BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

NOTICE OF PUBLIC MEETING

February 12, 2015
8:00 a.m.
Palmer College of Chiropractic West Campus
90 E. Tasman Drive
San Jose, CA 95134
(408) 944-6000

AGENDA

1. **OPEN SESSION** – Call to Order & Establishment of a Quorum
   Sergio Azzolino, D.C., Chair
   Heather Dehn, D.C., Vice Chair
   Julie Elginer, Dr.PH, Secretary
   Dionne McClain, D.C.
   John Roza Jr., D.C.
   Corey Lichtman, D.C.
   Frank Ruffino

2. **Pledge of Allegiance**

3. **Chair's Report**
   2014 Year-End Summary of BCE Accomplishments

4. **Welcome Presentation and Introduction from William Meeker, DC, MPH, President Palmer College of Chiropractic West Campus**

5. **Approval of Minutes**
   September 25, 2014
   October 28, 2014
   January 27, 2015

6. **Executive Officer's Report**
   A. Administration
   B. Budget
   C. Licensing
   D. Enforcement

7. **Ratification of Approved License Applications**

8. **Ratification of Approved Continuing Education Providers**

9. **Ratification of Denied License Applications in Which the Applicants Did Not Request a Hearing**

10. **BCE Licensing, Continuing Education and Public Relations Committee Meeting Update -** Board may take action on any item on the attached Licensing, Continuing Education and Public Relations Committee meeting agendas.

11. **BCE Government Affairs Committee Meeting Update –** Board may take action on any item on the attached Government Affairs Committee meeting agenda.

12. **BCE Enforcement Committee Meeting Update –** Board may take action on any item on the attached Enforcement Affairs Committee meeting agenda.

13. **Updates on Proposed Regulations**
    A. Licensing Application and Continuing Education Exemptions Title 16, CCR §§ 321 & 364
    B. Sponsored Free Health Care Events, Title 16, CCR §§ 309, 309.1, 309.2, 309.3, & 309.4

14. **Public Comment for Items Not on the Agenda**
    Note: The Board may not discuss or take action on any matter raised during this public comment section that is not included on this agenda, except to decide whether to place the matter on the agenda of a future meeting. [Government Code Sections 11125, 11125.7(a).] Public comment is encouraged; however, if time constraints mandate, comments may be limited at the discretion of the Chair.

15. **Hearings Re: Petition for Reinstatement of Revoked License (Time Certain 12:00 P.M.)**
    A. Bruce Ankrom
    B. Dmitriy Sklyut

16. **Hearing Re: Petition for Reduction of Penalty**
    A. Ali-Duy Nguyen, D.C. – DC 18151

17. **Closed Session**
    The Board will meet in Closed Session to:
    A. Deliberate on Disciplinary Decisions and Petitions Pursuant to California Government Code Section 11126(c)(3)
    B. Receive Advice from Legal Counsel Pursuant to California Government Code Section 11126(e) Regarding:
        1) Jonathan Widenbaum, D.C. v. California Department of Consumer Affairs/Board of Chiropractic Examiners, Cal.Ct.App.(1st app. Dist.), Case No. A142454
        2) Hugh Lubkin, D.C. v. Board of Chiropractic Examiners Workers' Compensation Case No. ADJ7361379

18. **OPEN SESSION: Announcements Regarding Closed Session**

19. **Adjournment**

Meetings of the Board of Chiropractic Examiners are open to the public except when specifically noticed otherwise in accordance with the Open Meeting Act. Public comments will be taken on agenda items at the time the specific item is raised. The Board may take action on any item listed on the agenda, unless listed as informational only. All times are approximate and subject to change, unless noticed as "Time Certain." Agenda items may be taken out of order to accommodate speakers and to maintain a quorum. The meeting may be cancelled without notice. For verification of the meeting, call (916) 263-5355 or access the Board's Web Site at www.chiro.ca.gov.

The meeting facilities are accessible to individuals with physical disabilities. A person who needs a disability-related accommodation or modification in order to participate in the meeting may make a request by contacting Marlene Valencia at (916) 263-5355 ext. 5363 or e-mail marlene.valencia@dca.ca.gov or send a written request to the Board of Chiropractic Examiners, 901 P Street, Suite 142A, Sacramento, CA 95814. Providing your request at least five (5) business days before the meeting will help to ensure availability of the requested accommodation.

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BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

BOARD OF CHIROPRACTIC EXAMINERS
TELECONFERENCE PUBLIC SESSION MINUTES

September 25, 2014
901 P Street, Suite 142A
Sacramento, CA 95814

DRAFT

Teleconference Meeting Locations:

Sergio Azzolino, DC
1545 Broadway St., #1A
San Francisco, CA 94109
(415) 563-3800

Heather Dehn, DC
4616 El Camino Ave #B.
Sacramento, CA 95821
(916) 488-0202

Julie Elginer, Dr.PH
Agoura Hills Library
29901 Ladyface Ct.
Agoura Hills, CA 91301
(818) 889-2278

Frank Ruffino
700 East Naples Court
Chula Vista, CA 91911
(619) 205-1415

Board Members Present
Sergio Azzolino D.C., Chair
Heather Dehn, D.C., Vice Chair
Julie Elginer, Dr.PH, Secretary
Frank Ruffino

Staff Present
Robert Puleo, Executive Officer
Kristy Schieldge, Attorney III
Linda Shaw, Staff Services Manager

Call to Order
Dr. Azzolino called the meeting to order at 12:10 p.m.

Roll Call
Dr. Elginer called the roll. A quorum was established.

Closed Session
The Board went into Closed Session to receive advice from legal counsel regarding the matter of Anthony T. Johnson v. California State Board of Chiropractic Examiners, Cal.Sup.Ct. Los Angeles Co., Case No. BS144229 at 12:12 pm.

Open Session
The Board went into Open Session at 12:18 p.m. to take public comment and adjourn the meeting.

Public Comment for Items Not on the Agenda
None

Adjournment
Dr. Azzolino adjourned the meeting at 12:20 pm.

DRAFT

BOARD OF CHIROPRACTIC EXAMINERS
PUBLIC SESSION MINUTES

October 28, 2014
State of California
San Diego State Building
1350 Front Street, Suite B109
San Diego, CA 92101

DRAFT

Board Members Present
Sergio Azzolino D.C., Chair
Heather Dehn, D.C., Vice Chair
Julie Elginer, Dr.PH, Secretary
Dionne McClain, D.C.
John Roza, Jr., D.C.
Corey Lichtman, D.C.
Frank Ruffino

Staff Present
Robert Puleo, Executive Officer
Kristy Schieldge, Attorney III
Linda Shaw, Staff Services Manager I
Sandra Walker, Staff Services Manager I
Maria Martinez, Special Investigator
Dixie Van Allen, Associate Governmental Program Analyst
Valerie James, Management Services Technician

Call to Order
Dr. Azzolino called the meeting to order at 9:46 a.m.

Roll Call
Dr. Dehn called the roll. All members were present.

Pledge of Allegiance
Mr. Ruffino led the Pledge of Allegiance.

Chair's Report
Dr. Azzolino spoke on the Board's implementation of the strategic plan. He reported on the Board's outreach efforts to stakeholders through a Chiropractic Summit held in San Francisco in which various chiropractic college representatives and chiropractors shared their ideas relating to the Chiropractic Initiative Act. Dr. Azzolino requested the chiropractic colleges and the California Chiropractic Association (CCA) to inform students and licensees that the Fall 2014 newsletter is now available on the Board's website. He reported that the California Law and Professional Practice Examination has been updated and will go into production on October 31, 2015. The fully redeveloped examination will go into production

in the spring of 2015. Dr. Azzolino thanked the subject matter experts and DCA's Office of Professional Examination Services for their involvement.

