notes that California has also become increasingly concerned with CLARB's inability to "revisit" exams that have produced such poor passing scores, or to demonstrate the defensibility of its exam. BLA stated that another factor influencing its decision concerns the capacity of a national exam to adequately measure all of the knowledge, skills, and abilities that are critical for the safe performance of landscape architecture in California, or in any other state. According to BLA, it is "attempting to strike a balance between State laws for licensure, candidates, the profession, and reciprocity with other State Boards." Finally, the letter informed fellow boards that California will offer a reciprocity exam for out-of-state candidates, covering content areas specific to practicing landscape architecture in California which are not covered in CLARB's exam, and noted that "[w]hile a national exam would appear to ostensibly 'guarantee' licensee reciprocity, a California local exam will in no way prohibit it."

After making minor modifications to the letter, BLA directed staff to forward the letter to the various state boards of landscape architecture by August 1.

Human Resources Strategies Submits Five-Year Proposal. On June 30, BLA's 1993 exam contractor, Human Resources Strategies (HRS), submitted its five-year proposal for developing and administering the Board's licensing examination. HRS' proposed administration plan includes the objectives of enhancing the objectivity and scoring reliability of the performance component of the exam; reducing the turnaround time for scoring and reporting results; reducing the number of appeals through a fair and technically sound examination process; and developing a computerized applicant tracking, scoring, and reporting system. HRS promised to work closely with subject matter experts representing both academic and practitioner perspectives in order to develop relevant exam content, and to maintain a fair passing rate that is representative of those candidates who are fully qualified to safely and effectively practice landscape architecture. HRS also provided BLA with cost estimates for the five-year test administration period; according to the estimates, per-candidate testing costs will range from approximately $325 in 1993 to approximately $375 in 1997. BLA hopes that exam administration will become so efficient that it will be able to offer its licensing exam twice per year, instead of the annual exam currently administered by CLARB.

At BLA's July 17 meeting, HRS representatives Anita Kamouri and Mark Blankenship updated the Board on HRS' plans for the landscape architecture examination administration. HRS is currently seeking qualified subject matter experts to assist in the development of the examination. Also, BLA President Larry Chimbole announced that HRS' Project Advisory Committee would consist of BLA members Bob Hablitzel and Greg Burgener, BLA Executive Officer Jeanne Brode, DCA legal counsel Don Chang, and landscape architects Ken Nakaba and Brian Powell.

Board Considers Terminating CLARB Membership. Although BLA has decided not to utilize CLARB's licensing examination (*see supra*), it currently remains a member of the national Council. At its July 17 meeting, the Board discussed whether it should continue its CLARB membership. BLA Executive Officer Jeanne Brode reported that the annual membership fee is $1,200; that fee is expected to increase to $1,400 in 1993. In addition to allowing member boards to purchase CLARB's examination, that fee provides member boards with information regarding continuing education, the code of ethics, and site visitations, among other things. The Board directed Brode to determine all of the services that CLARB provides for its member boards; BLA will continue this discussion at a future meeting.

Rulemaking Update. At this writing, BLA's amendments to sections 2610 and 2671, Title 16 of the CCR, still await review and approval by the Office of Administrative Law. Amendments to section 2610 would change the deadline for filing an application for the licensing exam from the current requirement of at least ninety days prior to the date of the examination to on or before March 15 of the year in which the application is made. Amendments to section 2671 would require a landscape architect to include his/her name and the words "landscape architect" in all public presentments. *[12:1 CRLR 68]*

LEGISLATION

SB 2044 (Boatwright) declares legislative findings regarding unlicensed activity and authorizes all DCA boards, bureaus, and commissions, including BLA, to establish by regulation a system for the issuance of an administrative citation to an unlicensed person who is acting in the capacity of a licensee or registrant under the jurisdiction of that board, bureau, or commission. SB 2044 also provides that if, upon investigation, BLA has probable cause to believe that a person is advertising in a telephone directory with respect to the offering or performance of services, without being properly licensed by the Board to offer or perform those services, the Board may issue a citation containing an order of correction which requires the violator to cease the unlawful advertising and notify the telephone company furnishing services to the violator to disconnect the telephone service furnished to any telephone number contained in the unlawful advertising. This bill was signed by the Governor on September 30 (Chapter 1135, Statutes of 1992).

AB 2743 (Frazee) requires that a landscape architect's certificate number and renewal date of the certificate appear on plans, specifications, and other instruments of service and contracts therefor, prepared for others, as specified. Additionally, this bill enables BLA to create a "cost recovery program"—in disciplinary proceedings, the Board is authorized to request the administrative law judge to direct the licentiate, in certain circumstances, to pay the Board a sum not to exceed the reasonable costs of the investigation and enforcement of the case. This bill was signed by the Governor on September 30 (Chapter 1289, Statutes of 1992).

RECENT MEETINGS

At its July 17 meeting, the Board discussed its options in light of probable mandatory budget cutbacks. In response to a proposed 50% reduction to the Board's travel line item, BLA proposed to transfer the location of all Board meetings to Sacramento and limit out-of-state travel to two Board members on one trip per year. BLA directed staff to develop alternatives to two other proposed options (reducing BLA committee meetings to two per year and eliminating the Executive Officer's visits to landscape architectural schools).

FUTURE MEETINGS

February 19 in southern California.

MEDICAL BOARD OF CALIFORNIA

Executive Director: Ken Wagstaff
(916) 920-6393
Toll-Free Complaint Number:
1-800-MED-BD-CA

The Medical Board of California (MBC) is an administrative agency within the state Department of Consumer Affairs (DCA). The Board, which consists of twelve physicians and seven nonphysicians appointed to four-year terms, is divided into three autonomous

divisions: Licensing, Medical Quality, and Allied Health Professions.

The purpose of MBC and its three divisions is to protect the consumer from incompetent, grossly negligent, unlicensed, or unethical practitioners; to enforce provisions of the Medical Practice Act (California Business and Professions Code section 2000 *et seq.*); and to educate healing arts licensees and the public on health quality issues. The Board's regulations are codified in Division 13, Title 16 of the California Code of Regulations (CCR).

The functions of the individual divisions are as follows:

MBC's Division of Licensing (DOL) is responsible for issuing regular and probationary licenses and certificates under the Board's jurisdiction; administering the Board's continuing medical education program; and administering physician and surgeon examinations for some license applicants.

In response to complaints from the public and reports from health care facilities, the Division of Medical Quality (DMQ) reviews the quality of medical practice carried out by physicians and surgeons. This responsibility includes enforcement of the disciplinary and criminal provisions of the Medical Practice Act. It also includes the suspension, revocation, or limitation of licenses after the conclusion of disciplinary actions. The division operates in conjunction with fourteen Medical Quality Review Committees (MQRC) established on a geographic basis throughout the state. Committee members are physicians, other health professionals, and lay persons assigned by DMQ to review matters, hear disciplinary charges against physicians, and receive input from consumers and health care providers in the community.

The Division of Allied Health Professions (DAHP) directly regulates five nonphysician health occupations and oversees the activities of eight other examining committees and boards which license podiatrists and non-physician certificate holders under the jurisdiction of the Board. The following allied health professions are subject to the oversight of DAHP: acupuncturists, audiologists, hearing aid dispensers, medical assistants, physical therapists, physical therapist assistants, physician assistants, podiatrists, psychologists, psychological assistants, registered dispensing opticians, research psychoanalysts, speech pathologists, and respiratory care practitioners.

DAHP members are assigned as liaisons to one or two of these boards or committees, and may also be assigned as liaisons to a board regulating a related area such as pharmacy, optometry, or nursing. As liaisons, DAHP members are expected to attend two or three meetings of their assigned board or committee each year, and to keep the Division informed of activities or issues which may affect the professions under the Medical Board's jurisdiction.

MBC's three divisions meet together approximately four times per year. Individual divisions and subcommittees also hold additional separate meetings as the need arises.

On August 12, Governor Wilson announced his appointments to fill five vacancies on the Medical Board. Dr. Lawrence D. Dorr and Cathryne B. Warner were named to fill vacancies on DMQ left by Dr. Andrew Lucine and Frank Albino, respectively. Dorr is a physician at Kerlan-Jobe Clinic in Inglewood and a professor of orthopedic surgery at the University of Southern California. He is also a member of the American Board of Orthopedic Surgeons, the Knee Society, and the Association of Arthritis, Hip and Knee Surgeons. Warner recently served as an assistant to the Governor and director of his Bay Area office, and previously worked in various positions in the Reagan administration. She is also a member of the board of the Cancer Support Community and chairs the Breast Cancer Survivor Committee for the Susan G. Komen Foundation's "Race for the Cure 1992."

The Governor appointed Dr. Mike Mirahmadi and Barbara Stemple to DAHP to fill vacancies left by Dr. John Tsao and Alfred Song, respectively. Mirahmadi is currently chief of staff of West Side Hospital and president of Brotman Hospital IPA. He is also a member of the Kidney Foundation and the International Society of Nephrology. Stemple is senior vice-president of the Greater San Diego Chamber of Commerce, where she coordinates the Chamber's health committee and represents it on the San Diego Child Care Coalition. She is also a former member of the Alcohol and Drug Abuse Prevention Task Force and is currently a member of the SAFE Kids Coalition and the Federal Emergency Management Agency's Technical Advisory Panel.

The Governor also appointed Dr. Alan E. Schumacher to fill Dr. J. Alfred Rider's position on DOL. Schumacher is director emeritus for the division of neonatology at the Children's Hospital of San Diego, and is certified by the American Board of Pediatrics. At this writing, the Governor has not named a replacement for outgoing DOL public member Audrey Melikian.

MAJOR PROJECTS

CBS News Focuses on Problems in MBC's Physician Discipline System. In a June 14 segment entitled *Negligent Doctors*, CBS News' "60 Minutes" revealed serious problems in the Medical Board's system of disciplining California physicians. Reporter Mike Wallace charged that the Board has been seriously remiss in discharging its duty to prevent dangerous doctors from continuing to practice medicine. Citing the infamous cases of Dr. Richard Boggs (in which MBC has failed to move against Dr. Boggs' license even though he apparently prescribed addictive drugs which led to the deaths of three patients, had his privileges revoked by three hospitals, suffered a large medical malpractice judgment, and was convicted of murder) and Dr. Milos Klvana (in which the Board failed to act in the face of complaints from nine women whose infants had died during or shortly after birth due to an overdose of the labor-inducing drug Pitocin by Dr. Klvana), Wallace questioned whether the Board is providing even minimal consumer protection.

Specifically, "60 Minutes" revealed that the Medical Board—which is statutorily charged with protecting consumers from incompetent or impaired physicians—does not disclose to inquiring consumers the facts that a physician has been convicted of felonies, suffered medical malpractice judgments or settlements, or had his/her admitting privileges revoked or suspended by a hospital, even though these facts are required to be reported to MBC. The segment even included footage of Wallace calling MBC's license verification unit, in the presence of Executive Director Ken Wagstaff, to inquire about the disciplinary records of several physicians who have been convicted of multiple felonies related to the practice of medicine. Wallace was told that Dr. Boggs (who is serving a life sentence for conspiracy, fraud, grand theft, and murder) has no disciplinary record, and that it took the Medical Board five years following the felony convictions to take disciplinary action against two other physicians.

Wagstaff admitted that the Klvana case was "not a proud case," but attempted to defend the Board by arguing that its system has improved since its handling of the particularly sensational cases featured by the news program. However, "60 Minutes" also interviewed Professor Robert C. Fellmeth, director of the Center for Public Interest Law, who argued that Wagstaff and the Board have "missed the

point" of the Boggs and Klvana cases. "If you take an extreme case and you see the system doesn't respond, that tells you something about less extreme cases." The Medical Board, said Fellmeth, "must respond to the physician who's simply incompetent,...and that's not happening." Fellmeth also noted that 35–40% of the disciplinary actions recently taken by the Medical Board occurred only after the subject physician had been disciplined by another state's medical board.

At its July 31 meeting, the Medical Board charged that the "60 Minutes" segment was biased, and Board staff distributed a handout which attempted to respond to various issues raised in the segment. Board member Dr. John Lungren called the program "thoughtless and disgusting," and moved that the Board pass a resolution indicating "vigorous support for Ken Wagstaff and his competent staff." The Board passed the motion unanimously.

DMQ Enforcement Staff Under Investigation for Misconduct. On June 23, Department of Consumer Affairs (DCA) Director Jim Conran responded to public complaints and grievances filed by union representatives of Medical Board investigative staff by requesting that Attorney General Dan Lungren conduct an official investigation into what Conran called "[s]erious allegations of misconduct... [which] may have jeopardized the health, safety and welfare of hundreds of California citizens." Specifically, Conran stated that DCA had learned that "widespread 'case dumping' was alleged to have been ordered by management at the Medical Board to reduce investigative backlogs." Additionally, members of DMQ management are alleged to have falsified state attendance documents, engaged in promotional and recruitment irregularities, misused state vehicles and state time, and used "frequent flyer" mileage credits earned on state business flights for personal travel.

Conran emphasized his concern over the "case dumping" allegations, noting that they appear to be supported by an April 1991 audit of closed cases by the Office of the Auditor General. Conran also observed that, in 1990, the legislature placed significant pressure on upper staff to reduce the Board's investigative backlog by withholding authorization to pay the salary of MBC's executive director unless Board staff achieved a 15% reduction in its unassigned investigative case backlog.

On June 30, Attorney General Lungren acknowledged the seriousness of the allegations, but declined to conduct the investigation. Lungren cited the "statutory relationship" between his office and MBC enforcement staff under the terms of SB 2375 (Presley) (Chapter 1597, Statutes of 1990). That bill created the Health Quality Enforcement Section (HQES) within the AG's office and mandated a close working relationship between the deputy attorneys general who prosecute medical discipline cases and MBC's investigative staff. *[12:2&3 CRLR 95]* According to Attorney General Lungren, "[i]nvestigation of the board staff with whom we work would be inimical to that relationship. Moreover, since it is impossible to say with certainty that members of this office will not be required to provide information in such an investigation, the inquiry should be conducted by an entity independent of this department." An additional reason justifying Attorney General Lungren's recusal is the fact that his father, Dr. John Lungren, is a member of the Medical Board.

Thus, in early July, DCA asked the Internal Investigations Unit of the California Highway Patrol to conduct the requested investigation; on August 7, CHP accepted the task. On September 1, Medical Board employees were officially informed of the investigation by Andrew Poat, Acting Secretary of the State and Consumer Services Agency (DCA's parent agency). Poat requested the "full and complete cooperation" of each MBC employee, and promised that "state law providing job security for those who report wrongdoing [will] be diligently honored. Those who ask or are asked to discuss this matter may cooperate with no fear of reprisals."

At this writing, CHP's investigation is ongoing.

MBC Enforcement Matrix Update. On September 10, MBC released the latest version of its "enforcement matrix"—a computer display of key enforcement statistics of DMQ's physician discipline program and the enforcement programs of the Board's allied health licensing boards and committees. *[12:2&3 CRLR 98]*

According to the September 10 matrix, 145,537 physician and allied health professional licenses (including 82,800 physician and surgeon licenses) are in effect. Over 4,750 cases were pending against physicians and surgeons at various stages of the investigative or prosecution process. The matrix also provides a breakdown of case accumulations at each stage of the process: 1,923 were pending with a consumer services representative at DMQ's Central Complaint and Investigation Control Unit (CCICU); 1,706 were under formal investigation; 442 were pending with a medical consultant; 402 fully investigated cases were pending in HQES awaiting the drafting of an accusation; and 290 cases in which an accusation has been filed were pending in HQES.

The September 10 version of the matrix includes information regarding the average number of days complaints stay at the various stages of investigation. According to the matrix, physician complaints spend an average of 101 days at the CCICU, 313 days under investigation, and another 53 days with a medical consultant. However, Assistant Executive Director Tom Heerhartz warned that the enforcement matrix figures do not reflect closed cases, such that the matrix should not be used to gauge compliance with Business and Professions Code section 2319, which requires DMQ to fully investigate and close cases (either by dismissal or transfer to HQES) within 180 days from receipt.

The September 10 CCICU figure (1,923 cases) is 544 cases more than were reported in the April matrix (1,379 cases), whereas the investigation figure has remained the same (1,704 in April as compared with 1,706 in September). This could indicate either that DMQ (1) has been deluged with an extraordinary number of incoming complaints; (2) is opening complaint cases on minor allegations so as to be able to close them quickly and reduce its average time for purposes of section 2319 compliance; or (3) is again holding cases in the CCICU and withholding them from its investigators, a past practice which landed DMQ in trouble with the Legislative Analyst and the legislature in 1987–90.

At this writing, MBC is compiling data which will show the average number of days all cases (both open and closed) were pending during the 1991–92 fiscal year. This information will be assembled in MBC's 1991–92 Annual Report and was scheduled to be available at the Board's November meeting.

MBC Submits Budget Reduction Plan. On September 15, MBC submitted its 1992–93 budget reduction plan to DCA Director Jim Conran. The plan incorporates the 10% "efficiency" mandate (*i.e.*, a 10% overall reduction in expenditures over 1991–92 spending) required of all special-funded agencies by the legislature and Governor Wilson in the 1992–93 Budget Bill, which was finally signed on September 2. Under the Budget Bill provision, the 10% savings—which, in the case of MBC, amounts to over $2.8 million—will be transferred to the general fund on June 30, 1993. (*See supra* COMMENTARY.)

MBC's budget cuts will be reflected in three main categories: operating expenses

and equipment, blanket expenditure reductions (*e.g.*, travel), and salary savings. Operating expenses will be reduced in several areas including printing, postage, training, consumer and professional services, DCA support and administrative services, additional and replacement vehicles, and vehicle operation. Also included in these cuts is a $1 million reduction in spending on administrative law judges from the Office of Administrative Hearings, due primarily to the hiring lag by HQES during the first six months of 1992. *[12:2&3 CRLR 95]*

In the area of blanket expenditures, MBC will cut travel for Board and MQRC members by 50%. This reduction will mean fewer Board, division, and MQRC meetings and less travel activity in general during 1992–93. Travel expenses for trips other than the scheduled Board or division meetings will not be reimbursed. Executive Director Ken Wagstaff suggested that two of the four Board meetings scheduled for calendar year 1993 be held in Sacramento; holding meetings in Sacramento saves $8,000–$10,000 per meeting, due mainly to the ability of MBC headquarters staff to attend the meeting without major travel expense. Also in this category, the allotment for expert examiners used for oral exams was decreased by $35,000, and all paid overtime was eliminated.

