enforce the auction laws."

Hall also informed licensees that, upon elimination of the Commission, the legislature intended to transfer the $377,000 remaining in the Commission's operating budget to the general fund as well.

LEGISLATION

AB 2734 (Peace) amends Business and Professions Code section 5730(c), which currently provides that an auctioneer's license is not required for an auction sale of real estate, to instead provide that such a license is not required for a sale of real estate or a sale of real estate with personal property or fixtures or both in a unified sale pursuant to Commercial Code section 9501(4)(a)(ii). This bill was signed by the Governor on September 29 (Chapter 1095, Statutes of 1992).

BOARD OF CHIROPRACTIC EXAMINERS

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

The Board consists of seven members, including five chiropractors and two public members. On July 22, Governor Wilson appointed Michael J. Martello, DC, to fill a chiropractor position on the Board. The terms of BCE members Matthew A. Snider, DC, and John Emerzian, DC, recently expired; at this writing, Governor Wilson has not named replacements to fill the vacant positions. Thus, the Board is currently operating with only five members.

MAJOR PROJECTS

Unprofessional Conduct Regulation Draws Fire. On June 19, BCE conducted a public hearing on a proposal by the California Medical Association (CMA) that the Board adopt one of two alternative versions of proposed new section 317(v), Title 16 of the CCR, concerning unprofessional conduct by chiropractors. *[12:2&3 CRLR 249]*

Under alternative one, new section 317(v) would provide that it is unprofessional conduct for a chiropractor to fail to refer a patient to a physician or other licensed health care provider if, in the course of a diagnostic evaluation, the chiropractor detects an abnormality that indicates that the patient has a physical or mental condition, disease, or injury that is not subject to appropriate management by chiropractic methods and techniques. This version of section 317(v) would not apply when the patient states that he/she is already under the care of a physician or licensed health care provider who is providing the appropriate management. This section would also allow the chiropractor to accept the patient's statement. Under alternative two, new section 317(v) would define unprofessional conduct in much the same way, except that the section would not apply when the chiropractor has knowledge that the patient is already under the care of a physician or licensed health care provider who is providing appropriate management; alternative two would require the doctor of chiropractic to obtain this knowledge.

The Board is obligated to adopt some form of section 317(v) under the stipulated settlement agreement in *California Chapter of the American Physical Therapy Ass'n, et al. v. California State Board of Chiropractic Examiners*, Nos. 35-44-85 and 35-24-14 (Sacramento County Superior Court). The settlement, reached in early 1991, ended a four-year-long battle among medical doctors, physical therapists, and chiropractors over the language of section 302, Title 16 of the CCR, BCE's scope of practice regulation. Under the agreement, the parties to the litigation—CMA, the California Chapter of the American Physical Therapy Association, the Medical Board, the Physical Therapy Examining Committee, and BCE—purported to agree to the language of amendments to section 302 and new section 317(v) which would be adopted by BCE in an Administrative Procedure Act rulemaking proceeding and presumably approved by the Office of Administrative Law (OAL).

Parlan Edwards, DC, the first witness at the June 19 hearing, challenged the legality of the settlement agreement because it had not been submitted to or authorized by the chiropractic profession, and called the regulatory hearing "a charade." Dr. Edwards argued that "[b]owing to the dictates of the CMA is not a reason to propose a rule replete with deficiencies and adverse implications for the profession."

Most witnesses agreed with Dr. Edwards and opposed both versions of the proposed regulation, opining that this new section would serve to greatly limit the right and ability of chiropractors to treat and diagnose their patients without the supervision of other health care professionals. Others viewed the proposed new section as duplicative and claimed that certain language of both alternatives is vague and ambiguous.

At its July 23 meeting, BCE tabled its consideration of the regulatory language of new section 317(v); at this writing, the Board is scheduled to revisit the proposal at its meeting on January 7.

OAL Rejects Board's Proposed Regulation Defining "Adjustment." On July 29, OAL rejected the Board's proposed adoption of section 310.3, Division 4, Title 16 of the CCR, which would have defined a chiropractic adjustment and/or manipulation, in order to facilitate the detection of unlicensed practice. *[12:2&3 CRLR 248]* Section 310.3 would have defined the adjustment and/or manipulation of hard tissues as "manually or mechanically moving such tissues beyond their passive physiological range of motion by applying a forceful thrust." OAL found that the rulemaking file submitted by BCE failed to comply with the necessity, clarity, and procedural standards of the Administrative Procedure Act (APA) and that the Board failed to adequately respond to public comments.