The Board moved to Agenda Item 10 – Welcome Presentation from San Diego Senator Marty Block.

Welcome Presentation from San Diego Senator Marty Block
Dr. Azzolino and Mr. Ruffino welcomed Senator Marty Block to the Board meeting. Senator Block welcomed the Board to San Diego and also commended the Board on their oversight and consumer protection achievements for the Chiropractic Profession.

Mr. Ruffino introduced and thanked Alberto Velasquez, Field Representative from Assembly Member Lorena Gonzalez' office, for attending the Board meeting.

Approval of Minutes

MOTION: MR. RUFFINO MOVED TO APPROVE THE JULY 17, 2014 MINUTES WITH THE FOLLOWING AMENDMENT ON PAGE 5: INSERT THE PHRASE, "AND WELCOMED THE BOARD TO HIS ASSEMBLY DISTRICT AND..." FOLLOWING THE PHRASE, "ASSEMBLY MEMBER BILL QUIRK OF HAYWARD CAME FORWARD".
SECOND: DR. DEHN SECONDED THE MOTION
VOTE: 7-0 (DR. AZZOLINO-AYE, DR. DEHN-AYE, DR. ELGINER-AYE, DR. MCCLAIN-AYE, DR. ROZA-AYE, DR. LICHTMAN-AYE, MR. RUFFINO-AYE)
MOTION: CARRIED

MOTION: DR. DEHN MOVED TO APPROVE THE MINUTES OF THE JUNE 26, 2014 AND THE SEPTEMBER 25, 2014 TELECONFERENCE BOARD MEETINGS.
SECOND: DR. ELGINER SECONDED THE MOTION
VOTE: 7-0 (DR. AZZOLINO-AYE, DR. DEHN-AYE, DR. ELGINER-AYE, DR. MCCLAIN-AYE, DR. ROZA-AYE, DR. LICHTMAN-AYE, MR. RUFFINO-AYE)
MOTION: CARRIED

Executive Officer's Report
Mr. Puleo gave the Executive Officer Report. The topics covered were Administration, Budget, Licensing and Enforcement.

Mr. Puleo stated there are no staff changes and all positions have been filled with the exception of the Special Investigator position, which is in the recruitment process. Dr. Elginer requested clarification on Maria Martinez' position number.

Mr. Puleo stated there are no changes to the budget. He addressed the loan for Arbuckle judgment and indicated that Ms. Shaw and Dr. Elginer have assisted him in working with the Department of Consumer Affairs (DCA) Budget Office to develop a plan for repayment of the loan.

Dr. Elginer provided clarification on possible scenarios to repay the loan for the Arbuckle case. The Board had to borrow 3 million dollars from the Bureau of Automotive Repair (BAR). One of the scenarios under consideration is an initial payment of 1 million dollars and approximately 200 thousand dollars a year thereafter for 10 years. Mr. Puleo added that the Board has been very frugal with the budget to prepare for repayment of this loan. Dr. Elginer also stated that a repayment recommendation will be brought to the Board for approval at a future Board meeting and a Memorandum of Understanding will be drafted between the BAR and the Board detailing the repayment plan. Mr. Puleo thanked DCA for their understanding and flexibility.

Mr. Puleo summarized the Board's licensing trends. He provided information regarding chiropractic college enrollment from 1995 to 2013 and licensee population provided by the Federation of Chiropractic Licensing Boards. Dr. Azzolino requested school enrollment trends from other health care Boards.

Mr. Puleo reported on the enforcement statistics. Mr. Puleo announced, with the help of Ms. Shaw and Ms. Lauziere, the Board held a Health Care Executive Officers Council (Council) meeting and it was very well received by the other Board and Bureau Executive Officers. He also stated that the Council will meet quarterly, but the group decided to meet more frequently at the onset to share ideas such as training for Executive Officers. He also indicated that Christine Lally, Deputy Director, Board and Bureau Relations and Brian Clifford, Manager, DCA Division of Legislative and Regulatory Review, also participated in the meeting.

Mr. Ruffino congratulated Mr. Puleo on getting the council together. Dr. Elginer formally thanked Mr. Puleo for taking a leadership position across all healthcare Boards.

Mr. Puleo acknowledged and thanked Ms. Walker for a job well done on her presentation at the Department of Insurance workshop on fraud investigation.

Mr. Puleo advised that consumer satisfaction surveys are being sent out following complaint closures via an electronic link.

Mr. Puleo announced that a new enforcement analyst, Summer Thomas, was hired in the Compliance Unit.

Parliamentary Procedures Overview and Training presentation-Dr. Elginer
Dr. Elginer provided training on parliamentary procedures.

Ratification of Approved License Applications

MOTION: DR. DEHN MOVED TO RATIFY THE APPROVED LICENSE APPLICATIONS
SECOND: DR. MCCLAIN SECONDED THE MOTION
VOTE: 7-0 (DR. AZZOLINO-AYE, DR. DEHN-AYE, DR. ELGINER-AYE, DR. MCCLAIN-AYE, DR. ROZA-AYE, DR. LICHTMAN-AYE, MR. RUFFINO-AYE)
MOTION: CARRIED
The Board ratified the attached list of approved license applications incorporated herein (Attachment A).

Ratification of Approved Continuing Education Providers

MOTION: DR. DEHN MOVED TO RATIFY THE APPROVED CONTINUING EDUCATION PROVIDERS
SECOND: DR. ELGINER SECONDED THE MOTION

Mr. Puleo stated that there is no additional information to provide on continuing education providers.

VOTE: 7-0 (DR. AZZOLINO-AYE, DR. DEHN-AYE, DR. ELGINER-AYE, DR. MCCLAIN-AYE, DR. ROZA-AYE, DR. LICHTMAN-AYE, MR. RUFFINO-AYE)
MOTION: CARRIED
The Board ratified the attached list of approved continuing education providers incorporated herein (Attachment B).

Ratification of Denied License Applications in Which the Applicants Did Not Request a Hearing
There were no denied license applications.

Discussion Regarding Possible Changes to the Chiropractic Initiative Act
Dr. Azzolino spoke on the possibility of changes to the Chiropractic Initiative Act (Act) and the information gathering meeting held with Dr. Dehn, representatives from chiropractic colleges, associations and individual chiropractors. Dr. Azzolino would like to establish advisory committees, one for education and the other for scope of practice, to further explore possible changes to the Act and the regulations.

MOTION: DR. AZZOLINO MOVED TO ESTABLISH COMMITTEES, ONE FOR EDUCATION, THE OTHER FOR SCOPE OF PRACTICE, TO EXPLORE THE NEED FOR CHANGES TO THE ACT AND REGULATIONS IN ORDER TO MOVE THE PRACTICE OF CHIROPRACTIC FORWARD.

Ms. Schieldge advised that formally establishing a committee of more than 2 persons would require the meeting to be publicly noticed pursuant to the Open Meeting Act.

Dr. Azzolino withdrew his motion.