Finally, salary savings in the amount of $739,850 will be achieved by freezing all promotions and holding several enforcement positions vacant. Five investigator positions and six supervisory enforcement positions will be kept vacant from three to twelve months. In addition, two medical consultant positions will be kept open for the balance of the fiscal year, with consultants from other district offices covering the workload. Various technical and support staff positions will also not be filled. In this area, the effect of the legislature's required budget cuts cannot be overstated; holding enforcement positions vacant will severely impact the Board's ability to effectively handle the volume of cases which is again accumulating in the CCICU (*see supra "MBC Enforcement Matrix Update"*).

Although special-funded agencies were given the option of raiding their mandatory reserve funds to achieve the required 1992–93 budget cuts, MBC chose not to tap its reserves, largely because fund projections reveal that the Board may be completely out of money by the end of fiscal year 1993–94 unless the legislature modifies its fee ceiling and MBC obtains a significant license fee increase. SB 1119 (Presley), which would have permitted the Board to increase licensing fees to $275 per year on January 1, 1993, and to $300 per year if absolutely necessary, recently died in the legislature (*see infra* LEGISLATION)—largely due to opposition by the California Medical Association (CMA). MBC is hoping for a change in position on the part of CMA regarding a new fee bill during 1993.

In related action, DOL announced on September 18 its intent to amend sections 1351.5 and 1352, Division 13, Title 16 of the CCR, to increase MBC licensing fees to their statutory maximums effective March 1, 1993. At this writing, MBC initial and biennial renewal fees stand at $480 (or $240 per year); DOL proposes to increase both fees to $500 (or $250 per year). If adopted by DOL and approved by the Office of Administrative Law, this will mark the third MBC license fee increase since August 1991. *[12:2&3 CRLR 95]* DOL was scheduled to hold a public hearing on these regulatory changes at its November 5 meeting.

HIV/HBV Transmission Prevention Committee Activity. At MBC's July 31 meeting, Board President Dr. Fredrick Milkie reported on the recent activities of MBC's HIV/HBV Transmission Prevention Committee. *[12:2&3 CRLR 98]* The Committee is monitoring the Department of Health Services' (DHS) drafting of guidelines required to protect the public from HIV/HBV infection by health care workers. The guidelines are required under both state (Health and Safety Code section 1250.11) and federal (Public Law No. 102-141) law, and must be equivalent to HIV transmission prevention guidelines issued by the federal Centers for Disease Control (CDC) in July 1991. At this writing, DHS is still in the process of drafting its guidelines, and does not plan to promulgate them as regulations under the Administrative Procedure Act; however, DHS believes the guidelines will effectively have the force of law because the Medical Board is authorized to discipline a physician for knowing failure to follow the guidelines under Business and Professions Code section 2221.1. The requirements of Public Law No. 102-141 must be met by all states by October 28.

Dr. Richard Ikeda, MBC's chief medical consultant, participated in a DHS HIV task force meeting on June 18 at which the proposed guidelines were discussed. In draft form, the guidelines do not include mandatory testing for health care workers who perform invasive procedures; they encourage voluntary testing under strict conditions of confidentiality. The task force is still debating the result if a health care worker tests positive for HIV or HBV; although the CDC guidelines recommend the establishment of local Expert Review Panels to review an infected health care worker's practice to determine appropriate restrictions, the task force is still discussing an informed consent option whereby a patient must be notified of an HIV-positive health care worker's condition prior to an invasive procedure. Under this option, no disclosure would be required if the health care worker does not perform invasive procedures, and no restriction would be placed on that health care worker's practice.

Use of the Term "Board Certified" in Physician Advertising. For almost two years, MBC has been engaged in an attempt to adopt regulations implementing SB 2036 (McCorquodale) (Chapter 1660, Statutes of 1990), which regulates the use of the term "board certified" in physician advertising. SB 2036 amended Business and Professions Code section 651 to provide that a physician licensed by MBC may include a statement in his/her advertising that he/she is certified or eligible for certification by a private or public board or parent association only if that board or association is (1) a member of the American Board of Medical Specialties (ABMS), (2) a board or association with an Accreditation Council for Graduate Medical Education (ACGME)-approved postgraduate training program that provides complete training in that specialty or subspecialty, or (3) a board or association with equivalent requirements approved by DOL (the so-called "equivalency option"). SB 2036 set a January 1, 1993 effective date in order to give the Medical Board time to adopt implementing regulations.

Over the past two years, the Medical Board's SB 2036 Committee and DMQ have held numerous public hearings on the draft language of proposed section 1363.5, Division 13, Title 16 of the CCR. *[12:2&3 CRLR 99]* Following an SB 2036 Committee meeting on May 28 and DMQ approval on July 2, MBC released its fourth amended version of the regulatory language. However, at DMQ's July 30 meeting, SB 2036 Committee Chair Dr. Fredrick Milkie petitioned DMQ to reverse its approval of the May 28 changes, arguing that the changes would preclude the advertising of board certification by members of specialty boards which are valid but not members of ABMS. CMA representatives disagreed and urged approval of the May 28 version. After much debate, DMQ voted to table the issue to enable DMQ members and staff to meet with representatives of CMA and other interested groups. DMQ was

scheduled to hold another public hearing on its proposed rulemaking on November 5.

Meanwhile, the legislature approved a bill which will affect both the timing and substance of MBC's SB 2036 regulations. AB 2180 (Felando), which was signed by the Governor on September 20 (*see infra* LEGISLATION), postpones the effective date of SB 2036 to July 1, 1993 and permits MBC to establish and collect a fee from each board or association applying for recognition under SB 2036; SB 2036 had not included a fee provision. Additionally, AB 2180 specifies that a "multidisciplinary board or association" ("an educational certifying body that has a psychometrically valid testing process, as determined by the Medical Board of California, for certifying medical doctors and other health care professionals that is based on the applicants' education, training and experience") may be eligible for recognition under SB 2036.

DMQ Revamps MQRCs. Pursuant to Business and Professions Code section 2320 *et seq.*, MBC maintains 14 regional committees which are authorized to participate in DMQ's physician discipline program. These Medical Quality Review Committees, which consist of 210 members (mostly physicians), are authorized to preside over disciplinary hearings of accused physicians, establish Physician Peer Counseling Panels to meet with physicians and counsel them on practice problems identified in investigations, act as a liaison between MBC and local communities, and identify medical quality problems within their communities.

At its July meeting, DMQ reviewed a report entitled *The Medical Quality Review Committees—What Lies Ahead?* prepared by a Division subcommittee chaired by DMQ member Dr. Michael Weisman. The subcommittee was charged with re-examining the role, size, and structure of the MQRCs. *[12:2&3 CRLR 101]* The report notes that it is nearly impossible for MQRCs to conduct disciplinary hearings, as most last for several days and MQRC members are practicing professionals who are paid only a token per diem. According to the report, MQRCs have continued to perform their other quality assurance roles, but their gradual elimination from formal disciplinary hearings has substantially reduced their overall volunteer hours and has raised the question whether 14 committees with 210 members are still needed.

The report analyzed the current format for the MQRCs, including time spent by members and staff to perform duties under the current system, and set forth several options for change. Option #1 called for maintenance of the status quo, which would minimize the number of monthly work hours per MQRC member. Option #2 presented three alternatives for a reduction of the number of committees and members (which would require redistricting and legislative amendment of Business and Professions Code section 2323); and Option #3 called for elimination of the MQRC program altogether. Although subcommittee chair Dr. Weisman favored a reduction in the MQRCs' membership to a total of 50 members, the report recommended that DMQ adopt a proposal reducing the number of committees to 10 and the total number of members to 110. A separate recommendation suggested a formal education program for MQRC members to ensure that they fully understand the amount of time they are expected to devote to MQRC work and the types of duties to be performed; prospective members would be asked to confirm that they are prepared to accept these terms of their appointment.

At a special meeting on September 9, DMQ voted to adopt the report's recommendations, and directed staff to prepare draft legislation reducing the number of MQRC members to 110 and the number of committees to ten for review at the Division's November meeting.

Governor Upholds OAL Rejection of DOL Training Program Regulation. On June 11, Governor Wilson upheld the Office of Administrative Law's (OAL) rejection of DOL's adoption of section 1325.5, Division 13, Title 16 of the CCR, as being discriminatory against osteopathic physicians.

Under regulatory section 1324, DOL is authorized to approve non-ACGME-approved clinical training programs for foreign medical graduates who have difficulty obtaining an ACGME-approved postgraduate training program. DOL recently adopted new section 1325.5, which would have required the medical director of a section 1324 training program to have an MD degree. The Division insisted on this provision over numerous objections that it violates Business and Professions Code section 2453, which prohibits discrimination between MDs and osteopathic physicians (DOs) on the basis of the degree. OAL rejected the provision three times, and DOL appealed the rejection to the Governor shortly after its May 7 meeting. *[12:2&3 CRLR 102]*

On June 11, the Governor upheld OAL's rejection of the MD requirement, recognizing the "hundred years war" between the allopathic and osteopathic branches of the medical profession and noting that "[t]he California Legislature has mandated equality between holders of MD degrees (medical doctors) and holders of DO degrees (doctors of osteopathy)....In this state osteopathy is firmly established as 'the practice of medicine.'" The Governor noted that DOL, in its final statement of reasons on its proposed rulemaking, stated that the proposed restriction "'does not prevent an osteopathic physician from being a staff teacher'; it applies only to the director. Thus, the Board explicitly acknowledges that the subject matter to be taught does not specifically require an allopathic orientation."

Other DOL Rulemaking. On September 18, DOL announced its intent to commence several rulemaking proceedings, including the following:

• ***Permit Reform Act Regulations.*** The Permit Reform Act of 1981, Government Code section 15374 *et seq.*, requires the Medical Board to adopt regulations specifying its maximum timeframes for processing applications for licensure, permits, and other authorizations. DOL's proposed addition of Article 5 (commencing with section 1318) to Division 13, Title 16 of the CCR, would implement the Permit Reform Act. DOL was scheduled to hold a public hearing on these proposed regulatory changes on November 5.

• ***Oral Examinations.*** DOL also proposes to amend section 1329, Title 16 of the CCR, to specify that (1) any licensure applicant who is a diplomate of the National Board of Medical Examiners (NBME) and whose application for licensure as a physician will be issued under Business and Professions Code section 2151 shall be required to take and pass the oral examination if the application is received by MBC more than five years from the date of the issuance of his/her diploma or certificate by the NBME; and (2) any physician whose license has been expired for more than five years and who is applying for a new license under Business and Professions Code section 2428 shall be required to take and pass the oral examination before the new license may be issued. DOL was scheduled to hold a public hearing on these proposed regulatory changes on November 5.

• ***Physician Questionnaire Compliance.*** At its July 30 meeting, DOL held a public hearing on its proposal to adopt regulatory section 1304, which would make ineligible for license renewal any physician who fails to complete and return MBC's biennial physician questionnaire prior to the time his/her license expires. Sections 920–25 of the Business and Professions Code require MBC to issue a report containing certain data regarding

physicians every two years, and the Board obtains the data through the survey. *[12:2&3 CRLR 102]* Section 1304 would also authorize DOL to waive the survey requirement for a physician who is, by reason of retirement, poor health, military service, or undue hardship, exempt from MBC's continuing education requirements. Over the objection of CMA representatives (who complained about the severity of the sanction for noncompliance with the survey requirement), DOL adopted proposed section 1304. At this writing, section 1304 awaits review and approval by OAL.

LEGISLATION

The following is a status update on bills reported in detail in CRLR Vol. 12, No. 2 & 3 (Spring/Summer 1992) at pages 103–05:

SB 2044 (Boatwright) declares legislative findings regarding unlicensed activity and authorizes all DCA boards, bureaus, and commissions, including MBC, to establish by regulation a system for the issuance of an administrative citation to an unlicensed person who is acting in the capacity of a licensee or registrant under the jurisdiction of that board, bureau, or commission. SB 2044 also requires the DCA Director to develop guidelines and prescribe components for mandatory continuing education programs administered by any board within the Department. This bill was signed by the Governor on September 28 (Chapter 1135, Statutes of 1992).

AB 2743 (Frazee) is another DCA omnibus bill which—among other things—expressly authorizes DCA boards in disciplinary proceedings to request the administrative law judge to direct the licentiate, in certain circumstances, to pay to the board a sum not to exceed the reasonable costs of the investigation and enforcement of the case. The Medical Board has consistently resisted the implementation of the "cost recovery system" authorized by this bill, and has also refused to implement its existing authority to create a system of citations and fines for minor violations of the Medical Practice Act. *[12:2&3 CRLR 95]* AB 2743 also authorizes DCA boards to revoke, suspend, or otherwise restrict a license on the ground that the licensee secured the license by fraud, deceit, or misrepresentation. This bill was signed by the Governor on September 28 (Chapter 1289, Statutes of 1992).

AB 3134 (Hunter). Existing law requires instruction in clinical courses as a condition of licensure for physicians and includes instruction in a hospital that is formally affiliated with an approved medical school located in the United States or Canada. This bill gives credit only for instruction in the subject areas covered by the affiliation agreement, if the affiliation is limited in nature. This bill also clarifies existing law to authorize a licensure candidate whose undergraduate education and clinical instruction is adjudged deficient by DOL to engage in the practice of medicine in any setting approved by MBC.

Existing law sets forth licensure requirements for a licensure candidate who is a graduate of a medical school located outside the United States or Canada; those candidates must complete one year of prescribed postgraduate training (PGT). This bill instead requires those applicants to satisfactorily complete the same PGT that is required of other applicants.

Existing law requires MBC licensure applicants to pass an examination in the basic sciences and clinical sciences, as determined by DOL, and to pass an examination designed to test their clinical competency; existing law requires applicants to achieve a passing score established by DOL on each part of the examination. This bill amends these provisions to pave the way for the administration of the new United States Medical Licensing Examination (USMLE) in California. The USMLE will be given to all medical graduates, eliminating the different exams for those graduating from domestic and foreign schools. This bill was signed by the Governor on July 22 (Chapter 311, Statutes of 1992).

AB 3309 (Moore) requires a physician requesting a clinical laboratory test, upon request of the patient who is the subject of the test, to provide the patient with the results of the test in plain language conveyed in the manner deemed most appropriate by the health care professional who requested the test. AB 3309 also requires that these test results be recorded in the patient's medical record and be reported to the patient within a reasonable time period after the test results are received at the office of the physician who requested the test. A willful violation of this requirement constitutes unprofessional conduct under existing provisions of law. This bill was signed by the Governor on July 23 (Chapter 328, Statutes of 1992).

SB 1813 (Russell) is a follow-up bill to SB 1070 (Thompson) (Chapter 1180, Statutes of 1991). SB 1070 requires the Department of Health Services (DHS) to promulgate guidelines and regulations to minimize the risk of transmission of bloodborne infectious diseases in the health care setting by January 1993. It requires MBC and other health profession regulatory agencies to ensure that their licentiates are informed of their responsibility to minimize the risk of transmission of bloodborne infectious diseases in the health care setting, and makes it unprofessional conduct for a licentiate to knowingly fail to protect patients by failing to follow DHS' infection control guidelines. (*See supra* MAJOR PROJECTS.)

SB 1813 provides that, in investigating and disciplining physicians for knowing failure to protect patients from transmission of bloodborne infectious diseases in the health care setting, MBC shall consider referencing DHS' guidelines; it also requires MBC to consult with the Board of Podiatric Medicine, the Board of Dental Examiners, the Board of Registered Nursing, and the Board of Vocational Nurse and Psychiatric Technician Examiners to encourage consistency in the implementation of this provision. This bill was signed by the Governor on September 30 (Chapter 1350, Statutes of 1992).

AB 3426 (Filante) requires DOL to charge an additional $25 fee to applicants and licensees at the time of initial issuance and biennial renewal of a license. The bill provides that payment of the $25 fee is voluntary, and requires that physicians be given the opportunity to expressly refuse to contribute. The bill also requires MBC to transfer the fees collected pursuant to this bill, on a monthly basis, to the Office of Statewide Health Planning and Development for support of the Song-Brown Family Physician Training Act (Education Code section 69270 *et seq.*), under which the Office is required to select and contract with accredited medical schools for the purpose of training medical students and residents in the specialty of family practice in order to increase the delivery of primary care health services in areas of the state with unmet needs for providers of those services. This bill was signed by the Governor on September 28 (Chapter 1130, Statutes of 1992).

SB 1876 (Deddeh). Existing law provides that a holder of a physician's certificate who, while in actual attendance on patients, is intoxicated to such an extent as to impair his/her ability to conduct the practice of medicine with safety to the public and his/her patients, is guilty of unprofessional conduct. This bill also provides that those persons are guilty of a misdemeanor. This bill was signed by the Governor on September 26 (Chapter 979, Statutes of 1992).

AB 3635 (Polanco). Existing law requires DOL to adopt and administer stand-

ards for the continuing education of physicians. This bill permits those standards to be met by prescribed educational activities, except that educational activities that are not directed toward the practice of medicine, or are directed primarily toward the business aspects of medical practice, would be prohibited from being deemed to meet those standards. This bill was signed by the Governor on July 23 (Chapter 331, Statutes of 1992).

AB 3077 (Katz) requires MBC, upon referral by the National Health Services Corps (NHSC) and the Attorney General of the United States of any physician who fails to provide service as required pursuant to a grant agreement between the licensee and the NHSC program or the federal loan insurance program, to review the facts and circumstances of the default and take appropriate disciplinary action where MBC determines that the licensee has committed unprofessional conduct in violation of specified provisions of law. This bill was signed by the Governor on September 26 (Chapter 1002, Statutes of 1992).

