

**Board of Chiropractic Examiners
MEETING MINUTES
Enforcement Committee
April 29, 2014
8:00 a.m.
Southern California University of Health Sciences
16200 Amber Valley Drive, Multipurpose Room #41
(562) 947-8755**

Committee Members Present

Sergio Azzolino, D.C., Chair
Heather Dehn, D.C.
Frank Ruffino

Staff Present

Robert Puleo, Executive Officer
Sandra Walker, Compliance Manager
Dixie Van Allen, Associate Governmental Program Analyst
Maria Martinez, Special Investigator
Valerie James, Management Services Technician
Kristy Shellans, Attorney III

Call to Order

Dr. Azzolino called the meeting to order at 8:15 a.m.

Roll Call

Dr. Azzolino called the roll. All committee members were present.

Approval of March 27, 2014 Minutes

MOTION: MR. RUFFINO MOVED TO APPROVE THE MINUTES

SECOND: DR. DEHN SECONDED THE MOTION

VOTE: 3-0

MOTION CARRIED

Possible Changes Regarding the Proposed Regulations for Extracorporeal Shock Wave (ECSW) Therapy (Proposed Regulation Section 318.2)

Mr. Puleo advised this proposed regulation will expire on May 17, 2014 if the Board does not take action.

Ms. Shellans stated, prior BCE counsel has indicated there is no legal authority to support this regulation which is a concern going forward. The BCE would need to substantiate that ECSW was taught in 1922 in the chiropractic colleges. Ms. Shellans also stated the BCE may want to consider an initiative amendment at some point.

Dr. Dehn asked how the BCE would address chiropractors (D.C.'s) who are currently performing ECSW.

Mr. Puleo stated that it depends on the technology the D.C.'s use, as section 302 allows for the use of low level ultrasound. If low level ultrasound is used rather than the high-level device for orthopedic lithotripsy requiring anesthesia, no regulation is necessary.

Dr. Dehn stated that D.C.'s performing ECSW need guidance. Dr. Dehn then inquired if the BCE has received any complaints about D.C.'s performing ECSW.

Mr. Puleo stated the BCE is not aware of any complaints against D.C.'s performing this procedure.

Dr. Dehn inquired about the response the BCE would provide to a D.C. who may call and ask if they can perform ECSW.

Mr. Puleo stated we would advise them to seek legal advice, review section 302, and know what type of device they are using. If it is a lithotripter then it would not be in the chiropractic scope of practice. If it is an ultrasound, then it would be within the scope of practice. Mr. Puleo stated he doesn't believe this regulation would change much.

Mr. Ruffino inquired about obtaining a legal opinion regarding this issue.

Ms. Shellans said she can provide the legal opinion, however, she cannot guarantee the result.

Mr. Ruffino inquired about language in the Initial Statement of Reasons (paragraph 2 under Section 318.2(a)), which states that ECSW involving the use of anesthesia is a procedure currently being performed by some licensed chiropractors in California. Mr. Ruffino inquired about the basis of this statement.

Ms. Van Allen, BCE legislative analyst, stated she prepared this Initial Statement of Reasons and that the information was obtained from a presentation given by Dr. Edward Cremata, D.C.

Mr. Ruffino stated he agrees the BCE is not ready to move forward with this regulation and we should allow it to expire.

Ms. Shellans stated if the Committee doesn't take any action, the proposed regulation will lapse. She suggested that the committee provide a summary to the Board at its next meeting recommending that no further action be taken on this proposed regulation.

Update Regarding the Options for Implementation of Uniform Standards of Substance Abusing Healing Arts Licensees

There was a short discussion regarding the content of SB 1441 and the impact it may have on licensees.

Ms. Shellans requested to reserve the more in depth discussion of this item for the full Board meeting. Ms. Shellans provided options for the proposed "trigger" language that would specify when a licensee is determined to be a "substance abusing licensee." She also stated the Disciplinary Guidelines should be separate from the Uniform Standards, within the regulations.

Dr. Azzolino stated he is fine with Ms. Shellans reserving the discussion for a more in depth overview at the full Board meeting. Dr. Azzolino also stated that there is benefit to acting consistently with the other Boards.

Discussion Regarding Proposed Changes to Title 16, CCR Section 317(w) (Failure to refer)

Dr. Azzolino expressed concern with the inconsistent interpretation of the regulations by the BCE Experts. He believes the regulations need to better define what constitutes unprofessional conduct related to not making or documenting a referral. He questioned; who is going to define when referral is appropriate?