According to OAL, the Board's initial statement of Reasons (ISR) indicated that the proposed regulation was intended to strengthen the Board's ability to protect the public from unlicensed persons performing adjustment procedures. However, the Board admitted that it did not rely on any technical, theoretical, or empirical studies, reports, or documents in proposing adoption of the regulation. In the ISR, the Board further stated that the Attorney General's Office will not prosecute unlawful practice of chiropractic without a clear definition of the term "adjustment." According to OAL, however, the Board failed to include evidence in the rulemaking file of consultation with the Attorney General at any time during the rulemaking process. OAL found that "there is no evidence that the proposed regulation will be considered a 'clear definition' by the prosecutor, and thus be useful in carrying out its prescribed purpose of enforcement. A regulation that does not or cannot fulfill its purpose is unnecessary."

OAL also found that section 310.3's definition of unlicensed practice of chiropractic facially appears to be ex-

tremely broad. According to OAL, the definition could conceivably be used to accuse other health practitioners, practicing within the scope of their licenses, of the unlicensed practice of chiropractic. OAL noted that the proposed regulation "might then be inconsistent with another health profession's act, invalidating the regulation." OAL held that because BCE's statements of reasons "are not sufficiently informative and lack supporting data, it is unclear what effect the Board intends."

Finally, OAL found that some of the Board's responses to public comments in opposition to the proposed action were inadequate, unresponsive, or inappropriate. Particularly, OAL found that the Board's responses were inadequate to comments requesting data and other supporting information.

The Board has until November 25 to modify and resubmit section 310.3 to OAL for approval.

Board Modifies Proposal to Create Review Panels. At its August 27 meeting, BCE approved a modified version of proposed new sections 306.1 and 306.2, Title 16 of the CCR. Section 306.1 would create Chiropractic Quality Review Panels, define their responsibilities, and specify the rights of chiropractors under review by these panels. Section 306.2 would define the Board's obligations to those experts who conduct evaluations of the performance of a licensee, are members of Chiropractic Quality Review Panels, administer BCE's examinations, or perform educational evaluations. The modified language specifies that each panel member shall have at least five years' experience practicing chiropractic in California, and have no disciplinary action against his/her license. Also, section 306.1 was modified to provide that the failure of a licensee to appear before a panel, without good cause, constitutes grounds for disciplinary action.

These new versions of proposed sections 306.1 and 306.2 represent a revised rulemaking package in response to two previous OAL disapprovals. *[12:2&3 CRLR 249]* BCE submitted the revised proposal to OAL on September 10; at this writing, the regulatory action awaits review and approval by OAL.

BCE Proposes Preceptor Regulations. On July 10, BCE published notice of its intent to adopt new section 313.1, Title 16 of the CCR, regarding preceptor programs in approved chiropractic institutions. Preceptor programs are offsite educational programs which extend the preceptee's chiropractic experience beyond completion of the curriculum requirement or date of graduation up to one year or the date of licensure, whichever occurs first. Among other things, section 313.1 would do the following:

–provide that preceptor programs shall include practice by the preceptee in both office management and clinical experience, and training in protocols for chiropractic care of patients in a health care facility, and shall be a maximum of twelve consecutive months with an average work week of 35 hours;

–provide that, in order to be approved to supervise a preceptee in a preceptor program, a chiropractor must hold a current license to practice chiropractic, have at least five years of full-time active experience in the practice of chiropractic as a licensee of BCE, and not have been found guilty of unprofessional conduct or violation of any medical or chiropractic practice act or convicted of any crime or conviction resulting from a plea of nolo contendere;

–specify the responsibilities of both preceptors and preceptees; and

–provide that advertising by a preceptee is considered unprofessional conduct, as preceptor programs are intended to be an extension of a supervised learning program conducted in compliance with recognized standards.

On August 27, BCE conducted a public hearing on this proposed regulation. Following the hearing, BCE made minor revisions to the proposal and released the modified text for an additional fifteen-day public comment period, which ended on October 8. At this writing, proposed section 313.1 awaits review and approval by OAL.