MOTION: DR. AZZOLINO MOVED TO CREATE TWO ADVISORY COMMITTEES, MADE UP OF NO MORE THAN TWO BOARD MEMBERS, FOR EDUCATION AND SCOPE OF PRACTICE, TO EXPLORE POSSIBLE CHANGES TO THE ACT AND THE REGULATIONS. EACH ADVISORY COMMITTEE WILL REPORT BACK TO THE APPROPRIATE COMMITTEE (GOVERNMENT AFFAIRS OR LICENSING AND CONTINUING EDUCATION COMMITTEES).
SECOND: DR. DEHN SECONDED THE MOTION

Dr. McClain inquired about the topics in question that the committees need to discuss. Dr. Azzolino commented that the Schools have concerns with the prescriptive hourly requirements in the Act and the regulations. Dr. Dehn clarified that the purpose of these committees are to gather information to be brought back to the full Board for consideration. Dr. Elginer recommended that the Chair and Vice Chair provide guidance to the advisory committees on the scope of the topics to be explored at these committee meetings and that Chair should appoint the members of the advisory committees.

VOTE: 7-0 (DR. AZZOLINO-AYE, DR. DEHN-AYE, DR. ELGINER-AYE, DR. MCCLAIN-AYE, DR. ROZA-AYE, DR. LICHTMAN-AYE, MR. RUFFINO-AYE)
MOTION: CARRIED

BCE Licensing, Continuing Education and Public Relations Committee Meetings Update
Dr. Dehn reported that the Licensing, Continuing Education and Public Relations Committee is awaiting the Meta-Analysis report which would determine equivalence of the educational standards between international and U.S. chiropractic colleges. Dr. Dehn stated that the Committee is looking to revise the Continuing Education (CE) regulations to give the Board authority to audit CE courses in order to ensure consumer protection. The Committee is developing outreach publications and the first publication will be a Consumer Guide to Chiropractic Services. She also stated that the Board's Strategic Plan will be posted on the website soon. Dr. Azzolino suggested that the Board should request chiropractic colleges and continuing education providers to post the Board's website and social media links on their websites. Dr. Stenzler, CCA, requested clarification on approval of continuing education courses. Dr. Dehn advised that the Board is just beginning to explore this area and has not made any decisions on changes to the current continuing education requirements. Dr. Azzolino would like the Board to interact with CCA to provide valuable information to licensees.

BCE Government Affairs Committee Meeting Update
Dr. Elginer thanked Mr. Ruffino for delivering the Committee update at the last Board meeting in her

absence. Dr. Elginer provided a summary of legislative bills and the Board's position that were taken this legislative year. Dr. Elginer brought to the Board's attention AB 2720 (Ting), which requires meeting agendas to be available at all teleconference meeting locations. This bill also requires all votes at teleconference meetings to be made by roll call and each member's vote formally recorded in the minutes. Ms. Schieldge pointed out that for AB 2143 (Williams) includes a legislative declaration regarding the need for having chiropractic perform commercial drivers examinations to address healthcare shortages. Ms. Schieldge discussed procedural changes and challenges the Board will face as a result of AB 2396 (Bonta) when processing license applications. Dr. Elginer provided a brief overview of the Committee's progress on Action Items in the Strategic plan and highlighted the proposed Board Member Mentorship Program.

MOTION: DR. ELGINER, ON BEHALF OF THE GOVERNMENT AFFAIRS COMMITTEE, MOVED TO APPROVE THE CONTENTS OF THE NEW BOARD MEMBER ON-BOARDING MANUAL
VOTE: 7-0 (DR. AZZOLINO-AYE, DR. DEHN-AYE, DR. ELGINER-AYE, DR. MCCLAIN-AYE, DR. ROZA-AYE, DR. LICHTMAN-AYE, MR. RUFFINO-AYE)
MOTION: CARRIED

MOTION: DR. ELGINER ON BEHALF OF THE GOVERNMENT AFFAIR COMMITTEE MOVES TO APPROVE THE BOARD MEMBER MENTORSHIP PROGRAM
VOTE: 7-0 (DR. AZZOLINO-AYE, DR. DEHN-AYE, DR. ELGINER-AYE, DR. MCCLAIN-AYE, DR. ROZA-AYE, DR. LICHTMAN-AYE, MR. RUFFINO-AYE)
MOTION: CARRIED

BCE Enforcement Committee Meetings Update
Dr. Azzolino reported on the items discussed at the Enforcement Committee Meeting.
The Committee is working on possible changes to the language of California Code of Regulations Section 318-Patient Records. The Committee is also reviewing the qualifications, criteria and standards for the selection of Expert Consultants. They are working on language for the trigger option of when SB 1441 Uniform Standards apply. Lastly, the Committee approved the language for the Consumer Protection Enforcement Initiative (CPEI) Regulations.

MOTION: DR. ELGINER, ON BEHALF OF THE ENFORCEMENT COMMITTEE, DIRECTED STAFF TO TAKE ALL NECESSARY STEPS TO INITIATE THE FORMAL RULEMAKING PROCESS WITH THE PROPOSED TEXT FOR THE CPEI REGULATIONS AND AUTHORIZED THE EXECUTIVE OFFICER TO MAKE NON-SUBSTANTIVE CHANGES TO THE RULEMAKING PACKAGE, AND SET THE PROPOSED REGULATIONS FOR A HEARING.
VOTE: 7-0 (DR. AZZOLINO-AYE, DR. DEHN-AYE, DR. ELGINER-AYE, DR. MCCLAIN-AYE, DR. ROZA-AYE, DR. LICHTMAN-AYE, MR. RUFFINO-AYE)
MOTION: CARRIED

The Board moved to Agenda item 16- Proposed Regulations Discussion and Possible Action to Initiate a Rulemaking to Amend Title 16, CCR Sections 321 and 364 (Licensing Application and Continuing Education Exemptions)

Discussion and Possible Action to Initiate a Rulemaking to Amend Title 16, CCR Sections 321 and 364 (Licensing Application and Continuing Education Exemptions)
Ms. Schieldge summarized revisions to the licensing application, the social security number/ tax identification number, military questions, conviction questions in regards to expungements and the disclosure notice at the end of the application.

MOTION: DR. AZZOLINO MOVED TO PROCEED WITH THE RULEMAKING PROCESS TO AMEND TITLE 16, CCR SECTIONS 321 AND 364 (Licensing Application and Continuing Education Exemptions)
SECOND: DR. ELGINER SECONDED
VOTE: 7-0 (DR. AZZOLINO-AYE, DR. DEHN-AYE, DR. ELGINER-AYE, DR. MCCLAIN-AYE, DR. ROZA-AYE, DR. LICHTMAN-AYE, MR. RUFFINO-AYE)
MOTION: CARRIED

The Board moved to Agenda 17- Public Comment for Items Not on the Agenda

Public Comment for Items Not on the Agenda
Dr. Stenzler, CCA, inquired about the status of the high school physical exam letter.

Proposed 2015 Board Meeting Schedule
The Board selected the following tentative dates for future board meetings:
January 27, 2015 – Sacramento
April 16, 2015 – Southern California
July 30, 2015 – San Francisco California
October 27, 2015 – Southern California

MOTION: DR. ELGINER MOVED TO APPROVE THE 2015 BOARD MEETING SCHEDULE
SECOND: MR. RUFFINO SECONDED THE MOTION
VOTE: 7-0 (DR. AZZOLINO-AYE, DR. DEHN-AYE, DR. ELGINER-AYE, DR. MCCLAIN-AYE, DR. ROZA-AYE, DR. LICHTMAN-AYE, MR. RUFFINO-AYE)
MOTION: CARRIED

Hearings Re: Petition for Early Termination/Modification of Probation
Administrative Law Judge, Abraham Levy, presided over and Deputy Attorney General Antoinette Cincotta appeared on behalf of the people of the State of California in the following hearings:

A. Truong Paul Nguyen, D.C. -DC 19553
B. Alejandro B. Platon, D.C.- DC 21096

Hearings Re: Petition for Reinstatement of Revoked License
Administrative Law Judge, Abraham Levy, presided over and Deputy Attorney General Antoinette Cincotta appeared on behalf of the people of the State of California in the following hearing:

A. Richard A. Warner

Closed Session
Following oral testimonies, the Board went into Closed Session for deliberation and determinations regarding petitioners.