Ms. Shellans' understanding of this regulation is to make it a requirement for D.C. to refer patients to an appropriate health care practitioner for issues and treatment that fall outside the scope of chiropractic practice.

Dr. Azzolino directed BCE staff to poll other state's Chiropractic Boards regarding this issue. He stated that this issue needs to be monitored closely.

Mr. Puleo asked Ms. Shellans if she knew whether other Boards have a screening process for their Expert reviewers.

Ms. Shellans also spoke about Expert calibration for future training, and recommended checking with other DCA Health Boards to see what else is going on within their Expert training efforts.

Dr. Azzolino stated the concern is with the language of CCR 317(w) and how it is interpreted.

Ms. Shellans stated the Committee could refer the language to a 2 person sub-committee to make suggestions and bring them back to the Enforcement Committee.

Ms. Shellans also reminded Committee members that the Board has the ability to reject the case decision (such as non-adopt the Proposed Decision, restructure Order's penalty and decision, etc.) as an approach if they don't agree with the Expert's conclusion.

Dr. Azzolino stated this effort should be aimed at a long term solution in changing the current language for this regulation which will be done as BCE looks at what the other states are doing.

Discussion Regarding the Physical Therapy Board Staff's Opinion of the Physical Therapist's Scope of Practice

Mr. Puleo referenced several documents including an e-mail from an employee of the Physical Therapy Board (PTB) and a legal opinion from the Legislative Counsel Bureau regarding Physical Therapy Scope of Practice. The legal opinion is in response to the question; "Does the Physical Therapy Practice Act authorize a physical therapist to perform joint manipulation." The opinion concluded that the Physical Therapy Act does not authorize physical therapists to perform joint manipulation.

Mr. Puleo stated that he spoke with the Executive Officer (EO) of the PTB. The PTB believes that if the physical therapist (PT) is performing manipulation while helping a patient to regain range of motion then it is within their scope of practice. The PTB EO advised Mr. Puleo that their last few occupational analyses found that manipulation is within the PT scope. Mr. Puleo stated the legislative counsel opinion states otherwise. However, it does leave the door open to allow the PTB to interpret their Act.

Ms. Shellans inquired if the PT Board has acted to endorse or support the statement in the email that was sent out. Mr. Puleo stated no, but the PTB EO didn't refute it.

Dr. Dehn inquired whether the current situation with Senator Yee changes anything regarding the Legislative Council's legal opinion. Mr. Puleo stated, no.

Dr. Dehn inquired about the amount of weight or rank the opinion has. Mr. Puleo indicated that the opinion is not law, it's just opinion. He stated it is comparable to an Attorney General's opinion.

Ms. Shellans indicated that the legal opinion was prepared by an attorney who works for the legislature. There is that support for the interpretation that it's not within the scope. It doesn't say anything in the statute about allowing them to move a joint outside its normal range of motion.

Dr. Dehn inquired about the Board's choices for action on this issue.

Ms Shellans clarified that it's not an official position interpretation of the PTB. Such as if a complaint is received, the question is, whether it is considered unlicensed activity for the BCE. Mr. Puleo stated that if a complaint is received, the BCE can investigate it for unlicensed practice of chiropractic and refer it to the PTB to investigate for exceeding the PT scope of practice. He also stated patient complaints no doubt are best.

Dr. Azzolino indicated it is rare that a week goes by where he doesn't see a patient that has been manipulated by a PT. His concern is public protection. Dr. Azzolino questions whether PT's have the proper training and directed staff to inquire further into that issue.

Dr. Dehn inquired whether or not the BCE is going to reply to the email. Mr. Puleo replied that we could post the legal opinion on our web site.

Dr. Azzolino asked for public comment.

Dr. Kenneth Winer, D.C., representing the California Chiropractic Association (CCA), introduced himself to the Committee. Dr. Winer stated that this issue has been going back and forth for quite some time. He states the main issue is that we have a legal opinion from the Legislative Counsel that says this is not within a PT's scope of practice. There are PT's out there performing manipulation and we feel the PTB is not enforcing this. It's as though they have an underground regulation by continuing to let this happen. He believes there are some alternatives that they would like to see the BCE do: (1) Set up a meeting with the PTB. Dr. Winer stated the CCA would be willing to attend the meeting as well. (2) Get a legislator to force a meeting between the PTB and BCE. Dr. Winer stated, we can't keep waiting for someone to get injured.

