



REGULATORY AGENCY ACTION

confusion or uncertainty regarding probations, revocations, and suspensions in force on July 1, 1992.

RECENT MEETINGS:

At BOC's November 18 meeting, the Board discussed holding the first joint public hearing with BBE sometime in May or June to develop and recommend regulations to implement the provisions of AB 3008, which would be adopted by the merged board.

BOC also discussed five budget change proposals submitted to DCA for the 1991-92 fiscal year. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 70 for background information.) Following budget hearings with the DCA Director in August, all of the proposals were approved and sent to the Department of Finance (DOF), which subsequently approved the following four requests: (1) five limited-term clerical positions, each to last two years; (2) \$21,000 for fiscal year 1991-92 and \$14,000 each year thereafter for ongoing review and validation of the written licensing examinations; (3) \$70,000 in fiscal year 1990-91 and \$70,000 in fiscal year 1991-92 to develop a course on hazardous substances in the cosmetology workplace (mandated by AB 2925 (Mojonnier) (Chapter 1674, Statutes of 1990)); and (4) one permanent clerical position at the Los Angeles examination facility with funding of \$22,000 in fiscal year 1990-91 and \$33,000 in the fiscal year 1991-92. DOF disapproved BOC's request for additional in-state travel funds.

FUTURE MEETINGS:

March 10 in the San Francisco/Oakland area.

May 5 in Sacramento.

BOARD OF DENTAL EXAMINERS

Executive Officer: Georgetta Coleman (916) 920-7197

The Board of Dental Examiners (BDE) is charged with enforcing the Dental Practice Act (Business and Professions Code sections 1600 *et seq.*). This includes establishing guidelines for the dental schools' curricula, approving dental training facilities, licensing dental applicants who successfully pass the examination administered by the Board, and establishing guidelines for continuing education requirements of dentists and dental auxiliaries. The Board is also responsible for ensuring that dentists and dental auxiliaries maintain a level of competency adequate to protect the con-

sumer from negligent, unethical, and incompetent practice. The Board's regulations are located in Division 10, Title 16 of the California Code of Regulations (CCR).

The Committee on Dental Auxiliaries (COMDA) is required by law to be a part of the Board. The Committee assists in efforts to regulate dental auxiliaries. A "dental auxiliary" is a person who may perform dental supportive procedures, such as a dental hygienist or a dental assistant. One of the Committee's primary tasks is to create a career ladder, permitting continual advancement of dental auxiliaries to higher levels of licensure.

The Board is composed of fourteen members: eight practicing dentists (DDS/DMD), one registered dental hygienist (RDH), one registered dental assistant (RDA), and four public members. The 1991 members are James Dawson, DDS, president; Gloria Valde, DMD, vice-president; Hazel Torres, RDA, secretary; Pamela Benjamin, public member; Victoria Camilli, public member; Joe Frisch, DDS; Henry Garabedian, DDS; Martha Hickey, public member; Carl Lindstrom, public member; Alfred Otero, DDS; Evelyn Pangborn, RDH; Jack Saroyan, DDS; and Albert Wasserman, DDS. At this writing, one practicing dentist position is vacant.

MAJOR PROJECTS:

"Wasserman Letter" Found To Be "Underground Rulemaking." In September 1989, then-Board President Albert Wasserman, DDS, issued a statement condemning as illegal any office practice under which a dental auxiliary is allowed to perform dental treatment procedures on a new patient without specific instructions and prior to the patient having been examined by the dentist. The California Dental Hygienists Association (CDHA) filed a request for determination by the Office of Administrative Law (OAL), contending that the so-called "Wasserman letter" was an "underground regulation" which must be adopted pursuant to the Administrative Procedure Act (APA) before it may be enforced. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 71; Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 85; and Vol. 9, No. 4 (Fall 1989) p. 54 for extensive background information.) The Board responded to the request for determination in June, and OAL published its decision on November 30.

OAL determined that the statement issued by the Board was in fact a regulation, and therefore had no legal effect since it was never formally adopted pursuant to the APA. Among other things,

the APA requires an agency to give notice of a proposed adoption, amendment, or repeal of a regulation, and to afford interested persons the opportunity to comment on the proposed action.

In its response to the request for determination, the Board maintained that the challenged statement was not a regulation, but "simply a restatement of current law." However, OAL found no California statute, regulation, or judicial opinion that imposes the specific requirements stated in the Wasserman letter. Instead, OAL characterized the Board's position statement as an effort to "interpret, implement, and make specific the Dental Practice Act," and therefore a regulation as defined in Government Code section 11342(b).

