business and Professions Code section 650 or any other provision of law, it shall not be unlawful for a person licensed pursuant to the Chiropractic Act, or any other person, to participate in or operate a group advertising and referral service for chiropractors, under eight specified conditions. The bill authorizes BCE to adopt regulations necessary to enforce and administer this provision, and to petition the superior court in any county for the issuance of an injunction restraining conduct which is in violation of this section. AB 316 also provides that it is a misdemeanor for a person to operate a group advertising and referral service for chiropractors without providing its name and address to BCE. This two-year bill is pending in the Assembly Health Committee.

SB 664 (Calderon) would prohibit chiropractors, among others, from charging, billing, or otherwise soliciting payment from any patient, client, customer, or third-party payor for any clinical labo-

ratory test or service if the test or service was not actually rendered by that person or under his/her direct supervision, except as specified. This bill is pending in the Senate Business and Professions Committee.

RECENT MEETINGS:

At its October 17 meeting, the Board approved sixteen out of twenty continuing education (CE) seminars seeking recognition by BCE. The Board refused to approve two separate CE seminars entitled *Surface Electromyography in Chiropractic Practice* and sponsored by Life Chiropractic College and National College of Chiropractic, stating that electromyography is currently an experimental area in the field of chiropractic. Citing this same reluctance to approve CE courses covering experimental areas in the field of chiropractic, the Board also refused to approve a course entitled *Standards of Care for Intact Spinal Column-Pelvic-Meningeal Unit Integral System Disorders*, sponsored by Life Chiropractic College-West. Furthermore, the Board refused to approve a course entitled *Chiropractic Philosophy*, sponsored by Sherman College Straight Chiropractic, because this course would review philosophical rather than practical aspects of the field of chiropractic care.

Also at the October 17 meeting, Dr. Keith Wells of the Los Angeles College of Chiropractic appeared before the Board to request that BCE consider administering its examinations three times each year, as opposed to its current practice of holding the exams twice each year. Stating that chiropractic college graduates currently have difficulty obtaining a license to practice chiropractic within six months after graduation and incur financial hardship, Dr. Wells asserted that a third exam, preferably in February, would allow recent graduates from chiropractic colleges to take the state examination and obtain a license within four months after graduation. Furthermore, an additional exam administration each year would reduce the number of examinees at each session, making it easier for BCE to manage the examination and providing examiners with more quality time with examinees. An additional examination date would increase the cost of the application fee, but Dr. Wells said that, based on an informal survey, students might be willing to pay a reasonable increase in the application fee which would accompany the addition of a third examination. The Board agreed to address the possibility of offering a third examination date at a future Board meeting.

At its December 5 meeting, BCE discussed whether any regulatory action is necessary to allow out-of-state chiropractors to participate at a planned Olympic Training Center (OTC) in San Diego. Presently, an effort is being made to establish a chiropractic room within the facility and to allow chiropractic access to this facility in the same manner as is presently being done at OTC locations in Colorado Springs and Lake Placid. Section 16 of the Chiropractic Act of California allows a chiropractor licensed in another state or territory to practice chiropractic in California so long as he/she consults with a licensed chiropractor in California, and so long as the out-of-state chiropractor does not open an office or place to receive patients within the limits of the state. However, the Olympic Training Committee may not allow a consulting California chiropractor onsite every time a sports chiropractor from another state is selected to work at the OTC.

Among the solutions which the Board is considering is the possible creation of a committee of licensed certified sports chiropractors, who would act as consultants to out-of-state chiropractors at the OTC in San Diego. One of the consultants would be notified each time an out-of-state chiropractor attends the OTC, and the consultant would be available by telephone and fax machine for the out-of-state chiropractor for the duration of his/her stay at the OTC. The Board is currently investigating whether regulatory or legislative action will be necessary in order to implement this proposal, and will address this subject at future meetings.

FUTURE MEETINGS:

April 23 in Sacramento.
June 9 in San Diego.
August 27 in Sacramento.
October 8 in Los Angeles.
December 17 in Sacramento.

HORSE RACING BOARD

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The California Horse Racing Board (CHRB) is an independent regulatory board consisting of seven members. The Board is established pursuant to the Horse Racing Law, Business and Professions Code section 19400 *et seq.* Its regulations appear in Division 4, Title 4 of the California Code of Regulations (CCR).

The Board has jurisdiction and power to supervise all things and people having to do with horse racing upon which wagering takes place. The Board licenses horse racing tracks and allocates racing dates. It also has regulatory power over wagering and horse care. The purpose of the Board is to allow parimutuel wagering on horse races while assuring protection of the public, encouraging agriculture and the breeding of horses in this state, generating public revenue, providing for maximum expansion of horse racing opportunities in the public interest, and providing for uniformity of regulation for each type of horse racing. (In parimutuel betting, all the bets for a race are pooled and paid out on that race based on the horses' finishing positions, absent the state's percentage and the track's percentage.)

Each Board member serves a four-year term and receives no compensation other than expenses incurred for Board activities. If an individual, his/her spouse, or dependent holds a financial interest or management position in a horse racing track, he/she cannot qualify for Board membership. An individual is also excluded if he/she has an interest in a business which conducts parimutuel horse racing or a management or concession contract with any business entity which conducts parimutuel horse racing. Horse owners and breeders are not barred from Board membership. In fact, the legislature has declared that Board representation by these groups is in the public interest.

At its December 13 meeting, CHRB reelected Henry Chavez and William Lansdale for another one-year term as Chair and Vice-Chair, respectively.

MAJOR PROJECTS:

Board Proposes Amendments to Controlling Authority Regulation. On December 6, CHRB published notice of its intent to amend section 1402, Title 4 of the CCR, which provides that the Board's laws, rules, and orders govern thoroughbred, harness, quarter horse, Appaloosa, Arabian, paint, and mule racing. Section 1402 also authorizes stewards to enforce rules or conditions of breed registry organizations if those rules or conditions are not inconsistent with the Board's rules. These organizations are The Jockey Club for thoroughbred racing, the United States Trotting Association for harness racing, the Appaloosa Horse Club for appaloosa racing, the Arabian Horse Registry of America for arabian racing, the American Paint Horse Association for paint racing, and the American Mule Association for mule racing.

According to the Board, section 1402 is currently written in general terms and