Dr. Azzolino replied that he does not have a problem setting up a meeting, but the focus should be an outreach approach with the PTB. He also stated the BCE could attend one of the PTB meetings and speak during public comment, or at their next Sunset Review.

Mr. Puleo stated he will share the legal opinion with Bill Gage at the Senate Business and Professions Committee and the EO of the PTB.

Mr. Ruffino agreed a meeting is appropriate.

Dr. Azzolino recommended that the CCA publish the legal opinion and stated the BCE can post it on our webpage as well.

Dr. Azzolino stated it would be beneficial to do some outreach with all the other Health Care Boards, because what we found out when meeting with the Medical Board was that there is no venue or anything formal among the Boards where we can meet to help each other and serve the public.

Consideration of and Possible Action Regarding Proposed Regulations to Implement Recommendations to Strengthen Enforcement Programs Pursuant to the Consumer Protection Enforcement Initiative (CPEI)

Ms. Van Allen provided an overview of the documents on this subject.

Ms. Shellans advised each section would be reviewed and then comments/issues would be discussed.

§303 no problems raised

§304 no problems raised

§306.3 no problems raised

§308 no problems raised

§312 Dr. Azzolino had concerns with the requirement that D.C.'s "prepare a written treatment plan". He stated it is not necessary in all cases and the information is in the SOAP notes, which is a standard. The language was changed to "A written treatment plan may be included in the SOAP note."

Ms. Van Allen advised there were comments during the comment period regarding section 312 and concerns were raised. Ms. Van Allen read aloud the comments to the Committee. The Committee agreed to move forward.

§314 no problems raised

§317.2 Ms. Shellans recommended that it be stricken because we already have the authority under 143.5.

MOTION: DR. DEHN MOVED TO STRIKE THE SECTION

SECOND: MR. RUFFINO SECONDED THE MOTION

VOTE: 3-0

MOTION CARRIED

§317.3 no problems raised

§321.1 no problems raised

§384.1 Ms. Shellans requested a modification. Dr. Dehn inquired if this section is where we are able to address charging an application, reinstatement or processing fee for Petitioning. Ms. Shellans replied that yes, the Board could, but it will extend the time of the regulation package, there may be a place within the disciplinary guidelines/regulations too and she also recommended we move forward to address it at a later meeting.

§390.5 no problems raised

§390.7 Ms. Shellans recommended striking this section, due to potential for litigation against the Board for failure to exercise discretion.

MOTION: DR. DEHN MOVED TO ADOPT MS. SHELLANS RECOMMENDATION

SECOND: MR. RUFFINO SECONDED THE MOTION

VOTE: 3-0

MOTION CARRIED

§390.8 Ms. Shellans again raised concerns regarding potential litigation and recommended striking this section.

MOTION: MR. RUFFINO MOVED TO ADOPT MS. SHELLANS RECOMMENDATION

SECOND: DR. DEHN SECONDED THE MOTION

VOTE: 3-0

MOTION CARRIED

Discussion Regarding Establishing a Standard for Maintenance of Patient Records when a Practice Closes

The Committee discussed that CCR 312.1 should work hand in hand with 312.2. Our 5 year law about maintaining patient records and Federal law concerning disposal of patient records should match or be compatible. Probate law complicates this issue as well and the 6 months requirement in our law doesn't give survivors enough time to dispose of a licensee's practice when he/she dies or becomes incapacitated.

As far as what to do with patient records, this discussion and action should include consideration not only for closure, but death, retirement and incapacitation as well. The Board should also consider a requirement to notify active or inactive patients and notify the Board.

Mr. Puleo inquired how we would enforce any regulation on the survivor of a deceased chiropractor since we only have jurisdiction over the licensee, not the family. Ms. Shellans said we could possibly issue a citation and fine but she would have to check into it.

Dr. Azzolino stated that we should extend the amount of time the family has to find another licensed chiropractor to take over the practice and take over as the custodian of the records.

Dr. Dehn asked if we had or need language addressing how long records are kept if the patient is a minor.

Public Comment

Dr. Charles Davis, D.C., representing the International Chiropractic Association of California, recommended that the BCE develop a checklist or guidelines for families to provide guidance when a D.C. suddenly dies or the practice closes. Ms. Shellans stated that a checklist cannot be in a regulation, it can be only mentioned as a guideline.

Dr. Azzolino requested that Dr. Davis provide the Board with a sample checklist.

Future Agenda Items

NONE

Adjournment

Dr. Azzolino adjourned the meeting at 10:40 a.m.