Under Business and Professions Code section 1741, the duties of a dental auxiliary may be classified as either "general supervision" or "direct supervision" functions; these classifications must be accomplished through APA rulemaking by the Board. The Wasserman letter insisted that dental auxiliaries may not perform general supervision functions on a new patient who has not yet been examined by the supervising dentist. However, OAL found that neither Business and Professions Code section 1741 nor any properly-adopted regulation requires that a dentist examine and diagnose a patient *prior* to issuing instructions to an auxiliary as to general supervision dental procedures. Thus, the requirements contained in the Board's position statement do in fact amend and make specific the Dental Practice Act. For that reason, OAL determined that the Wasserman letter is a regulation and is "without legal effect" until properly adopted according to the standards set forth in the APA.

OAL also noted that, during 1988-89, BDE attempted to adopt a regulatory change containing the precise restriction imposed by the Wasserman letter. In that rulemaking proceeding, the Board itself admitted that "the law is unclear," and proposed rulemaking to clarify the responsibilities of a dentist regarding the dental procedures which could be performed by auxiliaries before examination, diagnosis, and treatment has been rendered by the dentist. That proposed rulemaking was rejected by the Director of the Department of Consumer Affairs as unnecessary and unfair to the poor, disabled, and elderly. (See CRLR Vol. 9, No. 4 (Fall 1989) p. 54 for background information.)

Regulatory Changes. In its effort to implement AB 1417 (Speier) (Chapter 526, Statutes of 1989), the Board published proposed conscious sedation



permit procedure regulations during the late summer of 1990. The Board then conducted a public hearing on the proposed changes in September 1990, and subsequently adopted the regulatory amendments. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 71; Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) pp. 84-85; and Vol. 10, No. 1 (Winter 1990) pp. 65-66 for detailed background information on these regulations.) The Board expected to submit this rulemaking package to OAL during January or February.

In November 1989, the Board adopted proposed amendments to regulatory section 1086(d), which remove several restrictions on the authority of RDAs to perform coronal polishing. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 71; Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 85; and Vol. 10, No. 1 (Winter 1990) p. 66 for background information.) The Board submitted its rulemaking package to OAL in September; OAL approved the changes on October 29.

Medical Waste Management Act Implementation. On September 30, the Governor signed two bills enacting the Medical Waste Management Act—AB 1641 (Mojonnier) and AB 109 (Hayden). (See CRLR Vol. 10, No. 4 (Fall 1990) p. 72 for background information.) The Act became effective on January 1; enforcement efforts by the Department of Health Services (DHS) are scheduled to begin in April. Dentists who dispose of under 200 pounds of medical waste (sharps and bloody tissue) are now required to have a plan specifying how they will dispose of medical waste. According to BDE, this requirement may be satisfied simply by keeping a document in each dentist's office which describes the disposal plan. More specific requirements will be enforced for practitioners with a greater amount of medical waste.

DHS staff was scheduled to make an oral presentation to the Board in January regarding the impact of the Medical Waste Management Act.

LEGISLATION:

AB 91 (Moore) is a reintroduction of **AB 2934 (Moore)**, which died in the Senate Business and Professions Committee last session. AB 91 would require a dentist, dental health professional, or other licensed health professional to sign his/her name or enter his/her identification number and initials in the patient's record next to the service performed, and to date those treatment entries. This bill would also prohibit a person licensed under the Dental Practice Act from requiring or utilizing a policy for the delivery of dental care that discourages

necessary care or dictates clearly excessive, inadequate, or unnecessary treatment, as specified, the violation of which would constitute unprofessional conduct. At this writing, this bill is awaiting committee assignment in the Assembly.

Anticipated Legislation. The California Dental Laboratory Association (CDLA) has requested that BDE endorse legislation to regulate commercial dental laboratories. Currently, the prescribing dentist is responsible for the quality of materials and the adequate fit of dental prosthetic appliances for his/her patient. CDLA maintains that this should also be considered the responsibility of the dental laboratory as a "significant part of the dental team," and therefore the education and day-to-day activities of dental laboratories and dental technicians who own or manage them should be appropriately regulated by the state. The Board has not taken any position on the possibility of endorsement, but expects that CDLA will pursue the idea in the 1991 legislative session.