Open Session
The Board went back into Open Session to adjourn the meeting.

Adjournment
Dr. Azzolino adjourned the meeting at 5:02 p.m.

Approval By Ratification of Formerly Approved License Applications
July 1, 2014 – September 30, 2014

Name (First, Middle, Last)			Date Issued	DC#
Michael				
Jeremy	De Mesa	Bonsol	7/11/2014	32997
Kenneth	Justin	Dobbs	7/11/2014	32998
David	Robert	Mason	7/11/2014	32999
Shane	Harrison	Ott	7/11/2014	33000
Blair	Ryan	Schoolhouse	7/11/2014	33001
Nicole	Meshelle	Gauthier	7/14/2014	33002
Ann	Charlotte	Kushner	7/14/2014	33003
Mandana		Miramadi	7/14/2014	33004
Peter	Paul	Alongi	7/17/2014	33005
Scott	John	Davis	7/17/2014	33006
Gayane		Magzanyan	7/17/2014	33007
Khaleed	Camara	Samuels	7/17/2014	33008
Dena	Melissa	Amato	7/22/2014	33009
Shahrouz		Parvinjah	7/22/2014	33010
Neha		Bhatia	7/30/2014	33011
Suzanne	Rebecca	Frank	7/30/2014	33012
Seth	Robert	Pelock	7/30/2014	33013
Broderick	Alan	Peterson	7/30/2014	33014
Kolbyann	Mashian	Walker	7/30/2014	33015
Christina	Escultura	Alba	7/31/2014	33016
Troy	Henry	Holder	7/31/2014	33017
Jerry	Wayne	Hsieh	7/31/2014	33018
Nicole	Angela	Joaquin	7/31/2014	33019
Annalea		Kaye	7/31/2014	33020
Munish		Kumar	7/31/2014	33021
Vanessa	Kathleen	Nordin	7/31/2014	33022
Melissa	Shizuka	Tashiro	7/31/2014	33023
Sarah	Loredana	Schilbach	7/31/2014	33024
Savannah	Kathleen	Shortz	7/31/2014	33025
Pheomany		Vandy	7/31/2014	33026
Andrew	Phillip	Bussell	8/7/2014	33027
Hyosook	Kim	Hoe	8/7/2014	33028
Daniel	Cory	Hoover	8/7/2014	33029

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Mindi	Louise	Jentes	8/7/2014	**33030**
Michelle	Carling	Law	8/7/2014	**33031**
Bonnie	Lee	Ness	8/7/2014	**33032**
Alireza		Nikroo	8/7/2014	**33033**
Titus	Gan	Chiu	8/8/2014	**33034**
Jonathan	Hsitarn	Lin	8/8/2014	**33035**
Gregory	Chad	Nicosia	8/8/2014	**33036**
Walter		Su	8/8/2014	**33037**
CoCo	Wei-Lee	Chin	8/13/2014	**33038**
Justin	David	Coffeen	8/13/2014	**33039**
Amanda	Katherine	Stanuszek	8/13/2014	**33040**
Matthew	Michael	Willis	8/13/2014	**33041**
Jennifer	Anne	Liebersbach	8/14/2014	**33042**
Joseph	Ming-Yan	Ling	8/14/2014	**33043**
Michael	Dewayne	Scott	8/14/2014	**33044**
Sara	Hyun Ju	Chong	8/21/2014	**33045**
Amanda	Jane	Foster	8/21/2014	**33046**
Jane	Giddings	Macris	8/21/2014	**33047**
Gina	Antoinette	McCarthy	8/21/2014	**33048**
Christopher	Matthew	Norton	8/21/2014	**33049**
Rafael		Ramon IV	8/21/2014	**33050**
Eric	Tszchun	Wong	8/21/2014	**33051**
Caroline	T	Bui	8/22/2014	**33052**
Tiffany	Lyn	Fullmer	8/22/2014	**33053**
Race	Alton	Irby	8/22/2014	**33054**
Sara	Arminta	Irby	8/22/2014	**33055**
Daniel		Oh	8/22/2014	**33056**
Shahed		Sadr	8/22/2014	**33057**
Michael	Arne	Stromsness	8/22/2014	**33058**
Timothy	Gan	Chiu	9/4/2014	**33059**
Paul	Michael	Deyerle	9/4/2014	**33060**
Rhiannon	Marie	Dickison	9/4/2014	**33061**
Gerrit	Lee	Wagner	9/4/2014	**33062**
Eric	David	Goodman	9/10/2014	**33063**
Christina	Nicole	Renbarger	9/10/2014	**33064**
Grayson	William	Renbarger	9/10/2014	**33065**
Mary	Anne	Heidkamp	9/11/2014	**33066**
Steven	Jay	Albinder	9/18/2014	**33067**
Beau	Ryan	Beard	9/18/2014	**33068**
John	Douglas	Fraser	9/18/2014	**33069**
Justin	Allen	Keffer	9/18/2014	**33070**
Kevin	Confer	Leach	9/18/2014	**33071**

DRAFT

Michael	Moon	Myung	9/18/2014	**33072**
Charles	Edward	Richardson	9/18/2014	**33073**
Joseph	Leonard	Ritola	9/18/2014	**33074**
Aaron	James	Basco	9/18/2014	**33075**
Jasmine	Yukiko	Chau	9/18/2014	**33076**
Stephenie	Elizabeth	Stephens	9/18/2014	**33077**
Sarah	Caroline	Williams	9/18/2014	**33078**
Farid		Esmailion	9/24/2014	**33079**
Ly	Minh	Klatt	9/24/2014	**33080**
Alicia	Lynn	McDonough	9/24/2014	**33081**
Kori	Chad	Mortenson	9/24/2014	**33082**
Daniel	Alfred	Nash II	9/24/2014	**33083**
Justin	Thomas	Paquette	9/24/2014	**33084**
Hana	Issa	Hadawar	9/26/2014	**33085**
Phillip	Robert	Hersh	9/26/2014	**33086**

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ATTACHMENT B)

Ratification for New Continuing Education Providers

CONTINUING EDUCATION PROVIDERS	DATE APPROVED
1. Daniel P Dock, DC	10/28/14
2. Cage Motion	10/28/14
3. International College of Complementary & Alternative Medicine	10/28/14
4. Dr. Kenneth Howayeck	10/28/14
5. Resource Care One	10/28/14
6. Online CE Pro	10/28/14
7. Adam J Del Torto, DC	10/28/14
8. SI-BONE	10/28/14
9. David W Leaf, DC	10/28/14
10. Direct Personnel	10/28/14

DRAFT

BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

BOARD OF CHIROPRACTIC EXAMINERS
TELECONFERENCE PUBLIC SESSION MINUTES
January 27, 2015

Teleconference Meeting Locations:

Sergio Azzolino, DC
1545 Broadway St., #1A
San Francisco, CA 94109
(415) 563-3800

Heather Dehn, DC
4616 El Camino Ave., #B
Sacramento, CA 95821
(916) 488-0202

Julie Elginer, Dr.PH
640 Charles E. Young Dr
Los Angeles, CA 90024
Office Number 31-235A
(818) 889-2278

John Roza, Jr., DC
800 Douglas Blvd.
Roseville, CA 95678
(916) 786-2267

Dionne McClain, D.C.
6360 Wilshire Blvd., #410
Los Angeles, CA 90043
(323) 653-1014

Corey Lichtman, DC
538 Stevens Ave.
Solano Beach, CA 92075
(858) 481-1889

Frank Ruffino
CA Dept. of Veterans Affairs
700 E. Naples Ct.
Chula Vista, CA 91911
(619) 205-1415

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Board Members Present
Sergio Azzolino D.C., Chair
Heather Dehn, D.C., Vice Chair
Julie Elginer, Dr.PH
John Roza, Jr., D.C.
Corey Lichtman, D.C.
Frank Ruffino

Staff Present
Robert Puleo, Executive Officer
Kristy Schieldge, Attorney III
Dixie Van Allen, Associate Government Program Analyst

Call to Order
Dr. Azzolino called the meeting to order at 2:20 p.m.