OAL Rejects Out-of-State Licensee Regulatory Proposal. On May 18, OAL rejected the Board's proposed adoption of section 312.3, Title 16 of the CCR, regarding the ability of chiropractors licensed in other states to render professional services and/or evaluate or judge any person in California. *[12:2&3 CRLR 249]* Section 312.3 would have provided that the rendering of professional services by chiropractors not licensed to practice chiropractic in California constitutes the practice of chiropractic in California and a violation of section 15 of the Chiropractic Act, unless the unlicensed chiropractor actively consults with a treating chiropractor licensed in California each time professional services are rendered to a person in California. The term "professional services" includes the rendering of professional judgments or evaluations regarding any person for insurance purposes. This modified version of section 312.3 follows OAL's December 1991 rejection of BCE's originally-proposed language; in that disapproval, OAL found (among other things) that the Chiropractic Act does not authorize BCE to regulate an out-of-state chiropractor who is employed by an insurance company to review patient records.

In its May disapproval, OAL found that BCE's rulemaking file on section 312.3 failed to comply with the authority, consistency, and necessity standards of the APA and that the Board failed to adequately respond to public comments. Specifically, OAL again found that the Board failed to cite any authority granting BCE power to establish the review of insurance claims by chiropractors not licensed in California as a violation of the Chiropractic Act. Although acknowledging that BCE cited to Business and Professions Code section 1000–16 as granting it such authority, OAL found that "[s]ection 1000–16 exempts a chiropractor from another state who is consulting with a California licensed chiropractor from the requirements of the Chiropractic Act. This is an exception to the application of the Chiropractic Act. The Chiropractic Act only applies to the practice of chiropractic in California. This does not extend authority to the Board to regulate an out-of-state chiropractor reviewing insurance claims. Such a chiropractor is not providing services to or treating patients in this state."

OAL also found that BCE's attempt to regulate the review and examination of insurance claims outside of California as treatment or practice of chiropractic in California conflicts with the intent of the Chiropractic Act. According to OAL, "although the Board has the authority to regulate the practice of chiropractic *in this state*, the proposed regulation goes beyond the authority granted to the Board. Therefore the purpose of the proposed regulation is in conflict with the Chiropractic Act" (emphasis original). OAL opined that "it is also arguable that the extension of jurisdiction to chiropractors who would not otherwise be licensed in California and subject to the Board's regulation may constitute antitrust violations, restraint of trade, and violation of the commerce clause of the United States Constitution."

OAL further concluded that the rulemaking file contains no facts, studies, expert opinion, or other information in support of the conclusion that chiropractors licensed in other states make unreasonable determinations, adding that "since OAL finds no law requiring insurance companies to consult with chiropractors in the first place, it is unclear how the Board will resolve anything by

making it that much more difficult for insurance companies to carry out the review process with the assistance of chiropractors. Logic would indicate that insurance companies would simply cease to use chiropractors to review their claims rather than to incur any additional expense."

Finally, OAL also noted that BCE did not adequately respond to public comments concerning issues such as authority, consistency, necessity, and increased costs to insurance companies. Although the Board attempted to respond to the comments, OAL found that the responses were "often either too generalized or do not address the real point of the comment." The Board does not plan to submit a revised rulemaking file on this proposal.

OAL Approves BCE's Continuing Education Amendment. On June 3, OAL approved BCE's amendment to section 356, Title 16 of the CCR, regarding BCE's continuing education (CE) requirements. Section 356 formerly provided that licensees in active practice must complete a minimum of twelve hours per year of CE at an educational program approved by BCE, and that any twelve hours may be selected for relicensure credit. The amendment provides that four hours of every twelve hours selected for relicensure credit must be in adjustive technique, and that those four hours may be satisfied by lecture and demonstration. *[12:2&3 CRLR 249]* The four hours of adjustive technique CE will be required for license renewal beginning July 1, 1994.

OAL Approves "No Out-of-Pocket Expense" Advertising Regulation. On March 27, OAL approved the Board's amendments to section 317(u), Title 16 of the CCR. These amendments prohibit chiropractors from entering into agreements with patients to waive, abrogate, or rebate the deductible and/or co-payment amounts of any insurance policy by forgiving any of the patient's obligation or payment unless the insurer is notified in writing in each such instance. *[12:2&3 CRLR 249]* The amendments to section 317(u) became effective on April 26.