AB 1199 (Speier) would have required that, on or after July 1, 1993, every public and private health facility operating a PGT program must attempt, to the extent possible within available resources, and without requiring an increase in the number of staff, to meet requirements that would prohibit any resident physician in that training program from working, either in clinical or didactic duty, in excess of certain prescribed hour limits. This bill also would have prohibited a health facility operating a PGT program from routinely relying on resident physicians to perform ancillary services, as defined. This bill was vetoed by the Governor on September 26.

AB 2180 (Felando) postpones the effective date of SB 2036 (McCorquodale) (Chapter 1660, Statutes of 1990) from January 1, 1993 to July 1, 1993, and authorizes MBC to establish by regulation and collect a fee from each board or association applying for recognition under SB 2036 (*see supra* MAJOR PROJECTS). This bill was signed by the Governor on September 20 (Chapter 783, Statutes of 1992).

AB 569 (Hunter). Under existing law which takes effect on January 1, 1993, in order to use the term "perfusionist," a person is required to complete certain continuing education requirements or the equivalent if an equivalent is determined as necessary by DHS. As approved by the legislature after substantial amendments, this bill instead requires DAHP to perform the duties that were required to be performed by DHS. This bill also declares the intent of the legislature to reserve authority to DAHP to adopt examination, continuing education, and training standards, with appropriate consultation, if existing standards of the American Board of Cardiovascular Perfusion or the Accreditation Committee of the Committee on Allied Health Education and Accreditation of the American Medical Association prove inadequate after a trial period. This bill was signed by the Governor on September 27 (Chapter 1038, Statutes of 1992).

SB 664 (Calderon). Existing law prohibits physicians, among others, from charging, billing, or otherwise soliciting payment from any patient, client, customer, or third-party payor for any clinical laboratory test or service if the test or service was not actually rendered by that person or under his/her direct supervision, unless the patient is apprised at the first solicitation for payment of the name, address, and charges of the clinical laboratory performing the service. This bill also makes this prohibition applicable to any subsequent charge, bill, or solicitation. This bill makes it unlawful for any physician to assess additional charges for any clinical laboratory service that is not actually rendered by the physician to the patient and itemized in the charge, bill, or other solicitation of payment. This bill was signed by the Governor on June 4 (Chapter 85, Statutes of 1992).

AB 190 (Bronzan), among other things, requires a physician to give each patient a copy of the relevant standardized written summary describing the risks and possible side effects of silicone implants and collagen injections used in cosmetic, plastic, reconstructive, or similar surgery, before the physician performs the surgery. This bill was signed by the Governor on September 29 (Chapter 1140, Statutes of 1992).

The following bills died in committee: **AB 819 (Speier)**, which (before being substantially amended) would have made it unlawful for physicians, among other licensed health care professionals, to refer patients to any diagnostic imaging center, clinical laboratory, physical therapy or rehabilitation facility, or psychometric testing facility in which the physician has an ownership interest; **AB 3239 (Filante)**, which would have required graduates of foreign medical schools to complete an additional year of PGT in order to qualify for licensure; **AB 828 (Hansen)**, which would have exempted a physician from liability for any injury or death caused by a negligent act or omission of the physician, when he/she is in good faith and without compensation or consideration rendering voluntary medical assistance at a shelter that is privately operated; **SB 1119 (Presley)**, which would have increased the initial physician's license fee and the biennial renewal fee to $550 effective January 1, 1993, and expanded specified reporting requirements to require notification to allied health professional program committees or boards of the filing of felony charges against licensees of those agencies, and transmission of records of conviction or felony preliminary hearing transcripts concerning licensees of those agencies; **AB 465 (Floyd)**, which would have made general immunity provisions inapplicable to peer review activities which are subject to special immunity provisions; and **AB 704 (Speier)**, which would have required DMQ, when reviewing a physician's practice during any investigation pursuant to the Medical Practice Act, to ensure that the review is accomplished by peers of the subject physician.

LITIGATION

On June 16 in ***Kenneally v. Lungren***, No. 92-55098, the U.S. Ninth Circuit Court of Appeals held that the trial court properly abstained from and dismissed an action by a physician seeking to enjoin DMQ from holding an administrative hearing on its accusation to revoke his license. In 1990, DMQ filed an accusation against Leo Kenneally, charging him with gross negligence and incompetence in the performance of abortions on six patients, three of whom died soon after undergoing the procedure. Kenneally filed a civil rights action in federal court, seeking a temporary restraining order and an injunction to prevent the Board from holding a hearing on the accusation. Kenneally alleged that DMQ's proceedings deprived him of his due process and equal protection rights and failed to afford him a full opportunity to raise federal constitutional claims, and that DMQ was subjecting him to selective and discriminatory prosecution because he performed low-cost abortions in clinics rather than hospitals. The district court abstained and dismissed the case under *Younger v. Harris*, 401 U.S. 37 (1971), and *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), which require federal courts to abstain from interfering with ongoing state proceedings where (1) the nature of the state proceedings implicate important state interests, (2) there are ongoing state proceedings, and (3) the federal plaintiff is able to litigate his federal constitutional claims in the state proceeding.

Kenneally primarily argued that he would be unable litigate his federal constitutional claims in the state proceeding because Article III, section 3.5, of the California Constitution prohibits state administrative bodies from declaring statutes unconstitutional or refusing to enforce statutes on the basis of claims that such statutes are unconstitutional. The Ninth Circuit rejected this argument on grounds that DMQ is able to receive evidence in light of Kenneally's constitutional claims and that state courts are fully competent to review such claims prior to the effective date of any prospective revocation of Kenneally's license. The Ninth Circuit also rejected Kenneally's claim of agency bias due to several statements made by MBC staff members, noting that none of the objectionable statements challenged by Kenneally were made by DMQ members and that staff members have no role in deciding whether to revoke a physician's license.

In ***Kees v. Board of Medical Quality Assurance***, 7 Cal. App. 4th 1801 (July 9, 1992), the Fourth District Court of Appeal held that MBC was free to investigate and institute disciplinary proceedings against a substance-abusing physician where the physician was not formally enrolled in the Board's Diversion Program for Impaired Physicians. Philip Artz Kees, MD, had a long history of alcoholism, culminating in the filing of an action by DMQ to revoke his license. Kees claimed the Board's action was unlawful under its Diversion Program statutes, Business and Professions Code section 2340 *et seq.*, and cases interpreting them which have found that "once a physician enters the...program..., the Board halts all action against the physician, whether it is investigatory or disciplinary." *B.W. v. Board of Medical Quality Assurance*, 169 Cal. App. 3d 219, 231 (1985).

The Fourth District found that, although Kees voluntarily agreed to join the Diversion Program in 1983 as part of an employment agreement with Patton State Hospital and was "an informal, voluntary participant in the Diversion Program[,]...the record is devoid of any evidence that Kees was a formal participant of the Diversion Program under the statutory requirements establishing the program...and the rules and regulations governing those statutes." Notably, the statutes call for assignment of a Program participant to a diversion evaluation committee, which evaluates the physician and establishes a treatment program. "The record contains nothing to indicate any involvement by a diversion evaluation committee with Kees' voluntary participation in the process." Thus, DMQ was free to investigate Kees and institute disciplinary action.

In ***Gromis v. Medical Board of California***, 8 Cal. App. 4th 589 (July 30, 1992; as modified Aug. 27, 1992), the First District Court of Appeal reversed a trial court decision denying a petition for writ of mandate filed by a physician who had been disciplined by the Medical Board for engaging in sexual activity with a patient, in violation of section 726 of the Business and Professions Code.

Following the filing of an accusation and an administrative hearing, DMQ revoked Dr. Michael Gromis' license but stayed the revocation, instead suspending him for 60 days for violation of section 726. Gromis filed a petition for writ of mandate to set aside the disciplinary order, arguing that section 726 does not bar all sexual relations between physician and patient—only activity which is "substantially related to the qualifications, functions, or duties of the occupation." The trial court found that Gromis' sexual relationship with a female patient related to the functions and duties of a physician in two respects: "the whole intimate relationship arose out of the physician-patient relationship," and "[it] caused injury to the patient." Restating its findings, the trial court asserted that Gromis "took advantage of a position of trust and inserted the intimate social relationship over the existing professional relationship. This caused injury to [the] patient...because of the added stress, anxiety and worsened marital problems."

On appeal, the First District found that these findings were "insufficient to support the legal conclusion that the sexual relationship had a bearing on the functions and duties of a physician," and remanded to the trial court for further findings on "whether [Gromis] took advantage of his status as [the patient's] physician to induce [her] into the relationship...." In its modified opinion, the First District recognized that DMQ concluded that Gromis' conduct fell below the required medical standard of care in California, but noted that Gromis was not charged with negligence and that, in the case of a physician, "a single instance of negligent treatment, without more, is not grounds for discipline."

In ***Central Pathology Service Medical Clinic v. Superior Court (Hull)***, 3 Cal. 4th 181 (July 31, 1992), the California Supreme Court ruled that the unusual provision in the Medical Injury Compensation Reform Act (MICRA) which requires a medical malpractice plaintiff to obtain a judge's permission before seeking punitive damages against a physician (Civil Code section 425.13(a)) also applies to any case in which the action is "directly related" to the rendering of professional medical services, including intentional torts such as battery, fraud, or intentional infliction of emotional distress.

Section 425.13(a) provides in part: "In any action for damages arising out of the *professional negligence* of a health care provider, no claim for punitive damages shall be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed" (emphasis added). Although the language of the statute appears to limit its application to medical malpractice cases based on negligence, the Supreme Court concluded that the legislature's intent in enacting the provision was to protect health care providers from suits brought against them "in their capacity as practitioners." In so ruling, the Court expressly overruled *Bommareddy v. Superior Court*, 222 Cal. App. 3d 1017 (1990), which had found that the term "professional negligence" in section 425.13(a) "is a term of art that does not include intentional torts...even when occurring during the provision of medical services."

In ***United States of America v. Citrin***, No. 91-15594, the Ninth Circuit Court of Appeals upheld U.S. District Judge Carl A. Muecke's order requiring a physician to pay treble damages for breaching a scholarship agreement to serve in a medically underserved area. Under the National Health Service Corps' Scholarship Program, a student in a professional health degree program may receive a scholarship in exchange for the student's agreement to serve in a health manpower shortage area (HMSA). The student must serve one year for each year that he/she receives a scholarship, or two years, whichever is greater. Alan Citrin participated in the Program for two years and received a total of $22,134 in scholarship funds.

Scholarship recipients who are doctors may defer their service for a maximum of three years in order to complete PGT requirements for licensure. In order to defer, recipients must submit annually a Deferment Request Form (DRF). Citrin repeatedly failed to comply with the Program's requests for the DRF and documentation of his advanced training. On at least two occasions, he was given the opportunity to work in an HMSA in lieu of scholarship repayment. Citrin never fulfilled his obligations under the Program contract and the government sued for payment of statutory damages in the amount of treble the scholarship award

and treble the legal interest rate. Rejecting Citrin's arguments that he is excused from his service obligation because the Program's deferment policy changed, that he is not liable for the full amount of the damages because the damages provision in his contract was ambiguous, and that the damages are so excessive as to violate his due process rights, Judge Muecke granted the requested damages in the amount of $176,026.62 plus post-judgment interest of 6.62% per annum. The Ninth Circuit affirmed.

RECENT MEETINGS

DMQ cancelled its scheduled July 29 meeting and rescheduled its consideration of several important items to its November 5–6 meeting. These issues include public access to complaint information about physicians *[12:2&3 CRLR 97]*, improving patient protection in outpatient surgery centers *[12:2&3 CRLR 100]*, several Diversion Program issues *[12:2&3 CRLR 100]*, and its quarterly Enforcement Program report *[12:2&3 CRLR 95]*.

At its July 30 meeting, DOL again discussed the results of a survey it has distributed at recent administrations of its oral examination. The Division disseminated the survey to gather information on the knowledge of license applicants of the workings of MBC and non-competence aspects of the practice of medicine in California, and to determine the appropriateness of developing an orientation program for new licensees. The survey asks 34 questions based upon MBC's *Guidebook to Laws Governing the Practice of Medicine by Physicians and Surgeons* (1987), which is mailed to oral exam applicants. Several facts became apparent to DOL in examining the survey results: (1) only 38% of licensure applicants are required to take the oral exam, and only oral exam applicants receive the *Guidebook*; (2) many applicants expressed concerns about issues not fully covered in the *Guidebook*, or issues which have increased in importance since 1987 (such as AIDS testing and treatment); and (3) the *Guidebook* is the most efficient means of distributing information relative to the practice of medicine to newly licensed physicians, and it should be updated and distributed to all new physicians and not only those who take the oral exam.

Also at DOL's July meeting, a Division subcommittee which is examining the basic sciences curriculum of dental schools presented a report. Due to a recent increase in the number of dental students who transfer to medical school after the first two years, DOL decided to ensure that the basic sciences curriculum at dental school is equivalent to that required in medical schools. *[12:2&3 CRLR 107]* The Committee reported that it is developing a survey for distribution to dental schools in California and throughout the country, requesting information on the content and scope of the basic science coursework provided, total number of hours of instruction for each basic science course, information on whether these courses are designed and utilized for medical students, and information on whether dental and medical students participate in the same basic science courses. Once the data are compiled and the survey results summarized, the subcommittee will present its findings to the Division.

FUTURE MEETINGS

February 4–5 in Los Angeles.
May 6–7 in Sacramento.
August 5–6 in San Francisco.

ACUPUNCTURE COMMITTEE

Executive Officer: Sherry Mehl
(916) 924-2642

The Acupuncture Committee (AC) was created in July 1982 by the legislature as an autonomous body; it had previously been an advisory committee to the Division of Allied Health Professions (DAHP) of the Medical Board of California. AC still functions under the jurisdiction and supervision of DAHP.

Formerly the "Acupuncture Examining Committee," the name of the Committee was changed to "Acupuncture Committee" effective January 1, 1990 (Chapter 1249, Statutes of 1989). That statute further provides that until January 1, 1995, the examination of applicants for a license to practice acupuncture shall be administered by independent consultants, with technical assistance and advice from members of the Committee.

Pursuant to Business and Professions Code section 4925 *et seq.*, the Committee issues licenses to qualified practitioners, monitors students in tutorial programs (an alternative training method), and handles complaints against licensees. The Committee is authorized to adopt regulations, which appear in Division 13.7, Title 16 of the California Code of Regulations (CCR). The Committee consists of four public members and five acupuncturists. The legislature has mandated that the acupuncturist members of the Committee must represent a cross-section of the cultural backgrounds of the licensed members of the profession.

Following the mass resignation of four AC members at the Committee's December 1991 meeting *[12:1 CRLR 76]*, Assembly Speaker Willie Brown appointed his son Michael to fill one of the vacated public member slots in early February 1992. After attending the April 21 meeting at which AC Executive Officer Lynn Morris was terminated *[12:2&3 CRLR 107]*, Michael Brown resigned from AC in June. Speaker Brown has not yet filled the vacancy.

MAJOR PROJECTS

AC Selects New Executive Officer. At its August 5 meeting, AC selected Sherry Mehl as its new Executive Officer. Mehl was one of 16 candidates for the position and was chosen, according to AC Chair David Chen, because of her extensive government and management experience.

Mehl has worked with diverse parties and interests as a member of the Santa Cruz County Board of Supervisors and as the owner and co-managing operator of C.E. Mehl Farms in Watsonville. As a county supervisor, Mehl served on numerous committees, agencies, and boards, including the County Supervisors Association of California and the Association of Monterey Bay Area Governments. Specifically, she negotiated rules for budgeting and governing the operations of Santa Cruz County and initiated a low-cost program designed to dispose of unwanted agricultural chemicals.

Mehl stated that she wants AC to move forward from the controversies of late and bring the acupuncture profession into a positive public light. She wants to take a lead role in enforcement, education, and the direction of AC's rulemaking. In the enforcement area, she will focus on licensees who use incorrect terminology in advertising, delinquent licensees who are still in practice, and stopping unlicensed practitioners.

Mehl also intends to concentrate on the area of acupuncture education. She wants to be certain that quality education is available, that it is properly documented, and that accurate documentation is being received. She is especially interested in applicant tracking and maintenance of an up-to-date, high-quality list of continuing education providers.

Dr. Chen stated, "The AC is starting to get back on track, and the selection of Ms. Mehl is an important first step. Our goal has always been to maintain public trust and protect those who choose acupuncture as a form of treatment; Ms. Mehl will be

relied onto protect the public interest by advising [AC] and overseeing the Committee's day-to-day operations."

AC Rulemaking. The following is a status update on AC rulemaking proceedings discussed in recent issues of the *Reporter*:

• On July 2, the Office of Administrative Law (OAL) approved the Committee's amendments to six sections and the addition of two new sections to its regulations in Division 13.7, Title 16 of the CCR. AC amended section 1399.401 to correct its name and address; section 1399.403 to correct the names of AC and the Medical Board; section 1399.414(a) to reduce the period of time in which an applicant for registration as an acupuncturist has in which to request AC reconsideration of a rejected application; section 1399.418 to clarify that applicants who fail to appear for a scheduled examination must state their reasons for failing to appear in writing or their application will be deemed withdrawn; section 1399.436 to clarify that "four academic years" means eight semesters, twelve quarters, nine trimesters, or 36 months, and to specify that acupuncture schools must be approved by the Council for Private Postsecondary and Vocational Education pursuant to Education Code section 94310; and section 1399.443 to require licensure applicants to pass the written examination before becoming eligible to sit for the oral and practical examination.

Newly added regulations include section 1399.419, which specifies AC's examination processing time periods, in compliance with the Permit Reform Act of 1981; and section 1399.445, which establishes an appeals process for applicants who fail the practical examination.