Roll Call
Dr. Elginer called the roll. A quorum was established.

Election of Officers for 2015

A. Chair

MOTION: MR. RUFFINO MOVED TO NOMINATE DR. AZZOLINO AS CHAIR
SECOND: DR. ELGINER SECONDED THE MOTION
VOTE: 6-0-1 ABSTAIN (DR. AZZOLINO- ABSTAINED, DR. DEHN-AYE, DR. ELGINER-AYE, DR. MCCLAIN-AYE, DR. ROZA-AYE, DR. LICHTMAN-AYE, MR. RUFFINO-AYE)
MOTION: CARRIED

B. Vice-Chair

MOTION: DR. AZZOLINO MOVED TO NOMINATE DR. DEHN AS VICE-CHAIR
SECOND: DR. ELGINER SECONDED THE MOTION
VOTE: 6-0 -1 ABSTAIN (DR. AZZOLINO-AYE, DR. DEHN- ABSTAINED, DR. ELGINER- AYE , DR. MCCLAIN-AYE,DR. ROZA-AYE, DR. LICHTMAN-AYE, MR. RUFFINO-AYE)
MOTION: CARRIED

C. Secretary

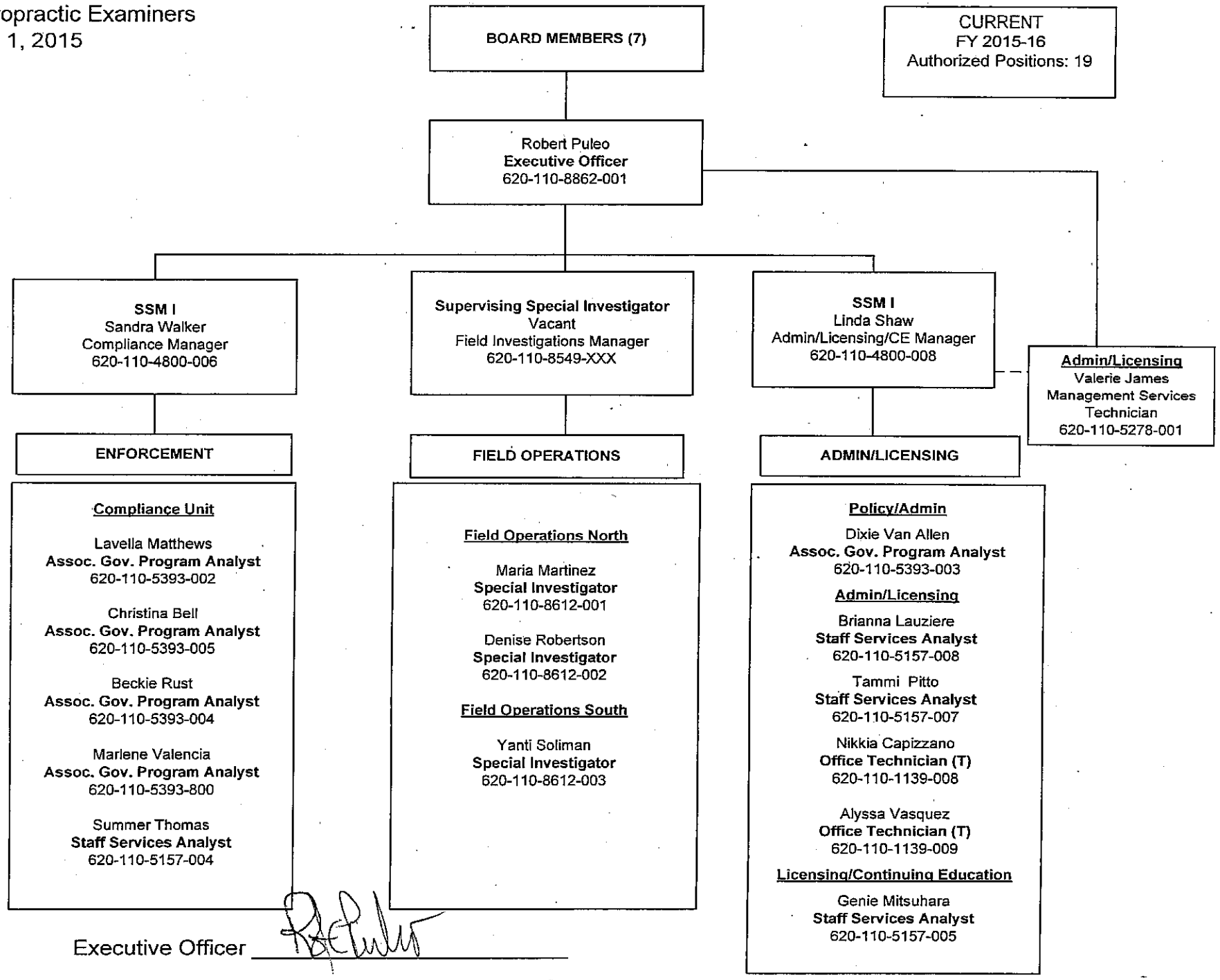
MOTION: MR. RUFFINO MOVED TO NOMINATE DR. ELGINER AS SECRETARY
SECOND: DR. AZZOLINO SECONDED THE MOTION
VOTE: 6-0 -1 ABSTAIN (DR. AZZOLINO-AYE, DR. DEHN-AYE, DR. ELGINER- ABSTAINED, DR. MCCLAIN-AYE, DR. ROZA-AYE, DR. LICHTMAN-AYE, MR. RUFFINO-AYE)
MOTION: CARRIED

Public Comment for Items Not on the Agenda
No public came forward to provide comment.

Adjournment
Dr. Azzolino adjourned the meeting at 2:31 p.m.