The Board is considering the following issues for possible legislative action in 1991:

-In an attempt to clarify procedures regarding the expiration, renewal, reinstatement, and reissuance of all licenses, permits, and registrations, the Board may request an amendment to section 1715.1 of the Business and Professions Code. The modification would simply apply the current standards for the expiration, renewal, reinstatement, and reissuance of a dental license and additional place of practice permit to all other licenses, permits, and registrations issued by the Board.

-The Board is considering legislation that would establish a time limit for passing its licensing exam. **AB 1798 (Moore)**, which would have required applicants for dental licenses who fail to pass the skills examination after three attempts to complete additional education requirements, died in the Senate inactive file last session.

-Currently, section 1625(e) of the Business and Professions Code describes the practice of dentistry as any person who "manages or conducts as manager, proprietor, conductor, lessor, or otherwise, a place where dental operations are performed." Possible legislation would change the word "lessor" to "lessee" to avoid prohibiting property owners from conveying tenancy of their real property to fully-licensed dentists.

-Finally, the Board is considering the reintroduction of **AB 3187 (Statham)**, which died in the Assembly inactive file last session. The bill would authorize

BDE to establish a system to issue a citation with an administrative fine to licensees for violations of the Board's statutes or regulations, and would require BDE to establish a regular inspections system.

LITIGATION:

California Dental Association v. Board of Dental Examiners, No. 511723 (Sacramento County Superior Court), is a declaratory relief action in which CDA seeks to prevent BDE from enforcing a cease and desist letter ordering CDA to refrain from advertising themselves as "the dentists who set the standards." (See CRLR Vol. 10, No. 4 (Fall 1990) p. 72; Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 87; and Vol. 10, No. 1 (Winter 1990) p. 66 for background information.) CDA's motion for summary judgment was denied at a December 4 hearing. A settlement conference was scheduled for January 9, and a trial date was set for January 17.

On November 13, Judge Lawrence K. Karlton, chief judge emeritus of the U.S. District Court for the Eastern District of California, found the California Department of Health Services (DHS) in violation of several sections of 42 U.S.C. and related federal regulations, in **Clark v. Kizer**, No. CIV S-87-1700LKK. Pursuant to federal law, the state is required to create an adequate payment schedule for dentists who treat Denti-Cal beneficiaries, in order to assure that dental services are available to those persons "at least to the extent that such care and services are available to the general population." Judge Karlton's order requires DHS Director Kenneth W. Kizer to take specific interim measures until a permanent plan is established. According to lead plaintiff Virginia Clark, low-level reimbursements have been a disincentive for dentists. As a result, less than 40% of licensed dentists treat Denti-Cal recipients, and many of those limit their services to only a few patients.

Under the federal court order, Kizer was required to provide plaintiffs with a plan for complying with the federal law by December 28; the plaintiffs had until February 15 to file any objections. In the meantime, Kizer is required to take "all practicable steps" to ensure adequate dental care for Denti-Cal beneficiaries, which may include providing financial assistance to recipients who must travel to dentists outside a defined geographical area.

Robert D. Newman, lead counsel for the plaintiffs, does not expect further opposition from DHS and was hopeful that a plan would be in place by the end of December. According to Newman, the



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plan should be finalized by the middle of 1991.

RECENT MEETINGS:

At its November meeting, the Board unanimously agreed to pursue an amendment to section 1017(d) of its regulations, as it relates to disabled licensees. Section 1017(d) currently provides that a licentiate who has not practiced in California for more than one year because the licentiate is disabled need not comply with specified continuing education requirements during the renewal period within which such disability falls. BDE proposes to amend this provision by requiring that each such licentiate provide documentation from a licensed physician that the licentiate has a disability which would not permit compliance with the continuing education requirements during the current renewal period.

FUTURE MEETINGS:

March 15-16 in Los Angeles.
May 10-11 in San Diego.
July 12-13 in San Francisco.

BUREAU OF ELECTRONIC AND APPLIANCE REPAIR

Chief: Jack Hayes
(916) 445-4751

The Bureau of Electronic and Appliance Repair (BEAR) was created by legislative act in 1963. It registers service dealers who repair major home appliances and electronic equipment. BEAR is authorized under Business and Professions Code section 9800 *et seq.*; BEAR's regulations are located in Division 27, Title 16 of the California Code of Regulations (CCR).