Several other regulatory changes which were originally part of this package were put on hold until the tutorial study mandated by SB 633 (Rosenthal) (Chapter 103, Statutes of 1990) is completed. *[11:4 CRLR 92]* These changes include amendments to regulatory section 1399.422 to correct a grammatical error; section 1399.424(c) to delete a requirement that a tutorial trainee's experience and training must have occurred prior to January 1, 1980 in order to reduce the theoretical and clinical training components of their tutorial training program; section 1399.425 regarding AC's criteria for approval of tutorial programs; section 1399.427 regarding the duties of trainees in tutorial programs; section 1399.430(d) regarding denial, suspension, or revocation of a supervisor's registration; and section 1399.433, which would specify AC's processing time periods for tutorial applications. AC has approached the Department of Consumer Affairs' Central Testing Unit (CTU) about conducting the tutorial study, and CTU is currently devising a plan to satisfy the statutory requirements. Use of the CTU instead of an outside contractor will save money.

• Discussion of AC's proposed amendment to section 1399.439, which would require AC-approved acupuncture schools to submit to AC a course catalog and specified information about the school's curriculum, faculty, and financial condition *[11:4 CRLR 92]*, was postponed to the Committee's November 11 meeting in San Diego.

• On July 6, OAL disapproved AC's proposed amendments to regulatory sections 1399.481 and 1399.486. These sections implement SB 633 (Rosenthal), which requires all acupuncturists licensed before 1988 to complete 40 hours of continuing education in six specified subject matter areas prior to January 1, 1993. OAL stated that AC's rulemaking file failed to comply with the clarity, consistency, and procedural requirements of the Administrative Procedure Act. AC plans to correct the deficiencies and resubmit the amendments.

Budget Cutbacks. The 1992–93 Budget Bill, which was finally signed on September 2, requires special-funded agencies, including AC, to reduce expenditures by 10% over 1991–92, and to transfer that 10% to the general fund on June 30, 1993. At its August 5 meeting, AC decided to meet the required cuts by reducing spending in four areas. First, AC plans to reduce the number of annual Committee and subcommittee meetings to four. All subcommittee meetings will be held at the same location as the full Committee meeting on the day prior to the scheduled AC meeting. Second, AC will institute a hiring freeze. Also, in lieu of overtime, employees will be given compensatory time off. Third, no new office equipment will be purchased, even though AC's offices will probably be moved in the near future. Finally, AC will not allow any out-of-state travel or rental cars. Even with these required cuts, AC believes it can continue to provide the same services it has in the past.

LEGISLATION

The following is a status update on bills reported in detail in CRLR Vol. 12, Nos. 2&3 (Spring/Summer 1992) at page 109:

SB 2044 (Boatwright) declares legislative findings regarding unlicensed activity and authorizes all DCA boards, bureaus, and commissions, including the Acupuncture Committee, to establish by regulation a system for the issuance of an administrative citation to an unlicensed person who is acting in the capacity of a licensee or registrant under the jurisdiction of that board, bureau, or commission. This bill was signed by the Governor on September 28 (Chapter 1135, Statutes of 1992).

SB 1813 (Russell) is a follow-up bill to SB 1070 (Thompson) (Chapter 1180, Statutes of 1991). SB 1070 requires the Department of Health Services (DHS) to promulgate guidelines and regulations to minimize the risk of transmission of bloodborne infectious diseases in the health care setting by January 1993. SB 1813 adds the knowing failure of an AC licensee to protect patients by following certain infection control guidelines of AC to the definition of cause or unprofessional conduct for specified purposes. SB 1813 also provides that, in investigating and disciplining acupuncturists for knowing failure to protect patients from transmission of bloodborne infectious diseases in the health care setting, AC shall consider referencing DHS' guidelines; it requires AC to consult with the Medical Board, the Board of Podiatric Medicine, the Board of Dental Examiners, the Board of Registered Nursing, the Board of Vocational Nurse and Psychiatric Technician Examiners, and other agencies to encourage consistency in the implementation of this provision. Finally, SB 1813 requires AC to ensure that its licensees are informed of their responsibility with regard to following infection control guidelines. This bill was signed by the Governor on September 30 (Chapter 1350, Statutes of 1992).

SB 664 (Calderon). Existing law prohibits acupuncturists, among others, from charging, billing, or otherwise soliciting payment from any patient, client, or customer for any clinical laboratory test or service if the test or service was not actually rendered by that person or under his/her direct supervision, unless the patient, client, or customer is apprised at the first solicitation for payment of the name, address, and charges of the clinical laboratory performing the service. This bill makes this prohibition applicable to any subsequent charge, bill, or solicitation. This bill also makes it unlawful for any acupuncturist to assess additional charges for any clinical laboratory service that is not actually rendered by the acupuncturist to the patient and itemized in the charge, bill, or other solicitation of payment. This bill was signed by the Governor on June 4 (Chapter 85, Statutes of 1992).

SB 1119 (Presley), which would have required district attorneys, city attorneys, and other prosecuting agencies to notify AC of the filing of felony charges against a licensee and required court clerks to transmit a certified copy of licensee convictions to AC, died in committee.

RECENT MEETINGS

At AC's August 5 meeting, Committee Chair David Chen announced an upcoming PBS special on acupuncture which is scheduled to air in the next few months. AC agreed to let producer David Marx know that a mailing list of California acupuncturists is available to him should he desire such a resource. AC members expressed hope that the special would give acupuncturists "good press," which is sorely needed after the recent exam-bribery scandal and the resignation of four Committee members. *[12:1 CRLR 76]*

Also, AC Vice-Chair Kathie Klass discussed her plans to develop general consumer education material on AC's role and function, and what consumers should look for when they go to an acupuncturist. This issue will be addressed at future Committee meetings.

AC member Dr. Margaret Filante reported on the latest AC examination results. She reported a higher pass rate than last year (66% compared to 55%), and noted that multilingual translators were available at the exam site. Although the examination process has improved over last year, Dr. Filante stated there is room for improvement. AC received 82 complaints regarding several exam questions, including 73 from students attending the same school (indicating a concerted letter-writing campaign). Although all the questions had been pretested and were not flawed in the opinion of AC exam contractor Dr. Barbara Cole and CTU's Dr. Norman Hertz, AC directed staff to personally check into the complaints. The results should be available at the next Committee meeting.

FUTURE MEETINGS

To be announced.

HEARING AID DISPENSERS EXAMINING COMMITTEE

Executive Officer: Elizabeth Ware (916) 920-6377

Pursuant to Business and Professions Code section 3300 *et seq.*, the Medical Board of California's Hearing Aid Dispensers Examining Committee (HADEC) prepares, approves, conducts, and grades examinations of applicants for a hearing aid dispenser's license. The Committee also reviews qualifications of exam applicants, and is authorized to issue licenses and adopt regulations pursuant to, and hear and prosecute cases involving violations of, the law relating to hearing aid dispensing. HADEC has the authority to issue citations and fines to licensees who have engaged in misconduct. HADEC recommends proposed regulations to the Medical Board's Division of Allied Health Professions (DAHP), which may adopt them; HADEC's regulations are codified in Division 13.3, Title 16 of the California Code of Regulations (CCR).

The Committee consists of seven members, including four public members. One public member must be a licensed physician and surgeon specializing in treatment of disorders of the ear and certified by the American Board of Otolaryngology. Another public member must be a licensed audiologist. Three members must be licensed hearing aid dispensers.

HADEC has had its full complement of seven members since March 26, when Governor Wilson appointed Deborah R. Kelly and Keld T. Helmuth to the Committee. Although the term of hearing aid dispenser member Byron Burton expired in December 1991, he continues to serve on HADEC during a temporary grace period which expires on December 31, 1992.

MAJOR PROJECTS

Advertising Issues Task Force. On July 31, the Advertising Issues Task Force convened its first meeting to discuss various types of hearing aid dispenser advertising which have been the subject of complaints by audiologists, other health care professionals, and the public. The Task Force consists of HADEC Chair Molly Wilson, Speech-Language Pathology and Audiology Examining Committee (SPAEC) Chair Robert E. Hall, and three trade association representatives. The Task Force discussed problems associated with fourteen types of advertising by hearing aid dispensers, including the following:

- "free hearing test"—among other things, the Task Force noted that members of the public who respond to this type of advertisement by a hearing aid dispenser do not always realize that the "free hearing test" conducted is for the purpose of fitting and selling hearing aids, and not for diagnostic evaluation;
- price advertisements and discounts—the examples of price advertising examined by the Task Force did not specify which hearing aid instrument was being priced, and/or failed to specify the price on which a discount was being offered;
- advertisement of educational credentials—the use of the term "Dr." on a business card or advertisement implies medical expertise when the holder may have a Ph.D.; the Task Force agreed that ads should specify a dispenser's training related to the field, and that the term "Licensed Hearing Aid Dispenser" is an acceptable indication of specific training;
- advertisement of professional association membership or board certification—the Task Force agreed that some standards should be established for the listing of an association membership or board certification in advertising, as is being done in physician advertising (*see supra* agency report on MEDICAL BOARD OF CALIFORNIA);
- use of the term "specialist" rather than "dispenser"—the Task Force noted that the correct statutory title is "dispenser"; and
- advertisement of licensure by the Medical Board—although hearing aid dispensers were once technically licensed by the Medical Board, they are now licensed by HADEC; any reference to Medical Board licensure by hearing aid dispensers should be clarified to indicate that licenses are issued by HADEC, which is a committee of the Medical Board.

The Task Force concluded that HADEC should take action to establish some policy in almost all of the fourteen areas identified. HADEC will discuss these issues at future meetings.

Proposed Legislation. At its September 26 meeting, HADEC discussed whether to pursue several legislative changes during 1993. First, the Committee addressed proposed changes to Business and Professions Code section 3452, which currently provides that an expired license may be renewed at any time within five years after its expiration so long as the licensee completes the appropriate form and pays the renewal fee in effect on the last renewal date. Following consultation with the Department of Consumer Affairs,

HADEC agreed to seek an amendment to section 3452 which would reduce the five-year period to three years; the amended section would further condition renewal of such an expired license on payment of all accrued and unpaid renewal fees. HADEC also agreed to pursue amendments to section 3454, to provide that a licensee who allows his/her license to lapse for more than three years is required apply for a new license.

The Committee also considered a proposal to change the term "hearing aid" throughout its enabling act to the term "hearing instrument." While manufacturers are presently using the latter term, the Committee expressed concern about several issues, including the need to differentiate between a hearing aid and an assistive listening device (ALD), what to call an ALD and the licensee, and how to define an ALD. After discussion, the Committee decided that it is not prepared to seek the proposed change in terminology at this time.

Enforcement Report. At HADEC's September meeting, Executive Officer (EO) Elizabeth Ware presented a report on current enforcement statistics and issues. Currently, 91 cases are being investigated; this figure is somewhat misleading because it includes multiple cases pending against the same individual. Incoming complaints are first screened by a consumer services representative (CSR) in the Medical Board's Central Complaint and Investigation Control Unit (CCICU); on average, complaints stay in the CCICU for three months. If HADEC and/or its EO decide that a complaint warrants formal investigation, it is referred for investigation by a Medical Board investigator; if evidence of a violation is found, the case is forwarded to the Health Quality Enforcement Section (HQES) in the Attorney General's Office, whose attorneys prosecute discipline cases of the Medical Board and its allied health committees. An administrative law judge (ALJ) conducts an evidentiary hearing in which the HQES attorney and the respondent dispenser are permitted to put on their case and cross-examine each other's witnesses. Following the hearing, the ALJ submits a proposed decision to HADEC, and the Committee must decide whether to adopt the decision. The most common penalty assessed against a dispenser is a fine.

Ware reported that recently, the Medical Board has declined to investigate a number of HADEC cases; thus, Ware has referred them to the Department of Consumer Affairs' Division of Investigation. These cases involve eleven out-of-state mail order companies and improper advertisements in their catalogs. To date, one case has been resolved and the company has printed a disclaimer that particular products are not available to California residents. HADEC hopes to convince the other ten companies to adopt this resolution as well.

Also in connection with the Medical Board's enforcement program, the Committee viewed a videotaped excerpt from the June 14 "60 Minutes" program, which featured a harsh critique of some aspects of the system (*see supra* agency report on MEDICAL BOARD OF CALIFORNIA for related discussion).

Call for Contracts. At HADEC's September meeting, Elizabeth Ware delivered a final report on the Committee's "call for contracts," in which it reviewed various purchase agreements, receipts, and other written contract forms used by hearing aid dispensers for compliance with consumer protection laws. *[12:2&3 CRLR 110]* HADEC received over 200 documents in response to its program, and 195 qualified for inclusion in the study. Four major issues were identified:

• Many dispensers do not include the serial number of the hearing aid on the receipt, as the number is not known until the aid is manufactured. HADEC agreed to advise licensees to use multi-part receipts and to include the serial number on the delivery receipt.

• Most dispensers use generic language to comply with the requirement that an aid be identified as used or reconditioned; however, the use of this generic language transforms the receipt into a warranty document subject to Federal Trade Commission regulations. Of the 195 documents reviewed, 119 were subject to FTC requirements and none were in compliance. HADEC decided to advise dispensers to refrain from using generic language on the receipt and replace it with "new," "used," and "reconditioned" boxes which may be checked when describing the aid ordered.

• Many dispensers have failed to include language required by the state Song-Beverly Consumer Warranty Act, Civil Code section 1793.02, or have improperly altered it. HADEC agreed to warn licensees of their statutory obligation to include this language in a contract.

• Only 8 of the 195 contracts complied with Business and Professions Code section 3365(g), which requires dispensers to include a statement that any examination or representation made by a hearing aid dispenser is not an examination, diagnosis, or prescription by a person licensed to practice medicine or audiology, and therefore must not be regarded as medical opinion or professional advice. Many dispensers who are also licensed as audiologists or physicians do not include the language because it does not apply to them (although it is statutorily required), and other dispensers object to the statement that their advice does not constitute "professional advice." HADEC decided to ask the legislature to repeal section 3365(g).

HADEC/SPAEC Joint Subcommittee. For the past several years, SPAEC has requested the formation of a standing joint subcommittee with HADEC which could address ongoing issues of mutual interest. *[12:2&3 CRLR 112]* At HADEC's July meeting, the Committee decided by consensus to oppose the establishment of a joint subcommittee at this time (due to budget constraints), but agreed to participate in joint task forces on issues of particular concern (*see supra "Advertising Issues Task Force"*).

LEGISLATION

SB 2044 (Boatwright) declares legislative findings regarding unlicensed activity and authorizes all DCA boards, bureaus, and commissions, including HADEC, to establish by regulation a system for the issuance of an administrative citation to an unlicensed person who is acting in the capacity of a licensee or registrant under the jurisdiction of that board, bureau, or commission. SB 2044 also provides that if, upon investigation, HADEC has probable cause to believe that a person is advertising in a telephone directory with respect to the offering or performance of services, without being properly licensed by the Committee to offer or perform those services, the Committee may issue a citation containing an order of correction which requires the violator to cease the unlawful advertising and notify the telephone company furnishing services to the violator to disconnect the telephone service furnished to any telephone number contained in the unlawful advertising. This bill was signed by the Governor on September 30 (Chapter 1135, Statutes of 1992).

AB 2743 (Frazee) provides that branch licenses for hearing aid dispensers shall expire on the same date as the permanent license, and increases the following HADEC fees: temporary trainee renewal fee (from $75 to $100); biennial permanent renewal fee (from $200 to $280); initial permanent license fee (from $150 to $280); branch license fee (from $15 to $25); and duplicate license fee (from $15 to $25). Additionally, AB 2743 institutes new fees for the following services: temporary license fee ($100);

branch license renewal fee ($25); continuing education (CE) approval application ($50); CE course monitoring ($100); CE transcript ($10); license confirmation letter ($10); and official license certification ($15).

AB 2743 also requires applicants for HADEC licensure to pass the written examination before they are eligible to take the practical examination; changes the passing score and scoring method for HADEC examinations; and redefines the permissible contents of HADEC examinations. This bill was signed by the Governor on September 30 (Chapter 1289, Statutes of 1992).

SB 1549 (Rogers) expands the definition of the practice of fitting or selling hearing aids to include the screening of persons at a health fair or similar event in a prescribed manner for the purpose of identifying the need for further hearing or medical evaluation. The bill requires the licensee to present to the person screened a prescribed written statement, and prohibits the licensee conducting those hearing screenings from making or seeking referrals for testing, fitting, or dispensing of hearing aids. This bill was signed by the Governor on August 30 (Chapter 573, Statutes of 1992).

AB 3160 (Conroy) includes the conduct of hearing screening within the definition of the practice of speech-language pathology. This bill was signed by the Governor on July 22 (Chapter 313, Statutes of 1992).

SB 664 (Calderon). Existing law prohibits hearing aid dispensers, among others, from charging, billing, or otherwise soliciting payment from any patient, client, customer, or third-party payor for any clinical laboratory test or service if the test or service was not actually rendered by that person or under his/her direct supervision, unless the patient is apprised at the first solicitation for payment of the name, address, and charges of the clinical laboratory performing the service. This bill also makes this prohibition applicable to any subsequent charge, bill, or solicitation. This bill also makes it unlawful for any hearing aid dispenser to assess additional charges for any clinical laboratory service that is not actually rendered by that person to the patient and itemized in the charge, bill, or other solicitation of payment. This bill was signed by the Governor on June 4 (Chapter 85, Statutes of 1992).

SB 1119 (Presley), which would have required district attorneys, city attorneys, or other prosecuting agencies to notify HADEC of the filing of felony charges against a licensee, and required court clerks to notify HADEC of licensee convictions, died in committee.