DRAFT

Department of Consumer Affairs
State Board of Chiropractic Examiners
January 1, 2015



Executive Officer _____

Personnel Office _____

Rev. 01/14/15

0152 - Board of Chiropractic Examiners
Analysis of Fund Condition

1/29/2015

(Dollars in Thousands)

CURRENT

	ACTUAL 2013-14	CY 2014-15	BY 2015-16	BY+1 2016-17	BY+2 2017-18
BEGINNING BALANCE	$ 2,294	$ 2,923	$ 2,946	$ 2,706	$ 2,478
Prior Year Adjustment	$ 67	$ -	$ -	$ -	$ -
Adjusted Beginning Balance	$ 2,361	$ 2,923	$ 2,946	$ 2,706	$ 2,478
REVENUES AND TRANSFERS					
Revenues:					
125600 Other regulatory fees	$ 153	$ 29	$ 29	$ 29	$ 29
125700 Other regulatory licenses and permits	$ 4	$ 177	$ 177	$ 177	$ 177
125800 Renewal fees	$ 3,379	$ 3,297	$ 3,297	$ 3,297	$ 3,297
125900 Delinquent fees	$ 53	$ 53	$ 53	$ 53	$ 53
150300 Income from surplus money investments	$ 7	$ 3	$ 16	$ 16	$ 6
161400 Miscellaneous revenues	$ 2	$ 3	$ 3	$ 3	$ 3
161900 Other Revenue - Cost Recoveries	$ 9	$ -	$ -	$ -	$ -
164600 Fines and Forfeitures	$ 25	$ -	$ -	$ -	$ -
Totals, Revenues	$ 3,632	$ 3,562	$ 3,575	$ 3,575	$ 3,565
Transfers from Other Funds					
FO0421 From Vehicle Inspection and Repair Fund per Item 1111-011-0421, Budget Act of 2014	$ -	$ 3,000	$ -	$ -	$ -
Totals, Revenues and Transfers	$ 3,632	$ 6,562	$ 3,575	$ 3,575	$ 3,565
Totals, Resources	$ 5,993	$ 9,485	$ 6,521	$ 6,281	$ 6,043
EXPENDITURES					
Disbursements:					
0840 State Controller (State Operations)	$ -	$ -	$ -	$ -	$ -
1110 Program Expenditures (State Operations)[a]	$ 3,053	$ 3,839	$ 3,803	$ 3,803	$ 3,879
8500 Program Expenditures (State Operations)	$ -	$ -	$ -	$ -	$ -
8880 Financial Information System for CA (State Operations)	$ 17	$ 3	$ 12	$ -	$ -
9670 Equity Claims of California Victim Compensation and Government Claims Board and Settlements and Judgements by Department of Justice	$ -	$ 2,698	$ -	$ -	$ -
Total Disbursements	$ 3,070	$ 6,540	$ 3,815	$ 3,803	$ 3,879
FUND BALANCE					
Reserve for economic uncertainties	$ 2,923	$ 2,946	$ 2,706	$ 2,478	$ 2,164
Months in Reserve	5.4	9.3	8.5	7.7	6.6

Note: $1k rounding adjustment in FY 2014-15.

0152 - Board of Chiropractic Examiners
Analysis of Fund Condition

1/29/2015

(Dollars in Thousands)

REPAYMENT SCENARIO

	ACTUAL 2013-14	CY 2014-15	BY 2015-16	BY+1 2016-17	BY+2 2017-18
BEGINNING BALANCE	$ 2,294	$ 2,923	$ 1,946	$ 1,456	$ 978
Prior Year Adjustment	$ 67	$ -	$ -	$ -	$ -
Adjusted Beginning Balance	$ 2,361	$ 2,923	$ 1,946	$ 1,456	$ 978
REVENUES AND TRANSFERS					
Revenues:					
125600 Other regulatory fees	$ 153	$ 29	$ 29	$ 29	$ 29
125700 Other regulatory licenses and permits	$ 4	$ 177	$ 177	$ 177	$ 177
125800 Renewal fees	$ 3,379	$ 3,297	$ 3,297	$ 3,297	$ 3,297
125900 Delinquent fees	$ 53	$ 53	$ 53	$ 53	$ 53
150300 Income from surplus money investments	$ 7	$ 3	$ 16	$ 16	$ 2
161400 Miscellaneous revenues	$ 2	$ 3	$ 3	$ 3	$ 3
161900 Other Revenue - Cost Recoveries	$ 9	$ -	$ -	$ -	$ -
164600 Fines and Forfeitures	$ 25	$ -	$ -	$ -	$ -
Totals, Revenues	$ 3,632	$ 3,562	$ 3,575	$ 3,575	$ 3,561
Transfers from Other Funds					
FO0421 From Vehicle Inspection and Repair Fund per Item 1111-011-0421, Budget Act of 2014	$ -	$ 3,000	$ -	$ -	$ -
Transfers to Other Funds					
Repayment Scenario (from State Board of Chiropractic Examiners Fund to Vehicle Inspection and Repair Fund)	$ -	$ -1,000	$ -250	$ -250	$ -250
Totals, Revenues and Transfers	$ 3,632	$ 5,562	$ 3,325	$ 3,325	$ 3,311
Totals, Resources	$ 5,993	$ 8,485	$ 5,271	$ 4,781	$ 4,289
EXPENDITURES					
Disbursements:					
0840 State Controller (State Operations)	$ -	$ -	$ -	$ -	$ -
1110 Program Expenditures (State Operations)[a]	$ 3,053	$ 3,839	$ 3,803	$ 3,803	$ 3,879
8500 Program Expenditures (State Operations)	$ -	$ -	$ -	$ -	$ -
8880 Financial Information System for CA (State Operations)	$ 17	$ 3	$ 12	$ -	$ -
9670 Equity Claims of California Victim Compensation and Government Claims Board and Settlements and Judgements by Department of Justice	$ -	$ 2,698	$ -	$ -	$ -
Total Disbursements	$ 3,070	$ 6,540	$ 3,815	$ 3,803	$ 3,879
FUND BALANCE					
Reserve for economic uncertainties	$ 2,923	$ 1,946	$ 1,456	$ 978	$ 410
Months in Reserve	5.4	6.1	4.6	3.0	1.2

Notes:

a. $1k rounding adjustment in FY 2014-15.

b. The Board will have the flexibility to adjust repayment amounts if the fund is projected to fall below 3.0 months in reserve.

BOARD OF CHIROPRACTIC EXAMINERS
LICENSING TRENDS

Total Population of Chiropractic Licenses

Month	Total Licenses
July	13,404
August	13,413
September	13,392
October	13,389
November	13,369
December	13,360

New Chiropractic License Issued

Month	Received	Issued
July	41	30
August	27	32
September	22	28
October	19	33
November	27	10
December	39	27

Number of Restored Cancelled Licenses

Month	Received	Issued
July	2	4
August	3	4
September	7	5
October	7	4
November	3	0
December	3	5

New Satellite Office Certificates Issued

Month	Received	Issued
July	111	131
August	68	67
September	101	102
October	135	70
November	124	148
December	123	122

Corporation Registrations Issued

Month	Received	Issued
July	5	3
August	9	6
September	6	4
October	6	5
November	9	3
December	8	10

Licensing Population as of December 31, 2014

License Type	Clear Licenses
Chiropractors	13,360
Satellite Offices	3,766
Corporation Registrations	1,376