Grounds for denial or revocation of registration include false or misleading advertising, false promises likely to induce a customer to authorize repair, fraudulent or dishonest dealings, any willful departure from or disregard of accepted trade standards for good and workmanlike repair and negligent or incompetent repair. The Electronic and Appliance Repair Dealers Act also requires service dealers to provide an accurate written estimate for parts and labor, provide a claim receipt when accepting equipment for repair, return replaced parts, and furnish an itemized invoice describing all labor performed and parts installed.

The Bureau continually inspects service dealer locations to ensure compliance with the Electronic and Appliance Repair Dealers Registration Law and

regulations. It also receives, investigates and resolves consumer complaints.

The Bureau is assisted by an Advisory Board comprised of two representatives of the appliance industry, two representatives of the electronic industry, and five public representatives, all appointed for four-year terms. Of the five public members, three are appointed by the Governor, one by the Speaker of the Assembly, and one by the Senate President pro Tempore.

MAJOR PROJECTS:

Proposed Rulemaking. BEAR's proposed rulemaking package, consisting of modifications and additions to twelve sections of Division 27, Title 16 of the CCR, has undergone an additional revision. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 73; and Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) pp. 87-88 for detailed background information.) During October, the proposed amendment to section 2736 was modified to ensure that when a mandatory 30-day labor and 90-day parts guarantee on a repair is implied due to the service dealer's failure to clearly disclaim a guarantee on the invoice, it does not modify or cancel any guarantees provided by the manufacturer on products or parts, and does not modify any applicable service contract provisions.

The Bureau distributed the modified language and reopened the public comment period for an additional fifteen days; it received no additional comments. BEAR then submitted the entire package to the Office of Administrative Law (OAL) for approval; at this writing, BEAR is awaiting OAL's response.

Phone Disconnect Legislation Rejected by DCA. During the fall, BEAR Program Manager George Busman drafted proposed legislation that would grant the Bureau authority to request the disconnection of telephone service to unregistered electronic and appliance repair businesses. Currently, such action requires BEAR to obtain a court order, which, according to BEAR, is expensive and time-consuming. The proposal was similar to current law applicable to the Contractors State License Board, which allows that board to make such a request directly to the Public Utilities Commission, after providing appropriate notice and an opportunity to be heard to the alleged offender. The justification for the proposal was to bolster BEAR's law enforcement activity and to protect consumers. However, the Department of Consumer Affairs subsequently informed BEAR that it would not endorse or sponsor such legislation.

LEGISLATION:

Anticipated Legislation. Currently, all BEAR registrations must be renewed at the end of the state's fiscal year (June 30). Under a cyclical renewal system, a registration would be renewed every year on the date of original issuance. The benefit of such a system is a more efficiently distributed workload for the Bureau. BEAR's legal counsel determined that the general provisions of the Business and Professions Code may allow implementation of cyclical renewal (via rulemaking) without seeking new legislation; however, the possibility of future legislation to effectuate such a change has not been foreclosed.

According to Bureau Chief Jack Hayes, Senator Herschel Rosenthal has promised to reintroduce legislation on service contracts in the coming year. Last year, Senator Rosenthal sponsored SB 2086, which would have required service contracts to contain, or have set forth in a related document, specified information relating to the total cost and terms of payment of the service contract, and protection of the buyer from loss in the event of the seller's bankruptcy. The bill died in the Assembly Committee on Governmental Efficiency and Consumer Protection. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 74 for background information.)

At the November 9 Advisory Board meeting, Assistant Chief Gordon Boranian noted that in the previous legislative session, not a single bill aimed at restricting the production, use, distribution, or sale of chlorofluorocarbons became law. (See CRLR Vol. 10, No. 4 (Fall 1990) pp. 73-74 for background information.) According to Mr. Boranian, BEAR anticipates that a number of bills addressing this issue will be introduced in the current legislative session.

RECENT MEETINGS:

At the October 11 meeting of BEAR's Executive Committee, Advisory Board public member Glenn Shoemaker reported that Pacific Gas and Electric Company (PG&E) in San Francisco has tentatively agreed to include basic information about BEAR in a newsletter which it encloses with its monthly bills sent to over four million customers. Assistant Chief Gordon Boranian subsequently reported at the November 9 Advisory Board meeting that BEAR will supply information to PG&E, which will write the newsletter article. BEAR will then review the article and resubmit it to PG&E for publication. Mr. Shoemaker stated that BEAR may need additional assistance in its efforts to disseminate consumer-related