LITIGATION

Hughes v. State of California, No. B060940, is still pending in the Second District Court of Appeal. In this case, hearing aid dispensers Robert and Mary Hughes appeal the dismissal of their case against HADEC, in which they claim that the Committee applies "underground rules" in regulating the hearing aid industry and, particularly, in approving licensed hearing aid dispensers to train and supervise trainees. *[12:2&3 CRLR 112]*

In a related matter, at its July meeting HADEC discussed the Office of Administrative Law's April 6 ruling on Bob Hughes' request for determination regarding the alleged "underground rulemaking." *[12:2&3 CRLR 111]* Of the numerous HADEC policies and practices challenged by Hughes, OAL ruled that only a few are "regulations" which should be adopted pursuant to the Administrative Procedure Act. Most pertain to the contents of HADEC's examination and will be cured by AB 2743 (Frazee) (*see supra* LEGISLATION) and by HADEC's new licensing exam, which is being prepared for use in 1993. Department of Consumer Affairs legal counsel Greg Gorges disagreed with OAL's finding that HADEC's imposition of a $19.50 fee for license applicant fingerprint processing is an underground rule, citing a Penal Code section which authorizes reimbursement for fingerprint costs, and advised the Committee to take no action on this issue.

RECENT MEETINGS

At HADEC's June meeting, new Committee members Keld T. Helmuth and Deborah R. Kelly were introduced. Helmuth, who is president of Exceptional Hearing Services, received his degree in electro-acoustic engineering from Holbaek College in Denmark, and has been a board-certified hearing aid dispenser since 1987. Kelly is a dispensing audiologist at University Audiologic Associates in Sacramento. Licensed as a dispenser since 1987, Kelly received her bachelor of arts degree in speech pathology and audiology from the California State University at Humboldt and her master's degree in audiology from the California State University at Sacramento.

Also in June, HADEC voted to oppose a then-pending legislative proposal to reorganize the Department of Consumer Affairs and reduce the membership of most DCA boards, including HADEC, to five members. At HADEC's September meeting, EO Elizabeth Ware reported that the proposal had been withdrawn but may be reactivated during 1993.

At HADEC's September 26 meeting, Executive Officer Ware reported on the impact of the 1992–93 Budget Bill, which was finally signed on September 2. The Budget Bill requires special-funded agencies, including HADEC, to reduce expenditures by 10% over 1991–92 and to transfer that 10% to the general fund on June 30, 1993. Ware, who is working with DCA officials in developing ways to implement the required cuts, reported that DCA may propose to consolidate all of its special-funded agencies' funds into one common business and professions fund; such a move would lessen the impact of future budget cuts on small boards such as HADEC. Ware stated her support for the idea.

Also in September, HADEC discussed its 1993 meeting schedule. Due to the ongoing budget crisis, the Committee decided to meet only three times instead of four, and to meet in Sacramento. Voting to hold three Friday meetings (one each in March, July, and November), HADEC will determine the specific dates at its December meeting.

FUTURE MEETINGS

December 5 in Sacramento.

PHYSICAL THERAPY EXAMINING COMMITTEE

Executive Officer: Steven Hartzell (916) 920-6373

The Physical Therapy Examining Committee (PTEC) is a six-member board responsible for examining, licensing, and disciplining approximately 14,200 physical therapists and 2,300 physical therapist assistants. The Committee is comprised of three public and three physical therapist members. PTEC is authorized under Business and Professions Code section 2600 *et seq.*; the Committee's regulations are codified in Division 13.2, Title 16 of the California Code of Regulations (CCR). The Committee functions under the general oversight of the Medical Board's Division of Allied Health Professions (DAHP).

Committee licensees presently fall into one of three categories: physical therapists (PTs), physical therapist assistants (PTAs), and physical therapists certified to practice kinesiological electromyography or electroneuromyography.

PTEC also approves physical therapy schools. An exam applicant must have graduated from a Committee-approved school before being permitted to take the licensing exam. There is at least one school in each of the 50 states and Puerto Rico whose graduates are permitted to apply for licensure in California.

At this writing, no replacement has been appointed for public member Mary Ann Meyers, who resigned in November 1990. The Committee currently has two public members and three PT members.

MAJOR PROJECTS

Supervision Requirements. On September 4, PTEC published notice of its intent to amend sections 1398.44, 1399, and 1399.1, Division 13.2, Title 16 of the CCR, regarding physical therapists' supervision and use of PTAs and physical therapy aides. *[12:2&3 CRLR 114]*

With regard to PTAs, existing regulatory section 1398.44 requires a PTA supervisor to be present in the same physical therapy facility with the PTA at least 50% of any work week or portion thereof the PTA is on duty, unless the requirement is waived by PTEC. The Committee's proposed amendments to section 1398.44 would revise the definition of "adequate supervision" of a PTA and establish two supervision standards: one for inpatient/outpatient facilities, and another for the home care setting.

In an inpatient/outpatient facility, the supervising physical therapist (SPT) shall be present at the same facility with the PTA at least 50% of the time the assistant is on duty, and shall be readily available to the PTA at all other times for advice, assistance, and instruction. Under the language of the proposed regulation, the SPT shall develop and maintain protocols which specify the procedures which may be delegated to a PTA. The protocol must include the names of PTAs whom the supervisor has verified have the knowledge, skills, and abilities to perform the procedures included in the protocol. The SPT must initially evaluate each patient and document that evaluation in writing; the supervisor must also formulate a treatment program based on the evaluation and identify the elements of the program which have been delegated to a PTA. The SPT must reevaluate the patient at least every other week, modify the treatment plan as necessary, and document the reevaluation in the patient's record.

In the home care setting, the SPT would be required to perform all the procedures listed above for the inpatient/outpatient setting (with the exception of the provision requiring the SPT to be at the same facility with the PTA at least 50% of the time the PTA is on duty). In addition, the SPT and the PTA shall make a joint visit and provide treatment jointly to the patient prior to the PTA providing care without the SPT present. The SPT and PTA must make a joint visit every other week to the patient being seen by the PTA for purposes of reevaluating the patient's progress and treatment plan. Each week, the SPT and PTA shall conduct a case conference on all patients not seen jointly that week. Under the proposed regulation, the SPT must be "readily available via telephone" to the PTA at all times the PTA is providing care without the SPT present.

With regard to the use of an aide (defined as "an unlicensed person who assists a physical therapist and may be utilized by a physical therapist in his or her practice by performing nonpatient related tasks, or by performing patient related tasks"), regulatory section 1399 already requires an SPT to "provide continuous and immediate supervision" of an aide while "in the same facility as and in immediate proximity to the location where the aide is performing patient related tasks...." PTEC proposes to amend section 1399 to additionally require the SPT to evaluate every patient prior to the performance of any patient related tasks by an aide, and to document that evaluation in the patient's record. After the evaluation, the physical therapist must document in the patient's record patient related tasks assigned to an aide. Under the proposed language, the SPT must reevaluate the patient at least every other week to modify the treatment plan, if needed; the reevaluation must be documented in the patient's record. Additionally, the SPT must countersign and date all entries in the patient's record which are made by the aide on the same day as the patient related tasks are provided.

PTEC's proposed addition of new section 1399.1 would preclude a PT from supervising more than one aide at any time during the performance of patient related tasks.

PTEC was scheduled to conduct a public hearing regarding these proposed amendments on October 22 in Sacramento.

PTA Licensure Standards. Business and Professions Code section 2655.3 requires applicants for a PTA license to have graduated from a school for PTAs approved by PTEC "or have training or experience or a combination of training and experience which in the opinion of [PTEC] is equivalent to that obtained in an approved school." On September 4, PTEC published notice of its intent to amend regulatory section 1398.47, which sets forth several combinations of training and experience which PTEC believes are equivalent to its PTA educational requirement. The amendments would revise several of the combinations to define more precisely the type of patient care settings to which an applicant should be exposed in order to gain sufficient experience necessary to obtain a minimum level of knowledge. *[12:2&3 CRLR 115]*

PTEC was scheduled to conduct a public hearing regarding these proposed amendments on October 22 in Sacramento.

Fee Increases. At its August 14 meeting, PTEC held a public hearing on its proposed amendments to regulatory sections 1399.50, 1399.52, and 1399.54, which set forth various licensing fees for PTs, PTAs, and PTs certified to perform electromyography (EMG), respectively. The proposed fee increases, which will take effect on January 1, 1993 if approved, are a result of PTEC's determination that current fee levels do not provide sufficient funds to enable the Committee to perform its mandated mission of protecting the consumers of physical therapy services in California, nor are they sufficient to administer the written examination required for licensure.

With regard to PTs, the proposed revisions to section 1399.50 would increase the examination fee and reexamination fee for retaking any part or parts of the written examination from $120 to $140. The initial license fee would increase from $50 to $80. The biennial renewal fee would increase from $50 to $80, and the delinquency fee would increase from $25 to $40.

With regard to PTAs, the amendments to section 1399.52 would reduce the PTA application fee from $50 to $30, but establish an initial license fee of $80 beginning January 1, 1993. The examination and reexamination fees would increase from $115 to $140. The biennial renewal fee would increase from $40 to $80, and the delinquency fee would increase from $20 to $40.

PTEC's proposed revisions to section 1399.54 would increase the biennial renewal fee for PTs certified to perform EMG from $50 to $80, and establish a delinquency fee at $40.

Following the August 14 public hearing, PTEC approved all of the changes. At this writing, the proposed revisions await approval by the Department of Consumer Affairs (DCA) and the Office of Administrative Law (OAL).

Foreign-Trained PT Clinical Service Requirement Regulation. On June 15,

PTEC published modified language of proposed section 1398.26(e), which was the subject of a January 1992 public hearing. *[12:2&3 CRLR 113]* Business and Professions Code section 2653 requires PT licensure applicants who have graduated from foreign physical therapy schools to complete a period of clinical service unless it is waived by PTEC. The modified version of new section 1398.26(e) would authorize PTEC to waive all or part of the required clinical service if the applicant has completed a period of clinical education or internship equivalent to that required by Business and Professions Code section 2650, and would require PTEC to waive all of the required period of clinical service if the applicant has been licensed and practicing for a minimum of nine months full-time in a jurisdiction of the United States or Canada.

At this writing, PTEC is deferring any further action regarding this proposal until more comments and information are received.

Other PTEC Rulemaking. PTEC's proposed amendment to section 1398.4, Title 16 of the CCR, regarding delegation of all functions necessary to dispatch the Committee's business in the absence of PTEC's executive officer, has been approved by DCA and is awaiting approval by OAL at this writing. *[12:2&3 CRLR 114]*

LEGISLATION

The following is a status update on bills reported in detail in CRLR Vol. 12, Nos. 2 & 3 (Spring/Summer 1992) at pages 115–16:

SB 1813 (Russell) is a follow-up bill to SB 1070 (Thompson) (Chapter 1180, Statutes of 1991). SB 1070 requires the Department of Health Services (DHS) to promulgate guidelines and regulations to minimize the risk of transmission of bloodborne infectious diseases in the health care setting by January 1993. SB 1813 authorizes PTEC to discipline licensees for the knowing failure to protect patients by failing to follow its infection control guidelines. SB 1813 also provides that, in investigating and disciplining physical therapists for knowing failure to protect patients from transmission of bloodborne infectious diseases in the health care setting, PTEC shall consider referencing DHS' guidelines, and requires PTEC to consult with the Medical Board, the Board of Podiatric Medicine, the Board of Dental Examiners, the Board of Registered Nursing, the Board of Vocational Nurse and Psychiatric Technician Examiners, and other agencies to encourage consistency in the implementation of this provision. This bill also requires PTEC to seek to ensure that its licensees are informed of their responsibility with regard to following infection control guidelines. SB 1813 was signed by the Governor on September 30 (Chapter 1350, Statutes of 1992).

SB 2044 (Boatwright) declares legislative findings regarding unlicensed activity and authorizes all DCA boards, bureaus, and commissions, including PTEC, to establish by regulation a system for the issuance of an administrative citation to an unlicensed person who is acting in the capacity of a licensee or registrant under the jurisdiction of that board, bureau, or commission. This bill also provides that the unlicensed performance of activities for which a PTEC license is required may be classified as an infraction punishable by a fine not less than $250 and not more than $1,000. This bill was signed by the Governor on September 28 (Chapter 1135, Statutes of 1992).

AB 3286 (Tucker). Existing law prohibits a person from furnishing any dangerous drug or device, except upon the prescription of a physician, dentist, podiatrist, or veterinarian. AB 3286 provides that the prohibition does not apply to the furnishing of any dangerous device by a manufacturer, wholesaler, or pharmacy to a physical therapist acting within the scope of his/her license.

Existing law authorizes a medical device retailer to dispense, furnish, transfer, or sell a dangerous device only to another medical device retailer, a pharmacy, a licensed physician, a licensed health care facility, or a patient or his/her personal representative. AB 3286 additionally authorizes a medical device retailer to dispense, furnish, transfer, or sell a dangerous device to a licensed physical therapist.

This bill, which contains an urgency clause, was introduced to clarify Business and Professions Code section 4227, which does not expressly permit physical therapists to dispense dangerous medical devices to patients without a dispensing license. Physical therapists currently dispense and administer treatments through transcutaneous electrical nerve stimulation ("TENS") units, which are considered dangerous devices under the medical device retailer statutes. TENS units are used in physical therapy and by physicians to control pain. This bill was signed by the Governor on July 18 (Chapter 271, Statutes of 1992).

AB 2743 (Frazee) adds section 2660.1 to the Business and Professions Code to provide that a patient, client, or customer of a physical therapist is conclusively presumed to be incapable of giving free, full, and informed consent to any sexual activity which is a violation of Business and Professions Code section 726. It also authorizes PTEC to establish a "cost recovery" system, under which it could request an administrative law judge presiding over a disciplinary hearing to order a disciplined licensee to reimburse the Committee for its costs of investigating the case. This bill was signed by the Governor on September 30 (Chapter 1289, Statutes of 1992).

SB 664 (Calderon). Existing law prohibits physical therapists, among others, from charging, billing, or otherwise soliciting payment from any patient, client, customer, or third-party payor for any clinical laboratory test or service if the test or service was not actually rendered by that person or under his/her direct supervision, unless the patient is apprised at the first solicitation for payment of the name, address, and charges of the clinical laboratory performing the service. This bill also makes this prohibition applicable to any subsequent charge, bill, or solicitation. This bill also makes it unlawful for any physical therapist to assess additional charges for any clinical laboratory service that is not actually rendered by that person to the patient and itemized in the charge, bill, or other solicitation of payment. This bill was signed by the Governor on June 4 (Chapter 85, Statutes of 1992).

The following bills died in committee: **AB 819 (Speier)**, which (before being substantially amended) would have made it unlawful for certain health care professionals to refer a patient to any diagnostic imaging center, clinical laboratory, physical therapy or rehabilitation facility, or psychometric testing facility in which the health care professional has an ownership interest; and **SB 1119 (Presley)**, which would have required district attorneys, city attorneys, and other prosecuting agencies to notify PTEC of any filings of felony charges against a licensee, and required court clerks to notify PTEC of any licensee convictions.

RECENT MEETINGS

At PTEC's May 29 meeting in Los Angeles, Committee Chair Norma Shanbour announced that Judith McKinnon's appointment as a PTEC public member would expire in June. McKinnon, however, has agreed to serve during the one-year grace period until a new appointment is made by Governor Wilson.

Also, Executive Officer Steve Hartzell discussed section 1399.63(d)(1)(C), Title 16 of the CCR, which allows PTs to satisfy

the experience requirement for kinesiological electromyography certification by completing 400 hours in electroneuromyography (ENMG) under the supervision of a licensed physician "who is similarly qualified to perform and who performs electromyography as part of his or her practice of medicine who is approved by the Committee." DCA legal counsel Greg Gorges advised staff to notify potential ENMG certification candidates through the PTEC newsletter that verification of the instructing physician's certification in ENMG prior to training is required. Only PTEC's credentials subcommittee can determine whether the supervising physician is properly certified.

Also at the May meeting, Greg Gorges addressed the issue of whether a licensed vocational nurse (LVN) may perform physical therapy treatment. In the opinion of the Board of Vocational Nurse and Psychiatric Technician Examiners, an LVN may perform physical therapy so long as the LVN has received physical therapy training from the physician whose patients the LVN is treating. According to Gorges, the LVN Practice Act provides that an LVN may perform procedures learned in nursing school. After reviewing the nursing school curriculum, Gorges determined that physical therapy courses are not included, except for massage. Gorges questioned whether the LVN Practice Act permits an LVN to practice physical therapy modalities, and indicated he will continue to research this issue.

At PTEC's August 14 meeting in San Diego, Steve Hartzell discussed the 1992–93 Budget Bill and its effects on PTEC. The Budget Bill, which was finally signed on September 2, requires special-funded agencies, including PTEC, to reduce expenditures by 10% over 1991–92 and to transfer that 10% to the general fund on June 30, 1993. To achieve the necessary savings, Hartzell suggested a reduction in the number of meetings in 1992–93 from five to four. Additionally, the PTEC newsletter will only be issued once per year instead of two times each year, as was previously decided. Additionally, PTEC may be required to dip into its reserve fund, thus requiring a fee increase (*see supra* MAJOR PROJECTS) and possibly legislative amendments to increase the Committee's fee ceilings. Other areas that will be affected by the budget cut are still being determined. While the need to change the fee ceilings does not currently exist, the time required to obtain legislative approval of increases to the fee ceilings (one to two years) suggests that preliminary action on this issue be taken in the near future.

Also in August, PTEC discussed the Board of Chiropractic Examiners' implementation and interpretation of new section 302, Title 16 of the CCR, which defines the scope of chiropractic practice. The new section was added to the CCR by BCE as the result of a stipulated 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). Under the settlement agreement, chiropractors are specifically precluded from holding themselves out as being physical therapists or as qualified to practice physical therapy, and are permitted to use physical therapy techniques only in the course of chiropractic manipulations. Hartzell expressed dismay at a letter disseminated by BCE Executive Director Vivian Davis which appears to contradict the terms of the settlement. PTEC and BCE representatives have agreed to meet in an attempt to resolve various problems regarding implementation and interpretation of section 302.

FUTURE MEETINGS

January 22 in Sacramento.
April 23 in Sacramento.
July 9 in San Francisco.

PHYSICIAN ASSISTANT EXAMINING COMMITTEE

Executive Officer: Ray Dale
(916) 924-2626

The legislature established the Physician Assistant Examining Committee (PAEC) in Business and Professions Code section 3500 *et seq.*, in order to "establish a framework for development of a new category of health manpower—the physician assistant." Citing public concern over the continuing shortage of primary health care providers and the "geographic maldistribution of health care service," the legislature created the physician assistant (PA) license category to "encourage the more effective utilization of the skills of physicians by enabling physicians to delegate health care tasks...."