Applications Received and Processed – October 1, 2014 through December 31, 2014

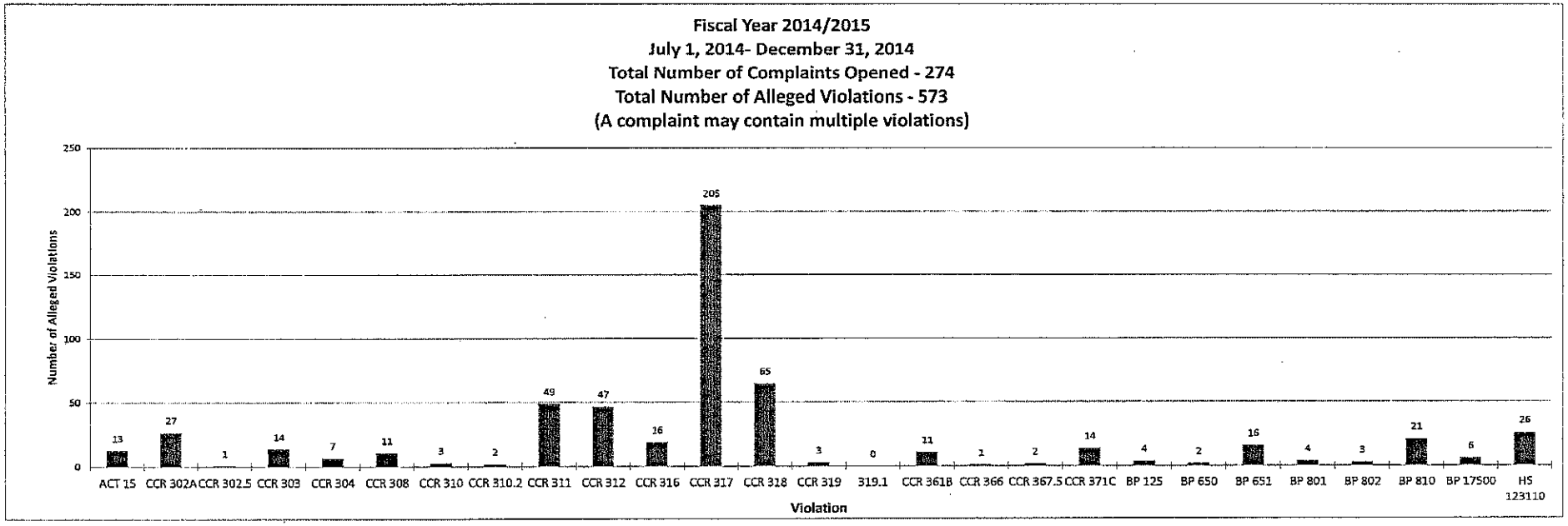
Application Type	Received	Issued	Denied	Pending
Initial	83	69	0	99
Reciprocal	2	1	0	13
Restorations (Cancelled & Forfeiture)	50	41	0	7
Corporation	23	18	0	12

Compliance Unit Statistics

Fiscal Year	10/11	11/12	12/13	13/14	14/15*
Complaints					
Received	497	391	386	487	274
Pending	137	125	159	214	253
Closed with Insufficient Evidence	96	89	57	88	24
Closed with No Violation	135	93	84	140	48
Closed with Merit	140	120	95	148	69
Letter of Admonishment	4	1	2	5	1
Citations and Fines Issued (Total Fine Amount)	47($12,700)	26($37,400)	33($19,400)	26($18,500)	7($4500)
Accusations					
Filed	68	41	34	38	12
Pending	130	99	73	56	63
Revoked	17	14	11	12	6
Revocation Stayed: Probation	26	20	31	15	5
Revocation Stayed: Suspension and Probation	9	12	5	4	1
Suspension	0	0	0	0	0
Suspension Stayed: Probation	0	0	0	0	0
Suspension and Probation	0	0	0	0	0
Voluntary Surrender of License	9	7	11	8	4
Dismissed/Withdrawn	10	21	9	3	2
Statement of Issues					
Filed	4	5	1	5	1
Denied	0	0	0	2	1
Probationary License	3	4	3	1	0
Withdrawn	0	0	1	2	0
Granted	1	0	0	0	0
Petition for Reconsideration					
Filed	0	2	4	3	0
Granted	0	0	0	0	0
Denied	0	0	2	2	0
Petition for Reinstatement of License					
Filed	7	7	6	5	1
Granted	2	2	2	1	0
Denied	10	6	5	3	2
Petition for Early Termination of Probation					
Filed	4	1	6	11	1
Granted	2	1	1	0	0
Denied	4	1	1	3	3
Petition for Modification of Probation					
Filed	0	0	0	3	0
Granted	0	0	0	0	0
Denied	0	0	0	1	0
Petition by Board to Revoke Probation					
Filed	13	6	2	11	4
Revoked	2	8	3	5	2
Probation Cases					
Active	138	89	139	135	131

* FY 14/15: July 1, 2014 –December 31, 2014

Revised: January 30, 2015


Fiscal Year 2014/2015
July 1, 2014- December 31, 2014
Total Number of Complaints Opened - 274
Total Number of Alleged Violations - 573
(A complaint may contain multiple violations)
Number of Alleged Violations
250
200
150
100
50
0
13
27
1
14
7
11
3
2
49
47
16
205
65
3
0
11
1
2
14
4
2
16
4
3
21
6
26
ACT 15
CCR 302A
CCR 302.5
CCR 303
CCR 304
CCR 308
CCR 310
CCR 310.2
CCR 311
CCR 312
CCR 316
CCR 317
CCR 318
CCR 319
319.1
CCR 361B
CCR 366
CCR 367.5
CCR 371C
BP 125
BP 650
BP 651
BP 801
BP 802
BP 810
BP 17500
HS 123110
Violation

Violation Codes/Descriptions

The Chiropractic Initiative Act of California (ACT):

10 – Rules of Professional Conduct
15 – Noncompliance With and Violations of Act

California Code of Regulations (CCR):

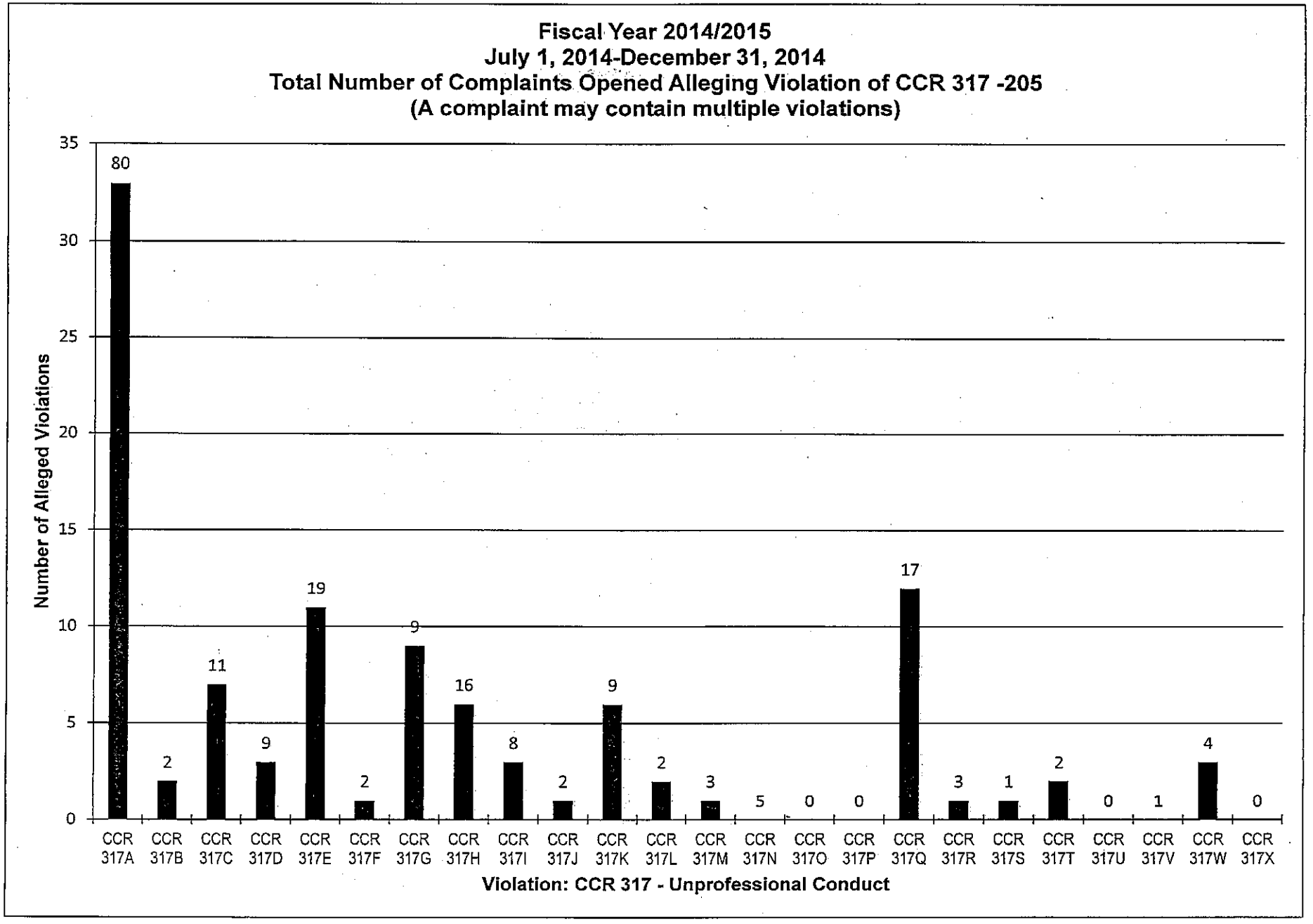
302(a) – Scope of Practice
302.5 – Use of Laser
303 – Filing of Addresses
304 – Discipline by Another State
308 – Display of License
311 – Advertisements
312 – Illegal Practice
316 – Responsibility for Conduct on Premises
317 – Unprofessional Conduct
318 – Chiropractic Patient Records/Accountable Billing
319 – Free or Discount Services
319.1 – Informed Consent
361(b) – 24 Hour CE Requirement
366 – Continuing Education Audits
367.5 – Application, Review of Refusal to Approve (corporations)
367.7 – Name of Corporation
371(c) – Renewal and Restoration