Board Alters Unprofessional Conduct Code. On August 17, OAL approved BCE's nonsubstantive change to section 317(h), Title 16 of the CCR, which includes in the definition of unprofessional conduct the "conviction of a felony or of any offense...involving moral turpitude, dishonesty or corruption." As amended, the section provides that a plea or verdict of guilty, or a plea of nolo contendere, is deemed to be a conviction within the meaning of BCE's disciplinary provisions. This change became effective on September 16.

BCE Considers HIV Prevention Course Requirement. At its June 18 meeting, BCE considered possible amendments to sections 355 and 356, Title 16 of the CCR; section 355 concerns license renewal and restoration, and section 356 concerns CE course content. Specifically, BCE is considering amending section 355 to require licensed chiropractors to complete an approved CE seminar in human immunodeficiency virus (HIV) prevention; BCE would require two hours of such CE every five years. BCE's amendments to section 356 would specify that the Board recommends that special attention in CE seminars be given to—among other things—HIV prevention. BCE agreed to commence the rulemaking process in order to effect these amendments; although formal notice has not yet been published in the *California Regulatory Notice Register*, a public hearing is tentatively scheduled for January 7 in San Diego.

BCE Considers Practical Exam Appeal Process Regulation. At its June 18 meeting, BCE considered the possible adoption of new section 353, Title 16 of the CCR, to establish an appeals process for its practical examinations. Specifically, section 353 would provide that practical exam appeals must be based upon one or more of the following grounds: (1) significant procedural error in the examination process, including content or format; (2) evidence of adverse discrimination; or (3) evidence of substantial disadvantage to an individual candidate. The regulation would also provide that appeals based on adverse discrimination or substantial disadvantage may best be resolved at the examination site, and that candidates experiencing such hardship should appeal before leaving the immediate examination area. Section 353 would also provide that BCE "shall deny any appeal which is not accompanied by information supporting the appeal, and may deny an appeal that is not filed within the thirty days following the date on the examination result letter." Section 353 would establish an Appeals Committee, consisting of three BCE members appointed by the Board Chair. Pursuant to the proposed section, BCE would act upon the recommendation of the Appeals Committee; the decision of the Board would be final.

BCE agreed to pursue the adoption of section 353; at this writing, however, no formal notice of proposed rulemaking has been published in the *California Regulatory Notice Register.*

BCE Considers Creation of Diversion Program. Also at its June 18 meeting, BCE reviewed draft language of proposed section 315.1, Title 16 of the CCR, which would implement a BCE Diversion Program. Pursuant to the proposed language, it is BCE's intent "to seek ways and means to identify and rehabilitate chiropractors with impairment due to abuse of dangerous drugs or alcohol, or due to mental illness or physical illness, affecting competency so that chiropractors so afflicted may be treated and returned to the practice of chiropractic in a manner which will not endanger the public health, safety or welfare." Section 315.1 would provide for the establishment of one or more Diversion Evaluation Committees, each composed of three persons appointed by the Board. The composition of each Committee must include one BCE member, one member licensed by the Medical Board of California, and one public member who has knowledge and expertise in the management of impairment, who shall be designated "Program Manager."

Among other things, section 315.1 would specify the duties and responsibilities of the Committees; establish the procedure for reviewing applicants who request admission to the program; specify reasons why applicants may be denied admission to the program; specify conditions under which a chiropractor's participation in the program may be terminated; and provide for the confidentiality of all Board, Committee, and program records relating to a chiropractor's application to or participation in the program. Notably, the proposed regulation specifies that only applicants who voluntarily request admission may participate in the program, and an applicant may be denied admission to or terminated from the program if BCE receives complaints or information indicating that the applicant/participant has violated a provision of the Chiropractic Act.

At its June 18 meeting, BCE agreed to pursue this regulatory proposal; at this writing, however, no formal notice of proposed rulemaking has been published in the *California Regulatory Notice Register.*

BCE Considers Regulation Governing Chiropractic Referral Services and Information Bureaus. At its August 27 meeting, BCE reviewed draft amendments to section 317.1, Title 16 of the CCR, regarding chiropractic referral services. Among other things, the amendments would also make the section applicable to chiropractic information bureaus; require that approved referral services and information bureaus renew their registration with BCE on an annual

basis and include an updated list of the service's or bureau's available practitioners; and require that a copy of the referral service's or information bureau's fictitious name permit be submitted with the original application, and a new copy submitted any time there is a change in information as required in section 317.1.