PAEC licenses individuals as PAs, allowing them to perform certain medical procedures under a physician's supervision, including drawing blood, giving injections, ordering routine diagnostic tests, performing pelvic examinations, and assisting in surgery. PAEC's objective is to ensure the public that the incidence and impact of "unqualified, incompetent, fraudulent, negligent and deceptive licensees of the Committee or others who hold themselves out as PAs [are] reduced." PAEC's regulations are codified in Division 13.8, Title 16 of the California Code of Regulations (CCR).

PAEC's nine members include one member of the Medical Board of California (MBC), a physician representative of a California medical school, an educator participating in an approved program for the training of PAs, one physician who is an approved supervising physician of PAs and who is not a member of any division of MBC, three PAs, and two public members. PAEC functions under the jurisdiction and supervision of MBC's Division of Allied Health Professions (DAHP).

On June 4, Governor Wilson appointed Stephan Morey of Modesto to PAEC. Morey has been a PA since 1985 when he graduated from the University of Wisconsin-Madison's Physician Assistant Program.

MAJOR PROJECTS

PA Scope of Practice Regulations Survive Legislative Attack. As predicted, over the summer the California Nurses Association (CNA) and other nursing and physician groups convinced Assemblymember Tricia Hunter to amend AB 569 to supersede PAEC's new scope of practice regulations which became effective in February 1992. *[12:2&3 CRLR 117]* Existing law and PAEC's scope of practice regulations provide that a PA may perform medical services authorized in regulations adopted by DAHP (1) under the supervision of a licensed supervising physician (SP), and (2) pursuant to protocols developed by the PA and his/her SP, or pursuant to a patient-specific order by the SP. As amended June 8, AB 569 would have added a new condition—the SP must be available by electronic means and within a 30-minute radius of the site where the PA is providing services. Additionally, AB 569 would have expressly precluded PAs from initiating orders for nursing services, admitting patients for inpatient hospital care, and performing surgical procedures under certain circumstances.

PAEC and the California Academy of Physician Assistants (CAPA) immediately took an oppose position on the legislation, arguing that the bill would adversely affect the availability, timeliness, and quality of health care services provided to over three million Californians; increase service delivery costs and reduce the operational efficiency of hundreds of

medical offices, clinics, and hospitals; and constrict the long-established scope of practice of California's 2,200 licensed PAs. Specifically, PAEC objected to the "30-minute radius" rule as being excessively rigid; the Committee noted that administrative law judges have used a "reasonable and prudent" rule to determine if the time and distance separating the physician from the PA is so great as to be potentially injurious to the health and well-being of a patient. PAEC also argued that PAs have been transmitting and initiating orders to nurses ever since 1975 when PAs were first licensed in California. Those orders are based on the SP's written and specific delegation of authority to the PA, and the SP is always held ultimately responsible for all care ordered or given to his/her patient by a PA.

Although both CNA and the California Medical Association supported the June 8 version of AB 569, the Senate Business and Professions Committee suggested several amendments to the bill at a hearing on June 29. As requested, Assemblymember Hunter amended AB 569 again on July 2. The July 2 version deleted the "30-minute radius" rule, but retained the provisions prohibiting a PA from initiating orders for nursing services and from "independently" admitting patients for inpatient hospital care. CNA persisted in including the prohibition on initiating orders to registered nurses because it maintains RNs are not authorized to implement orders initiated by PAs.

PAEC and CAPA renewed their vigorous opposition, arguing that there have been no administrative disciplinary decisions against PAs for gross negligence, and none for issuing orders to RNs or others which could have or did lead to significant patient harm. PAEC's Ray Dale stated that he could find no civil or criminal action in which the initiation of a physician's patient care order by a PA was at issue or found to be illegal, and no court case holding that it is illegal for a nurse to follow a physician's order which has been transmitted to the nurse by a PA. In response to CNA's argument regarding the authority of an RN to implement an order initiated by a PA, PAEC noted that the Office of Administrative Law reviewed its scope of practice regulations for consistency with other statutes and approved them.

With a hearing on the July 2 version of AB 569 scheduled for August 3, PAEC and CAPA were pleased to learn that Assemblymember Hunter deleted all language relating to PAs from the bill on July 29. PAEC and CAPA noted that this issue will likely be resurrected, and agreed to begin a dialogue with CNA and promote a more collaborative approach to this issue and to health care in general.

Disciplinary Statistics. As part of its defense to AB 569, PAEC compiled statistics on its disciplinary actions between January 1986 and June 1992. During that 6.5-year period, PAEC took a total of 18 disciplinary actions, mostly for practicing without supervision (4), conviction of miscellaneous criminal offenses (3), sexual abuse or misconduct with patients (2), and discipline by another regulatory agency (2). In 1991, the Committee doubled its disciplinary activity over prior years, issuing five decisions that year; during the first six months of 1992, it has already issued two decisions.

At PAEC's June 12 meeting, Executive Officer Ray Dale detailed the Committee's enforcement performance from July 1, 1991 to May 31, 1992. During that period, 64 complaints were received, 39 cases were closed, 17 cases are still being processed, and 29 cases were referred to formal investigation. Twenty-two cases are pending at the Attorney General's Office, and five accusations have been filed. A total of four PAs have been disciplined thus far in fiscal year 1991–92, and the licenses of nine PAs are on probation.

Federal Regulations Permit PAs to Perform Truck Driver Physical Examinations. On August 27, Federal Highway Administration regulations permitting PAs and nurse practitioners to perform physical examinations on commercial motor vehicle drivers, as required by the Federal Motor Carrier Safety Regulations, finally became effective. These regulations allow AB 1912 (Waters) (Chapter 760, Statutes of 1989) to take effect; AB 1912 authorizes California-licensed PAs and nurse practitioners to perform federally mandated physical examinations for truck drivers seeking licensure in California (*see* Vehicle Code sections 12804 and 12804.9).

PAEC Joins Long-Term Care Demonstration Project. On July 23, PAEC's Executive and Budget Subcommittee directed staff to confirm the willingness of PAEC to participate in a demonstration project to be conducted in cooperation with the Department of Aging and several other state agencies. The demonstration project, which has been initiated by the American Association of Retired Persons (AARP) in California and Georgia, is directed towards improving the quality of long-term care. Specifically, the Department of Aging maintains a Long-Term Care Ombudsman Program, and the thrust of the demonstration project is to test the effectiveness (in resolving long-term care quality problems) of a closer working relationship between the Ombudsman Program and the various state licensing boards which regulate professionals who work in nursing homes. The first meeting of participants in the project was scheduled for October 15.

Compilation of Laws and Regulations. PAEC is currently compiling a book containing its enabling statute, its regulations, and other laws and regulations which affect its conduct of business. At this writing, the book's publication date is uncertain.

LEGISLATION

The following is a status update on bills reported in detail in CRLR Vol. 12, Nos. 2 & 3 (Spring/Summer 1992) at page 118:

SB 2044 (Boatwright) declares legislative findings regarding unlicensed activity and authorizes all DCA boards, bureaus, and commissions, including PAEC, to establish by regulation a system for the issuance of an administrative citation to an unlicensed person who is acting in the capacity of a licensee or registrant under the jurisdiction of that board, bureau, or commission. This bill was signed by the Governor on September 28 (Chapter 1135, Statutes of 1992).

AB 569 (Hunter) was substantially amended on July 29 and is no longer relevant to PAEC (*see supra* MAJOR PROJECTS).

SB 664 (Calderon). Existing law prohibits PAs, among others, from charging, billing, or otherwise soliciting payment from any patient, client, customer, or third-party payor for any clinical laboratory test or service if the test or service was not actually rendered by that person or under his/her direct supervision, unless the patient is apprised at the first solicitation for payment of the name, address, and charges of the clinical laboratory performing the service. This bill also makes this prohibition applicable to any subsequent charge, bill, or solicitation. This bill also makes it unlawful for any PA to assess additional charges for any clinical laboratory service that is not actually rendered by the PA to the patient and itemized in the charge, bill, or other solicitation of payment. This bill was signed by the Governor on June 4 (Chapter 85, Statutes of 1992).

SB 1813 (Russell) is a follow-up bill to SB 1070 (Thompson) (Chapter 1180, Statutes of 1991). SB 1070 requires the Department of Health Services (DHS) to promulgate guidelines and regulations to minimize the risk of transmission of bloodborne infectious diseases in the

health care setting by January 1993. SB 1813 adds the knowing failure of a licensee to protect patients by following PAEC's infection control guidelines to the respective definitions of cause or unprofessional conduct, as specified. SB 1813 provides that, in investigating and disciplining PAs for knowing failure to protect patients from transmission of bloodborne infectious diseases in the health care setting, PAEC shall consider referencing DHS' guidelines; it also requires PAEC to consult with the Medical Board, the Board of Podiatric Medicine, the Board of Dental Examiners, the Board of Registered Nursing, the Board of Vocational Nurse and Psychiatric Technician Examiners, and other agencies to encourage consistency in the implementation of this provision. Finally, the bill requires PAEC to seek to ensure that licensees are informed of their responsibility with regard to following infection control guidelines. This bill was signed by the Governor on September 30 (Chapter 1350, Statutes of 1992).

The following bills died in committee: **SB 1119 (Presley)**, which would have required district attorneys, city attorneys, and other prosecuting agencies to notify PAEC of the filing of felony charges against a licensee and required court clerks to transmit a certified copy of the conviction of a licensee to PAEC; and **AB 706 (Jones)**, which would have declared the intent of the legislature that stable funding be sought to increase the training of primary care PAs under the Song-Brown Family Physician Training Act.

RECENT MEETINGS

At PAEC's June 12 meeting, staff member Jennifer Barnhart presented a status report on current licensing statistics. As of March 31, there were a total of 2,145 PAs and 5,577 supervising physicians licensed in California.

FUTURE MEETINGS

January 8 in Berkeley.
April 2 in Ontario.
July 30 in Long Beach.

BOARD OF PODIATRIC MEDICINE

Executive Officer:
James Rathlesberger
(916) 920-6347

The Board of Podiatric Medicine (BPM) of the Medical Board of California (MBC) regulates the practice of podiatry in California pursuant to Business and Professions Code section 2460 *et seq.* BPM's regulations appear in Division 13.9, Title 16 of the California Code of Regulations (CCR).

The Board licenses doctors of podiatric medicine (DPMs), administers two licensing examinations per year, approves colleges of podiatric medicine, and enforces professional standards by initiating investigations and disciplining its licentiates, as well as administering its own diversion program for DPMs. The Board consists of four licensed podiatrists and two public members.

MAJOR PROJECTS

BPM Secures Extension of Limited License Period for Podiatric Residents. At its June 26 meeting, BPM continued its review of the various types of podiatric residency programs, including the rotating podiatry residency, the podiatric orthopedic residency, the podiatric surgical residency (12 months), and the podiatric surgical residency (24 months). Section 2484 of the Business and Professions Code requires that prior to regular licensure by BPM, each applicant must complete an approved one-year hospital residency. The national Council on Podiatric Medical Education (CPME) evaluates and approves podiatric residency programs, and any program approved by CPME is deemed acceptable by BPM. Section 2475 expressly authorizes a podiatric resident "in an approved...residency...[to] *engage in the practice of medicine* for a period not to exceed two years wherever and whenever required as a part of the training program..." (emphasis added). Under this provision, the podiatry residents are granted a limited license and allowed to practice medicine beyond the scope of podiatric medicine during the residency (not to exceed two years), so they might gain sufficient training to perform podiatric medicine. Within the context of a proposed legislative amendment to extend the two-year period in section 2475 to four years, the Medical Board expressed reservations about the practice of medicine by podiatric residents, and agreed to participate in a joint task force to explore several issues related to podiatric residencies and the practice of medicine by podiatric residents within their residencies. *[12:2&3 CRLR 119]*

At BPM's June 26 meeting, Franklin J. Medio, Ph.D., and Lawrence M. Oloff, DPM, participated in a roundtable discussion with Board members about podiatric medical residency programs and CPME's approval process. Although concerned Medical Board representatives were invited, none attended. Dr. Medio is Director of Educational Resources at the University of Medicine and Dentistry of New Jersey, School of Osteopathic Medicine, and has considerable experience in evaluating postgraduate training programs in allopathic, osteopathic, and podiatric medicine. Dr. Oloff is the Dean of Academic Affairs at the California College of Podiatric Medicine in San Francisco. Dr. Medio described the basic model of a CPME-approved residency program, and expressed his overall approval of the CPME site visit process. He stated that medicine is an essential part of podiatric medical practice, and that podiatric residents cannot get too much training in medicine. Dr. Medio also opined that the training DPM residents obtain at podiatric medical school prior to residency is the same as or comparable to the training MD residents obtain at medical school prior to residency, and that the overall quality of podiatric residency programs is comparable to the overall quality of allopathic and osteopathic residency programs. Dr. Medio's presentation instilled a renewed confidence in the quality of CPME-approved programs in BPM members.

Also at the June meeting, BPM voted to resurrect its proposed amendment to Business and Professions Code section 2475, to extend BPM's limited-license period from two years to four years. Without the extension, some DPM residents who have already completed a one-year residency as a prerequisite to an advanced 24-month podiatric surgical residency are being prevented from completing those advanced residencies and/or are risking criminal liability for unlicensed practice. The negotiation of this amendment through the joint MBC/BPM task force became the next item on BPM's agenda.

The joint task force met in San Diego on July 16. In exchange for the Medical Board's agreement to support an extension of the DPM limited license period to four years, BPM agreed to amend section 2475(a) to read as follows: "A graduate with a limited license in an approved internship, residency, or fellowship program may *participate in training rotations outside the scope of podiatric medicine, under the supervision of an MD or DO physician and surgeon* wherever and whenever required as a part of the training program..." (emphasis added). Although members of the California Podiatric Medical Association subsequently became concerned over the loss of the original "engage in the practice of medicine" language and over potential misinterpretations of the word "participate," BPM Ex-

ecutive Officer Jim Rathlesberger clarified with Dr. Robert del Junco of the Medical Board that their mutual understanding of the word "participate" involves full, "hands-on" participation in, and not mere observation of, the practice of medicine under the supervision of an allopathic or osteopathic physician and surgeon. The Medical Board subsequently approved the proposed amendments at its July 30–31 meeting.

Due to MBC's approval, the Department of Consumer Affairs agreed to add BPM's revisions to section 2475 to AB 2743 (Frazee), its omnibus bill reserved for noncontroversial changes. BPM successfully lobbied the bill through the legislature, noting that the amendments to section 2475 clarify current law and codify current policies and hospital protocols limiting the exemption to training settings and requiring supervision by MDs or DOs when DPM residents are involved in rotations taking them outside the scope of podiatric medicine. The Governor signed the bill on September 30 (*see infra* LEGISLATION).

Enforcement Matrix. At the Board's June 26 meeting, BPM Enforcement Coordinator Teena Arneson reported on the ongoing efforts of MBC to implement its "enforcement matrix." *[12:2&3 CRLR 120]* The enforcement matrix is a computer printout display of key enforcement statistics of the Medical Board's Division of Medical Quality (DMQ), BPM, and the allied health licensing programs under the jurisdiction of the Medical Board's Division of Allied Health Professions (DAHP); all DMQ, BPM, and allied health program complaints are routed and tracked through DMQ's Central Complaint and Investigation Control Unit (CCICU).

SB 2375 (Presley) (Chapter 1597, Statutes of 1990) requires the Medical Board to track and regularly publish numerous statistics of its enforcement program for medical doctors. Last year, BPM Executive Officer Jim Rathlesberger suggested that similar statistics of BPM and DAHP's other constituent programs be tracked and published as well. Despite initial objections from several boards, this suggestion was ultimately adopted and implemented. Current versions of the enforcement matrix now include "aging data," which show the average number of days cases spend at each stage of the investigation process. This data is used to gauge compliance with SB 2375's provision requiring complaints about physicians to be disposed of within an average of six months of receipt—either by dismissal, warning, or forwarding to the Attorney General's Office for preparation of an accusation.

In her report, Arneson stated—and the Board agreed—that the enforcement matrix is deceiving. The version of the case aging report considered at BPM's June meeting, dated May 14, 1992, states that BPM complaints spend an average of 135 days at the consultant stage. This period is over three times as long as physician complaints stay at the consultant stage (44 days), according to the matrix. Arneson explained that while the 135-day figure makes it appear that BPM's podiatric medical consultants are grossly inefficient, the "consultant" stage also includes the time cases spend undergoing review by independent experts, which artificially skews the data. BPM's position is that the "consultant" column on the matrix should only reflect the time cases spend with BPM consultants (which is about two weeks, according to Dr. DiGiacomo, one of the consultants present at the June 26 meeting). Arneson also pointed out that the matrix figure showing the percentage of complaints lodged against each board's licensees is calculated by dividing the number of current licensees by the number of complaints filed. Since some licensees have multiple complaints against them, this figure is deceiving because it suggests that more podiatrists are the subject of complaints than is actually the case.

Issuance of Misdemeanor Criminal Citations by the Medical Board? In a May 5 memo to Warren J. Wolfe, Chief of the Department of Consumer Affairs' Division of Investigation (DOI), EO Jim Rathlesberger inquired about the feasibility of allowing MBC investigators to issue misdemeanor criminal citations. Rathlesberger took notice of an April 29 report to Senator Dan Boatwright, Chair of the Senate Business and Professions Committee, in which Wolfe described the issuance of misdemeanor criminal citations by DOI investigators. The criminal citation process (to be distinguished from administrative citations and fines) is relatively efficient because it eliminates the need for a formal investigation report and criminal complaint. Noting the potential benefits of this process, Rathlesberger queried Wolfe as to (1) whether MBC investigators could obtain the authority to issue criminal citations; (2) whether MBC and its constituent boards (including BPM) could utilize DOI in the event that such authority could not be obtained; (3) how BPM could refer cases to DOI instead of MBC; and (4) the circumstances under which criminal citations and fines are most appropriate.

Wolfe replied that, in his opinion, statutory authority already exists for MBC investigators to issue criminal citations. Penal Code section 830.3(a) designates MBC investigators as peace officers for purposes of making an arrest pursuant to Penal Code section 836. Section 836 provides that a peace officer may make arrests whenever he/she has probable cause to believe a crime has been committed in his/her presence; and Penal Code section 853.6 describes the process for issuance of misdemeanor citations by peace officers. Wolfe stated his belief that the only obstacle to overcome would be the development of the actual citation form, approval from the Judicial Council, and development of the necessary procedures and training.

Wolfe advised Rathlesberger to discuss the mechanics of the process with MBC staff before researching the possibility of utilizing DOI investigators to issue misdemeanor citations. However, Wolfe state that there is no legal obstacle to the use of DOI investigators (as opposed to MBC investigators) by MBC's allied health committees; in fact, DOI is already processing some cases referred by the Physical Therapy Examining Committee and the Hearing Aid Dispensers Examining Committee.

As to appropriate circumstances for the use of criminal citations, Wolfe replied that DOI uses the misdemeanor criminal citation process almost exclusively in the area of unlicensed activity, stating that DOI experience has reflected that local prosecutors need little additional documentation to prove unlicensed activity which has occurred in the presence of an undercover investigator. Wolfe suggested that criminal citations would be ineffective for more complicated cases, as local prosecutors are largely unfamiliar with the technical aspects of the Business and Professions Code. Because misdemeanor citations typically contain a minimal narrative content, citations for complex violations could likely be dismissed for lack of evidence.

BPM Explores Diversion Program Issues. BPM recently transferred the administration of its Diversion Program from an outside contractor to the Medical Board's in-house Diversion Program. The purpose of the Diversion Program is to enable BPM to identify and rehabilitate podiatrists who are impaired due to abuse of dangerous drugs or alcohol, with the ultimate goal of treating them and returning them to practice in a manner which will not endanger the public health and safety. A diversion program functions by diverting the health professional from the

discipline track if he/she enters the diversion program and complies with its requirements. Theoretically, a diversion program provides the professional with an incentive to seek rehabilitation for the long term. If the professional fails to comply with the terms and conditions of the program, the licensing agency is free to initiate discipline proceedings.

At the June 26 meeting, MBC Diversion Program Manager Chet Pelton presented an issue paper on the Medical Board's Diversion Program to BPM. Pelton opined that a diversion program is much more effective than the disciplinary process at quickly assessing a given health professional's threat to the public and removing him/her from practice if necessary. In addition, a diversion program offers a more permanent solution to the problem than discipline by allowing the health professional to get treatment. Merely disciplining the health professional for substance abuse does not ensure that he/she will seek treatment. Pelton suggested that possible drawbacks of the diversion program include negative public perceptions that health professionals are being shielded from discipline, and the possibility that a patient might gain access to the fact that a practitioner has an alcohol or drug problem.

Pelton reiterated the philosophy of the Medical Board with respect to the diversion program, which is to divert confidentially rather than to discipline. Once a physician self-refers to the Program or is required to participate by MBC, the Board refrains from instituting disciplinary proceedings so long as the physician complies with the terms of the Program. BPM members expressed their views as well, stating that they tend to prefer discipline rather than a strictly non-disciplinary diversion program. BPM sees the diversion program as a valuable part of the discipline system; that is, practitioners should be assigned to diversion as part of discipline where appropriate. In the alternative, consultants could hold non-disciplinary interviews and, where appropriate, refer practitioners for voluntary attendance at a diversion program.

BPM Budget. Pursuant to a provision in the 1991–92 Budget Bill, the state Department of Finance transferred all BPM reserve funds in excess of three months' operating expenses to the general fund on June 30, to assist in reducing California's huge budget deficit. BPM lost $625,000 in licensing fees collected from podiatrists, which is the sole source of BPM's financial support. BPM members have been consistently critical of this transfer, characterizing it as a "double taxation" of podiatry licensees, and noting that at the same time the state is pressuring boards to increase enforcement activities, it is stripping the boards of money collected for that very purpose. *[12:2&3 CRLR 121]*

On top of that transfer, the 1992–93 Budget Bill requires special-funded agencies, including BPM, to reduce 1992–93 expenditures by 10% over 1991–92 expenditures, and to transfer that 10% to the general fund on June 30, 1993. As a result of these losses, BPM believes that, by fiscal year 1993–94, its reserve fund will be effectively eliminated, and that by 1994–95, the Board's budget will show a negative reserve of $243,000. At its September 25 meeting, the Board reiterated its commitment to avoid raising licensing fees to alleviate this deficit. BPM already charges one of the highest licensing fees in DCA—$400 per year; in contrast, the Medical Board only recently raised its fee to $240 annually. Also rejected were proposals to reinstate the $800 initial license fee, which was reduced to $400 on January, and to reinstate the $30 loan deferment fee, which was eliminated in March 1991.

Instead, BPM staff proposed several means to cut costs and raise revenue which would not require an increase in licensing fees. The Board is considering cutting the number of annual meetings from four to three. The Board also agreed to terminate membership in the Federation of Podiatric Medical Boards (FPMB). EO Jim Rathlesberger reported to the Board that the benefits of remaining in the organization, which mainly serves to provide a uniform licensing exam, does not justify the $1,100 annual cost of membership. BPM currently uses an examination that it feels is superior to FPMB's, and terminating membership would eliminate the expense of out-of-state travel to FPMB's annual meeting. To generate revenue, the Board will fully implement its citation and fine program, which is expected to raise $27,000 annually, and seek higher cost recovery amounts from disciplined licensees.

LEGISLATION

The following is a status update on bills reported in detail in CRLR Vol. 12, Nos. 2 & 3 (Spring/Summer 1992) at pages 121–22:

SB 2044 (Boatwright) declares legislative findings regarding unlicensed activity and authorizes all DCA boards, bureaus, and commissions, including BPM, to establish by regulation a system for the issuance of an administrative citation to an unlicensed person who is acting in the capacity of a licensee or registrant under the jurisdiction of that board, bureau, or commission. SB 2044 also provides that if, upon investigation, BPM has probable cause to believe that a person is advertising in a telephone directory with respect to the offering or performance of services, without being properly licensed by the Board to offer or perform those services, the Board may issue a citation containing an order of correction which requires the violator to cease the unlawful advertising and notify the telephone company furnishing services to the violator to disconnect the telephone service furnished to any telephone number contained in the unlawful advertising. This bill was signed by the Governor on September 28 (Chapter 1135, Statutes of 1992).

AB 2743 (Frazee) revises licensing and examination requirements relative to the practice of podiatric medicine. Specifically, the bill amends Business and Professions Code section 2486 to require the Medical Board's Division of Licensing to issue, upon the recommendation of BPM, a certificate to practice podiatric medicine if the applicant meets all of the following requirements: the applicant has graduated from an approved school or college of podiatric medicine and meets the requirements of Business and Professions Code section 2483; the applicant has passed, after June 30, 1958, the examination administered by the National Board of Podiatric Medical Examiners or a written examination which is recognized by the Board to be equivalent in content to that administered in this state; the applicant has satisfactorily completed the postgraduate training required by Business and Professions Code section 2484; the applicant takes and passes an oral and practical examination administered by the Board to ascertain clinical competence; the applicant has committed no acts or crimes constituting grounds for denial of a certificate under Division 1.5 of the Business and Professions Code; and, if the applicant is licensed is another state, territory, or province, the Board determines that no disciplinary action has been taken against the applicant by any podiatric licensing authority and that the applicant has not been the subject of adverse judgments or settlements resulting from the practice of podiatric medicine which constitutes evidence of a pattern of negligence or incompetence.

Further, AB 2743 repeals Business and Professions Code section 2487, regarding applicants not qualifying for licensure after examination or as reciprocity applicants, and section 2488, regarding re-

quirements for the issuance of a reciprocity certificate from BPM.

This bill also amends Business and Professions Code section 2475 to provide that a graduate with a limited license in an approved internship, residency, or fellowship program may participate in training rotations outside the scope of podiatric medicine, under the supervision of an MD or DO wherever and whenever required as a part of the training program, and may receive compensation for that practice (*see supra* MAJOR PROJECTS). This bill also repeals Business and Professions Code section 2475(c), which provided that a graduate in an approved preceptorship program may engage in the practice of podiatric medicine in a general acute care facility or otherwise under the supervision of an approved preceptor, where required as part of the training program, and may receive compensation for that practice.

Finally, AB 2743 amends Business and Professions Code section 2492(b), regarding BPM's examination requirements, to provide that unless an applicant meets the requirements of Business and Professions Code section 2486, applicants shall be required to have taken and passed the examination administered by the National Board of Podiatric Medical Examiners. This bill was signed by the Governor on September 30 (Chapter 1289, Statutes of 1992).

SB 1813 (Russell) is a follow-up bill to SB 1070 (Thompson) (Chapter 1180, Statutes of 1991). SB 1070 requires the Department of Health Services (DHS) to promulgate guidelines and regulations to minimize the risk of transmission of bloodborne infectious diseases in the health care setting by January 1993. It requires BPM and other health profession regulatory agencies to ensure that their licentiates are informed of their responsibility to minimize the risk of transmission of bloodborne infectious diseases in the health care setting, and makes it unprofessional conduct for a licentiate to knowingly fail to protect patients by failing to follow DHS' infection control guidelines.

SB 1813 provides that, in investigating and disciplining podiatrists for knowing failure to protect patients from transmission of bloodborne infectious diseases in the health care setting, BPM shall consider referencing DHS' guidelines; it also requires BPM to consult with the Medical Board, the Board of Dental Examiners, the Board of Registered Nursing, and the Board of Vocational Nurse and Psychiatric Technician Examiners, and other agencies to encourage consistency in the implementation of this provision. This bill was signed by the Governor on September 30 (Chapter 1350, Statutes of 1992).

SB 664 (Calderon). Existing law prohibits podiatrists, among others, from charging, billing, or otherwise soliciting payment from any patient, client, customer, or third-party payor for any clinical laboratory test or service if the test or service was not actually rendered by that person or under his/her direct supervision, unless the patient is apprised at the first solicitation for payment of the name, address, and charges of the clinical laboratory performing the service. This bill also makes this prohibition applicable to any subsequent charge, bill, or solicitation. This bill also makes it unlawful for any podiatrist to assess additional charges for any clinical laboratory service that is not actually rendered by that person to the patient and itemized in the charge, bill, or other solicitation of payment. This bill was signed by the Governor on June 4 (Chapter 85, Statutes of 1992).

The following bills died in committee: **SB 1119 (Presley)**, which would have extended existing law requiring prosecutors and court clerks to report to MBC and BPM criminal charges against and convictions of licensees to other allied health licensing programs; and **AB 465 (Floyd)**, which would have made general immunity provisions inapplicable to peer review activities which are subject to special immunity provisions.

RECENT MEETINGS

At its June 26 meeting, the Board elected Dr. Michael R. Vega as President and Dr. Steven J. DeValentine as Vice-President for 1992–93. The Board also distributed a revised list of BPM subcommittees.

Also in June, the Board requested EO Jim Rathlesberger to send a letter to the Medical Board requesting MBC personnel to stop referring to BPM licensees as "non-physicians and surgeons." BPM was particularly disturbed when MBC began referring to the MBC/BPM joint task force on podiatric residencies (*see supra* MAJOR PROJECTS) as the "Committee on Non-Physician Residencies." MBC Executive Director Ken Wagstaff responded that the title of the task force was a sincere attempt at generic terminology, with no insult intended. Wagstaff agreed to suggest a name change to "Committee on Postgraduate Medical Training for Podiatrists and Dental Surgeons." The task force met on August 19 and elected to rename itself the "Committee on Non-MD Residency Programs."

At its September 25 meeting, the Board unanimously voted to cancel its upcoming December 11 meeting in San Diego as a cost-cutting measure. By law, the Board is only required to conduct three meetings per year, and eliminating the San Diego meeting is expected to save $3,500–$4,500. The Board had previously scheduled its first meeting in 1993 for March 12 in Sacramento but, because there will be no December meeting, the Board may move its next meeting to January; at this writing, the date is undetermined.

FUTURE MEETINGS

To be announced.

BOARD OF PSYCHOLOGY

Executive Officer:
Thomas O'Connor
(916) 920-6383

The Board of Psychology (BOP) (formerly the "Psychology Examining Committee") is the state regulatory agency for psychologists under Business and Professions Code section 2900 *et seq.* Under the general oversight of the Medical Board's Division of Allied Health Professions, BOP sets standards for education and experience required for licensing, administers licensing examinations, issues licenses, promulgates rules of professional conduct, regulates the use of psychological assistants, investigates consumer complaints, and takes disciplinary action against licensees by suspension or revocation. BOP's regulations are located in Division 13.1, Title 16 of the California Code of Regulations (CCR). BOP is composed of eight members, three of whom are public members.

MAJOR PROJECTS

Proposed Supervised Professional Experience Regulations. At its July 31 and September 25 meetings, BOP entertained public comment on its proposed changes to section 1387, its proposed addition of section 1387.3, and its proposed repeal of section 1386, Division 13.1, Title 16 of the CCR. Collectively, these regulatory changes would implement the provision in Business and Professions Code section 2914 requiring applicants for licensure to have engaged for at least two years in "supervised professional experience [SPE] under the direction of a licensed psychologist, the specific requirements of which shall be defined by

the Board in its regulations, or such suitable alternative supervision as determined by the Board in regulations duly adopted under this chapter, at least one year of which shall be after being awarded the doctorate in psychology." *[12:2&3 CRLR 123]*

Numerous organizations and individuals presented comments on the Board's proposed regulatory changes. The California Psychological Association (CPA) focused its concerns on the following provisions:

• Proposed section 1387(d)(2), which would require the qualified primary supervisor (QPS) to ensure that the applicant has had adequate coursework for the SPE, and that the SPE is in the same or a similar field of psychology as is the applicant's education and training. CPA stated that this requirement places an unreasonable burden on the QPS, and suggested an alternative provision which would require the applicant to provide verification of coursework taken, including a description of the content authenticated and verified by the director of clinical training at the applicant's educational institution. BOP agreed to substitute CPA's provision for its originally-proposed language.

• Proposed section 1387(e), which would specify that no more than 1,500 hours of an applicant's SPE (approximately half the SPE requirement) may be accrued under any one supervisor. CPA questioned the necessity of this provision, stating that "good supervisors are not numerous" and noted that, if implemented immediately, this provision would require psychological assistants to give up positions that may have been difficult to obtain in the first place. CPA requested that the Board clarify and justify this requirement, and—if it insists on adopting the provision—postpone its effective date to as not to interfere with SPEs currently under way.

• Proposed language in sections 1387(c), 1387(o)(2), and 1387.3(a) which effectively precludes anyone but a licensed psychologist or a board-certified psychiatrist from being a QPS. CPA noted that this provision would prevent social workers from being supervisors, and argued that the effect of this provision would be to severely restrict the number of persons able to secure qualifying experience and gain eligibility for licensure. CPA suggested that the Board consider the following alternatives: all supervisors must be doctoral level professionals; doctoral level social workers should be added to the list of those who qualify to be a QPS; or the Board should allow an exemption in all three regulatory sections for applicants working in a rural area (defined as a county with a population of less than 75,000 or one which meets the federal manpower shortage definitions).

Also at CPA's suggestion, the Board agreed to modify section 1387(b) to provide that a QPS means "a psychologist who is engaged in rendering professional services a minimum of one-half time in the same work setting at the same time as the person supervised is obtained supervised professional experience."

Representatives of other organizations expressed concern about these and other provisions. Several commenters from nonprofit, low-cost, community-based mental health clinics suggested that the proposed changes would require them to replace current experienced supervisory staff with licensed psychologists who charge higher rates for their services. This would result in increased operating costs and would have a negative effect on low-income populations. Many witnesses stated that the Board's proposed regulations would so drastically change existing law that it should consider postponing the effective date of the entire regulatory package, to give supervisors and prospective supervisees an opportunity to adjust to and plan for the new requirements. In response, the Board tentatively approved modifications to sections 1387(b) and 1387.3(a), to postpone the effective date of the requirement that a QPS have at least three years of post-licensure professional experience from July 1, 1993 until July 1, 1994.

After considerable discussion at both its July and September meetings, the Board decided to release modified language of its proposed regulatory changes and revisit the issue at its November meeting.

Diversion. In an August 18 memo to Karen McGagin, Special Assistant to Department of Consumer Affairs Director Jim Conran, BOP Executive Officer Tom O'Connor criticized the concept of "diversion programs" within the context of licensing boards charged with protecting consumers from incompetent or impaired practitioners. Expressing his personal opinion, O'Connor stated that "the entire concept of diverting impaired licensees away from board disciplinary action is a powder keg ready to explode....Is it the place of a consumer protection agency to 'divert' a licensee from the established enforcement process and into a program of tough love encounter groups?"

O'Connor then turned to the problem of psychotherapists who sexually abuse their patients. He noted that the Medical Board, which operates an in-house diversion program, has routinely referred sexual offenders to its diversion program in the past, and is only now—at the insistence of Medical Board member Dr. Michael Weisman—questioning the wisdom of diverting sexual offenders to programs designed to treat substance abuse. *[12:2&3 CRLR 100]* O'Connor argued that sexual abuse cases should never be diverted, as "experts agree that we are dealing with a psychopathology which is not conducive to rehabilitation in any way....Revocation is the only responsible decision in such cases—certainly not diversion."

O'Connor encouraged DCA to take a closer look at the diversion concept, considering the possible serious repercussions to consumers. (*See supra* COMMENTARY for a modified version of Mr. O'Connor's memorandum.)