BCE agreed to pursue this regulatory proposal; at this writing, however, no formal notice of proposed rulemaking has been published in the *California Regulatory Notice Register.*

LEGISLATION

AB 2638 (Boland). Business and Professions Code section 4227 prohibits a person from furnishing any dangerous drug or device, except upon the prescription of a physician, dentist, podiatrist, or veterinarian, except under specified conditions. Sponsored by the California Chiropractic Association and opposed by the California Medical Association, this bill would have clarified section 4227 by providing that the prohibition does not apply to the furnishing of any dangerous device upon the order of a chiropractor acting within the scope of his/her license. This bill also would have provided that the prohibition does not apply to the furnishing of any dangerous device by a manufacturer or wholesaler or pharmacy to a chiropractor acting within the scope of his/her license; and provided that a medical device retailer may dispense, furnish, transfer, or sell a dangerous device to a licensed chiropractor. Governor Wilson vetoed this bill on September 26, stating that he objects to the portion of the bill permitting chiropractors to prescribe dangerous devices to their patients.

AB 316 (Epple) provides that, notwithstanding Business and Professions Code section 650 or any other provision of law, it shall not be unlawful for a person licensed pursuant to the Chiropractic Act, or any other person, to participate in or operate a group advertising and referral service for chiropractors, under eight specified conditions. The bill authorizes BCE to adopt regulations necessary to enforce and administer this provision, and provides that it is a misdemeanor for a person to operate a group advertising and referral service for chiropractors without providing its name and address to BCE. This bill was signed by the Governor on September 22 (Chapter 856, Statutes of 1992).

SB 664 (Calderon). Existing law prohibits chiropractors, 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 chiropractor to assess additional charges for any clinical laboratory service that is not actually rendered by the chiropractor 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 856 (Hunter) would have provided that the offering or performance of colonic irrigations, as defined, is unlawful and prohibited, and that the offering or performance of enemas, as defined, is unlawful and prohibited unless offered or performed, or ordered to be offered or performed, by a physician under prescribed circumstances. AB 856 would have fulfilled a court order in a 1985 lawsuit in which CMA sought to prevent chiropractors from offering colonics. The San Diego County Superior Court ruled that colonic irrigations are invasive procedures and, as such, may not be performed by chiropractors. A term of the decision required BCE to support limitations on colonics; BCE co-sponsored this bill along with CMA. AB 856 died in committee.

RECENT MEETINGS

At BCE's June 18 meeting in Palm Springs, Board member John Emerzian, DC, reported that the Continuing Education Committee is aware of problems arising with the submission of CE programs that are co-sponsored by a Board-approved sponsor. Often, advertisements promoting the seminars make no mention of the sponsor's name, and offer course outlines which focus more on marketing than chiropractic CE. BCE agreed to review all proposed seminars with the exception of the National College of Chiropractic's seminars on HMOs.

At its July 23 meeting, the Board held an informational hearing regarding manipulation under anesthesia (MUA), in which chiropractors perform manipulations and adjustments while patients are under varying degrees of anesthesia. *[12:2&3 CRLR 251]* BCE, as well as the majority of those in attendance at the hearing, expressed general support for the practice of this relatively new technique. Most witnesses stressed the fact that the chiropractor simply performs the adjustment and does not administer the anesthesia; anesthesia may be administered only by a person licensed to deliver such agents. In this vein, various hearing participants expressed concern about the practice of MUA at outpatient centers, which may not have the same level of staff and equipment as hospitals. Thus, it was suggested that chiropractors at outpatient centers wishing to conduct MUA be required to have equipment similar to that found in hospital operating rooms, particularly anesthesia monitoring equipment. It was also suggested that chiropractors who wish to conduct MUA at an outpatient center have privileges at a nearby hospital and that ambulances be available in case of complications or an emergency. Despite these concerns, the majority of the chiropractors at the meeting reported that they have not encountered any serious problems in performing MUA. BCE is expected to discuss this topic further at future Board meetings.

FUTURE MEETINGS

January 7 in San Diego.
February 18 in Sacramento.
April 8 in Los Angeles.
May 6 in Sacramento.

HORSE RACING BOARD

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

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