LEGISLATION

The following is a status update on bills reported in detail in CRLR Vol. 12, Nos. 2 & 3 (Spring/Summer 1992) at pages 123–24:

SB 2044 (Boatwright) declares legislative findings regarding unlicensed activity and authorizes all DCA boards, bureaus, and commissions, including BOP, to establish by regulation a system for the issuance of an administrative citation to an unlicensed person who is acting in the capacity of a licensee or registrant under the jurisdiction of that board, bureau, or commission. This bill also provides that the unlicensed performance of activities for which a BOP license or registration is required may be classified as an infraction punishable by a fine not less than $250 and not more than $1,000. This bill was signed by the Governor on September 28 (Chapter 1135, Statutes of 1992).

AB 2743 (Frazee) increases the renewal fee for a psychologist's license from $225 to $400 for biennial renewal periods commencing on or after January 1, 1993, and authorizes BOP to increase the fee to an amount not to exceed $500. It also revises, effective July 1, 1993, the examination and reexamination fees for written and oral psychologist examinations. AB 2743 also authorizes DCA boards, including BOP, to create a "cost recovery program"—that is, in disciplinary proceedings, BOP may request the administrative law judge to direct the licentiate, under certain circumstances, to pay to the Board a sum not to exceed the reasonable costs of the investigation and enforcement of the case. This bill was signed by the Governor on September 30 (Chapter 1289, Statutes of 1992).

AB 2416 (Hunter) requires the State Department of Mental Health to convene a multidisciplinary task force to review and make recommendations regarding the professional services provided by all clinical professional disciplines in state hospitals. The bill also requires the Department to convene a subcommittee of the task force to review the services that psychologists and psychiatrists may provide relative to state hospital patients. This bill was signed by the Governor on September 8 (Chapter 601, Statutes of 1992).

SB 1773 (Boatwright) authorizes BOP to refuse to issue a license to an applicant when it appears that the applicant may be unable to practice safely due to mental illness or chemical dependency, and makes specified procedures regarding the examination of licentiates by a Board-designated physician or psychologist also applicable to applicants. The bill also authorizes BOP to deny an application for licensure or registration as a clinical psychologist, or suspend or revoke a license or registration of, and that it constitutes grounds for disciplinary action for unprofessional conduct against, a psychologist if another state revokes or suspends that license, or otherwise disciplines that licensee. This bill also provides that BOP may deny any application for licensure or registration or suspend or revoke a license or registration to practice psychology if a board established under the law regulating healing arts licentiates, or an equivalent licensing agency of another state, has revoked, suspended, or taken other disciplinary action against that person's license to practice any of the healing arts. This bill was signed by the Governor on July 29 (Chapter 384, Statutes of 1992).

AB 3034 (Polanco). The Psychology Licensing Law authorizes the Board to deny an application for a license, issue a license subject to terms and conditions, order the suspension of a license for a period not exceeding one year, or revoke or impose probationary conditions upon a licensee for, among other things, accepting commissions or rebates or other forms of remuneration for referring persons to other professionals. This bill changes that limitation on the issuance or use of a license to practice psychology and prohibits the payment, acceptance, or solicitation of consideration, compensation, or remuneration, whether monetary or otherwise, for the referral of clients. This bill also permits the Board to reinstate a revoked license to practice psychology upon an application made to the Board three years from the date of revocation. This bill was signed by the Governor on September 28 (Chapter 1099, Statutes of 1992).

SB 664 (Calderon). Existing law prohibits psychologists, among others, from charging, billing, or otherwise soliciting payment from any patient, client, customer, or third-party payor for any clinical laboratory test or service if the test or service was not actually rendered by that person or under his/her direct supervision, unless the patient is apprised at the first solicitation for payment of the name, address, and charges of the clinical laboratory performing the service. This bill also makes this prohibition applicable to any subsequent charge, bill, or solicitation. This bill also makes it unlawful for any psychologist to assess additional charges for any clinical laboratory service that is not actually rendered by that person to the patient and itemized in the charge, bill, or other solicitation of payment. This bill was signed by the Governor on June 4 (Chapter 85, Statutes of 1992).

SB 774 (Boatwright), commencing January 1, 1996, prohibits BOP from issuing any renewal license unless the applicant submits proof satisfactory to the Board that he/she has completed no less than 18 hours of approved continuing education (CE) in the preceding year, and requires that on or after January 1, 1997, BOP may issue renewal licenses only to those applicants who have completed 36 hours of approved CE in the preceding two years. This bill was signed by the Governor on July 18 (Chapter 260, Statutes of 1992).

SB 1119 (Presley), which would have required district attorneys, city attorneys, and other prosecuting agencies to notify BOP of the filing of felony charges against a licensee, and required court clerks to transmit a certified copy of the conviction of a licensee to BOP, died in committee. Amendments to Business and Professions Code section 2987 which increase BOP's biennial renewal fee, which were previously contained in SB 1119, were deleted from this bill and amended into AB 2743 (*see supra*).

SB 1882 (Bergeson). Existing law provides for the licensure by the state Department of Health Services of clinics, excluding from these licensure requirements a place, establishment, or institution that solely provides advice, counseling, information, or referrals on the maintenance of health or on the means and measures to prevent or avoid illness. This bill would have added psychology services to the list of services such excluded entities may provide. This bill, which would also have eliminated existing law which provides for the licensure of psychology clinics, died in committee.

FUTURE MEETINGS

To be announced.

SPEECH-LANGUAGE PATHOLOGY AND AUDIOLOGY EXAMINING COMMITTEE

Executive Officer: Carol Richards (916) 920-6388

The Speech-Language Pathology and Audiology Examining Committee (SPAEC) consists of nine members: three speech-language pathologists, three audiologists and three public members (one of whom is a physician). SPAEC functions under the jurisdiction and supervision of the Medical Board's Division of Allied Health Professions (DAHP).

The Committee administers examinations to and licenses speech-language pathologists and audiologists. It also registers speech-language pathology and audiology aides. SPAEC hears all matters assigned to it by the Division, including but not limited to any contested case or any petition for reinstatement, restoration, or modification of probation. Decisions of the Committee are forwarded to DAHP for final adoption.

SPAEC is authorized by the Speech-Language Pathologists and Audiologists Licensure Act, Business and Professions Code section 2530 *et seq.*; its regulations are contained in Division 13.4, Title 16 of the California Code of Regulations (CCR).

At this writing, two Committee members—one audiologist and one public member—are serving under a grace period, having completed the maximum term of service without replacement. In addition, three SPAEC positions are vacant: one audiologist, one speech-language pathologist, and one public member position appointed by the Assembly Speaker.

MAJOR PROJECTS

SPAEC Continues Rulemaking Effort on Exam Waiver Criteria. At its July 10 meeting, SPAEC reviewed draft rules defining the criteria it will apply in deciding whether to grant a request for an exam waiver under Business and Professions Code section 2532.2(e) and section 1399.159, Division 13.4, Title 16 of the CCR. The rulemaking effort stems from a

formal petition filed by the Center for Public Interest Law (CPIL) last February, which SPAEC granted at its April meeting. *[12:2&3 CRLR 125]*

Under draft language developed by a subcommittee consisting of SPAEC members David Alessi, Gail Hubbard, Ellen Mosher, and Phil Reid, licensure applicants who have taken and passed the national examination and who (1) are licensed in another state, or (2) hold a certificate of clinical competence issued by the American Speech-Language-Hearing Association in the field for which licensure is sought, or (3) were previously licensed in this state but whose license has lapsed under Business and Professions Code section 2535.4, and who have been continuously employed (except for usual and customary absences for illness and vacations) in the field for which licensure is sought for three years prior to the date on which their application was filed with SPAEC, shall be deemed to have satisfied the examination requirement in regulatory section 1399.159(a) even though the national exam was taken more than five years from the date on which their application was filed with SPAEC, "assuming that the applicant can demonstrate breadth of experience. Continuous employment in the field for which licensure is sought is defined as documented employment of not less than 15 hours per week during the three years specified above while maintaining a license in the state where the applicant was employed."

CPIL representative Ron Espinoza pointed out that the draft language fails to resolve the problem which prompted the Center's petition for rulemaking, as it requires proof of "breadth of experience" without defining that term in any way. SPAEC members then engaged in a lengthy discussion of what constitutes proof of currency and knowledge of the field. Citing the ongoing difficulty of making this determination, Dr. Alessi moved to repeal section 1399.159, which permits SPAEC to waive the exam for applicants who have taken the national exam more than five years prior to application for California licensure; this motion was narrowly defeated. SPAEC then tentatively agreed to drop the "breadth of experience" language, and replace it with some showing of completion of continuing education credits within the three years prior to application for exam waiver. The subcommittee will continue to refine the draft language and was scheduled to present a modified version at SPAEC's October meeting.

The Budget Ax Falls. During the fall, SPAEC must determine how it will satisfy mandatory budget cuts set forth in the 1992–93 Budget Bill, which was finally signed on September 2. The Budget Bill requires special-funded agencies, including SPAEC, to reduce expenditures by 10% over 1991–92 and to transfer that 10% to the general fund on June 30, 1993. The Committee also plans to monitor several proposals to restructure the Department of Consumer Affairs (DCA), of which SPAEC is a constituent agency, and/or to consolidate all the special funds of the 38 DCA agencies into a single business and professions fund, which will lessen the impact of future budget cuts on small agencies like SPAEC.

Mandatory Continuing Education. In another discussion of the subject at its July 10 meeting, SPAEC decided that the proposed imposition of a mandatory continuing education (CE) requirement on Committee licensees is important but not a major focus at present. Currently, the entire concept is being addressed in the context of DCA's ongoing study of the CE requirements of its various boards and commissions, and a provision of SB 2044 (Boatwright) (*see infra* LEGISLATION) which authorizes the DCA Director to develop guidelines and prescribe components for CE programs administered by any agency within the Department. SPAEC will continue to monitor this subject.

Speech-Language Pathology Aides. Over the past few years, SPAEC has engaged in considerable discussion of the appropriate amount of supervision to be exercised by speech-language pathologists over aides. At the Committee's July meeting, SPAEC Chair Robert Hall reported that he recently attended a panel discussion on the issue sponsored by the California Speech-Language-Hearing Association (CSHA); according to Hall, "eight different presenters had eight different points of view." Meanwhile, the American Speech-Language-Hearing Association (ASHA) has established a task force on the use of supportive personnel; the task force will present its findings to the ASHA board at its annual meeting in November.

Advertising Issues Task Force. On July 31, the Advertising Issues Task Force convened its first meeting to discuss various types of hearing aid dispenser advertising which have been the subject of complaints by SPAEC licensees, other health care professionals, and the public. *[12:2&3 CRLR 126]* The Task Force consists of SPAEC Chair Robert Hall, Hearing Aid Dispensers Examining Committee (HADEC) Chair Molly Wilson, and three trade association representatives. The Task Force discussed problems associated with fourteen types of advertising by hearing aid dispensers, and agreed that HADEC should take action or establish some policy in almost all of the fourteen areas identified. (*See supra* agency report on HADEC for related discussion.)

LEGISLATION

The following is a status update on bills reported in detail in CRLR Vol. 12, Nos. 2 & 3 (Spring/Summer 1992) at page 127:

SB 2044 (Boatwright) declares legislative findings regarding unlicensed activity and authorizes all DCA boards, bureaus, and commissions, including SPAEC, to establish by regulation a system for the issuance of an administrative citation to an unlicensed person who is acting in the capacity of a licensee or registrant under the jurisdiction of that board, bureau, or commission. SB 2044 also provides that if, upon investigation, SPAEC has probable cause to believe that a person is advertising in a telephone directory with respect to the offering or performance of services, without being properly licensed by the Committee to offer or perform those services, SPAEC may issue a citation containing an order of correction which requires the violator to cease the unlawful advertising and notify the telephone company furnishing services to the violator to disconnect the telephone service furnished to any telephone number contained in the unlawful advertising. Finally, this bill authorizes the DCA Director to develop guidelines for mandatory continuing education programs administered by any DCA board. This bill was signed by the Governor on September 28 (Chapter 1135, Statutes of 1992).

AB 3160 (Conroy) includes the conduct of hearing screening within the definition of the practice of speech-language pathology. The term "hearing screening" as performed by a speech-language pathologist is defined as "a binary puretone screening at a preset intensity level for the purpose of determining if the screened individuals are in need of further medical or audiological evaluation." This bill was signed by the Governor on July 22 (Chapter 313, Statutes of 1992).

SB 1549 (Rogers) expands the definition of the practice of fitting or selling hearing aids to include the screening of persons at a health fair or similar event in a prescribed manner for the purpose of identifying the need for further hearing or medical evaluation. The bill requires the hearing aid dispenser licensee to present to the person screened a prescribed written

statement, and prohibits the licensee conducting those hearing screenings from making or seeking referrals for testing, fitting, or dispensing of hearing aids. This bill was signed by the Governor on August 30 (Chapter 573, Statutes of 1992).

AB 2743 (Frazee) renames SPAEC's enabling act as the Speech-Language Pathologists and Audiologists Licensure Act; provides that the delinquency fee shall be $25, the fee for a duplicate wall certificate fee is $25, and the duplicate renewal receipt fee is $25; provides that all speech-language pathologist and audiologist licenses issued as of January 1, 1992, shall expire at midnight on the last day of the birth month of the licensee during the second year of a two-year term if not renewed; provides that all other initial licenses issued by SPAEC will expire at midnight on the last day of the birth month of the licensee during the second year after it is issued; and provides that, to renew an unexpired license, the licensee must, on or before the date of expiration of the license, apply for renewal on a form provided by SPAEC, accompanied by the prescribed renewal fee. This bill was signed by the Governor on September 30 (Chapter 1289, Statutes of 1992).

SB 664 (Calderon). Existing law prohibits speech-language pathologists and audiologists, among others, from charging, billing, or otherwise soliciting payment from any patient, client, customer, or third-party payor for any clinical laboratory test or service if the test or service was not actually rendered by that person or under his/her direct supervision, unless the patient is apprised at the first solicitation for payment of the name, address, and charges of the clinical laboratory performing the service. This bill also makes this prohibition applicable to any subsequent charge, bill, or solicitation. This bill also makes it unlawful for any speech-language pathologist or audiologist to charge additional charges for any clinical laboratory service that is not actually rendered by that person to the patient and itemized in the charge, bill, or other solicitation of payment. This bill was signed by the Governor on June 4 (Chapter 85, Statutes of 1992).

SB 1119 (Presley), which would have required district attorneys, city attorneys, and other prosecuting agencies to notify SPAEC of the filing of felony charges against a licensee and required court clerks to transmit the record of any convictions of a licensee to SPAEC, died in committee.

FUTURE MEETINGS

January 15 in San Diego.

BOARD OF EXAMINERS OF NURSING HOME ADMINISTRATORS

Executive Officer: Ray F. Nikkel (916) 920-6481

Pursuant to Business and Professions Code section 3901 *et seq.*, the Board of Examiners of Nursing Home Administrators (BENHA) develops, imposes, and enforces standards for individuals desiring to receive and maintain a license as a nursing home administrator (NHA). The Board may revoke or suspend a license after an administrative hearing on findings of gross negligence, incompetence relevant to performance in the trade, fraud or deception in applying for a license, treating any mental or physical condition without a license, or violation of any rules adopted by the Board. BENHA's regulations are codified in Division 31, Title 16 of the California Code of Regulations (CCR). Board committees include the Administrative, Disciplinary, and Education, Training and Examination Committees.

The Board consists of nine members. Four of the Board members must be actively engaged in the administration of nursing homes at the time of their appointment. Of these, two licensee members must be from proprietary nursing homes; two others must come from nonprofit, charitable nursing homes. Five Board members must represent the general public. One of the five public members is required to be actively engaged in the practice of medicine; a second public member must be an educator in health care administration. Seven of the nine members of the Board are appointed by the Governor. The Speaker of the Assembly and the Senate Rules Committee each appoint one member. A member may serve for no more than two consecutive terms.

The terms of Board members John Colen and Donald Henderson have expired and they have not been reappointed. At this writing, their replacements have not been named.

MAJOR PROJECTS

Nursing Home Reform Act Update. In February 1992, as a result of the settlement of litigation between the federal Health Care Financing Administration (HCFA) and California's Department of Health Services (DHS) regarding California's implementation of the federal Nursing Home Reform Act of 1987, HCFA published proposed rules implementing the federal reforms in the *Federal Register* (57 Fed. Reg. 4516). Among other things, the proposed rules relate to the qualifications of nursing home administrators; if approved, California's NHA licensure requirements will have to be amended. *[12:2&3 CRLR 128]*

At BENHA's June 23 meeting, Executive Officer Ray Nikkel announced that the National Association of Boards of Examiners of Nursing Home Administrators (NAB) had submitted its comments to HCFA regarding the proposed rules; NAB representatives also met with HCFA officials to further discuss their concerns. Nikkel reported that HCFA is expected to implement most, if not all, of NAB's recommendations. Nikkel estimated that HCFA's revised regulations may be released in November; however, Nikkel does not anticipate the release of a final version until August 1993, which will provide BENHA with time to revise its existing regulations to conform with the final regulations.

RCFE Administrator Licensing/Certification Program Update. At its June 23 and August 28 meetings, BENHA continued its discussion regarding the possible redirection of responsibility for administering the residential care facility for the elderly (RCFE) administrator certification program from the Department of Social Services (DSS) to BENHA. *[12:2&3 CRLR 129]*

At the June 23 meeting, Nancy Campbell, chair of the BENHA subcommittee charged with identifying and analyzing pertinent areas of concern regarding the transfer of the RCFE program to BENHA, submitted a 33-page report addressing relevant issues. Among other things, the report describes the history of RCFE administrator certification; evaluates the concerns of both providers and consumers; proposes draft legislation necessary to transfer the program's jurisdiction to BENHA; discusses the need to change BENHA's composition in order to reflect representation of RCFE administrators; and analyzes the costs of such a transfer. The report concludes that BENHA should be able to administer the RCFE administrator certification process for approximately the same costs as does DSS' Community Care Licensing Division; and recommends that the current RCFE certification process be changed to a licensing program under BENHA. Although the report is not conclusive in nature, its finding generally support the transfer proposal and it offers recommendations which would facilitate that transfer.