Business and Professions Code (BP):

801 (a) – Professional Reporting Requirements (Ins-malpractice settlements)
802 (a) – Professional Reporting Requirements (Lic-malpractice settlements)
810 – Insurance Fraud
1051 – Apply for a Corporation with the Board
1054 – Name of Chiropractic Corporation
17500 – Unlawful Advertising

Health and Safety Code (HS):

123110 – Patient Access to Health Records

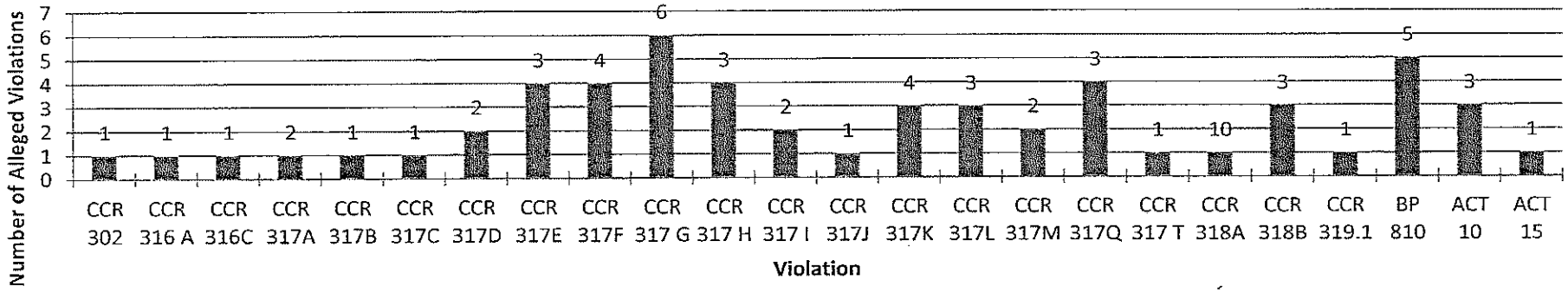

Fiscal Year 2014/2015
July 1, 2014-December 31, 2014
Total Number of Complaints Opened Alleging Violation of CCR 317 -205
(A complaint may contain multiple violations)
Number of Alleged Violations
35
30
25
20
15
10
5
0
80
2
11
9
19
2
9
16
8
2
9
2
3
5
0
0
17
3
1
2
0
1
4
0
CCR 317A
CCR 317B
CCR 317C
CCR 317D
CCR 317E
CCR 317F
CCR 317G
CCR 317H
CCR 317I
CCR 317J
CCR 317K
CCR 317L
CCR 317M
CCR 317N
CCR 317O
CCR 317P
CCR 317Q
CCR 317R
CCR 317S
CCR 317T
CCR 317U
CCR 317V
CCR 317W
CCR 317X
Violation: CCR 317 - Unprofessional Conduct

Violation Codes/Descriptions

California Code of Regulations (CCR) Section 317 – Unprofessional Conduct:

(a) Gross Negligence
(b) Repeated Negligent Acts
(c) Incompetence
(d) Excessive Treatment
(e) Conduct Endangering Public
(f) Administering to Oneself Drugs/Alcohol
(g) Conviction of a Crime Related to Chiropractic Duties
(h) Conviction of a Crime Involving Moral Turpitude/Physical Violence/etc.
(i) Conviction of a Crime Involving Drugs or Alcohol
(j) Dispensing Narcotics/Dangerous Drugs/etc.
(k) Moral Turpitude/Corruption/etc
(l) False Representation
(m) Violation of the ACT/Regulations
(n) False Statement Given in Connection with an Application for Licensure
(o) Impersonating an Applicant
(p) Illegal Advertising related to Violations of Section 17500 BP
(q) Fraud/Misrepresentation
(r) Unauthorized Disclosure of Patient Records
(s) Employment/Use of Cappers or Steerers
(t) Offer/Receive Compensation for Referral
(u) Participate in an Illegal Referral Service
(v) Waiving Deductible or Co-Pay
(w) Fail to Refer Patient to Physician/Surgeon/etc.
(x) Offer or Substitution of Spinal Manipulation for Vaccination

Fiscal Year 2014/2015
July 1, 2014- December 31, 2014
Total Number of Accusations Filed- 20
Total Number of Alleged Violations - 67 (An accusation may contain multiple violations)



STATE OF CALIFORNIA

BOARD OF CHIROPRACTIC EXAMINERS

EDMUND G. BROWN JR., GOVERNOR

MEMORANDUM

Date: February 2, 2015

To: **Board Members**

From: Robert Puleo
Executive Officer

Subject: **Ratification of Formerly Approved Doctors of Chiropractic for Licensure**

This is to request that the Board ratify the attached list of individuals as Doctors of Chiropractic at the February 12, 2015, public meeting.

Between October 1, 2014 and December 31, 2014, staff reviewed and confirmed that the applicants met all statutory and regulatory requirements.

If you have any questions or concerns, please contact me at your earliest opportunity.

Approval By Ratification of Formerly Approved License Applications
October 1, 2014 – December 31, 2014

Name (First, Middle, Last)			Date Issued	DC#
Jason	Charles	Braun	10/2/2014	**33087**
David	Tanner	Brooks	10/2/2014	**33088**
Ian	Christian	Cooke	10/2/2014	**33089**
Cassandra	Leigh Angott	Ferguson	10/2/2014	**33090**
Mitchell	Steven	Simon	10/2/2014	**33091**
Luke	Richard Anthony	Stringer	10/2/2014	**33092**
Maurice		Daoud	10/9/2014	**33093**
Allison	Hope	Evans	10/9/2014	**33094**
Scott	Aubrey	Howard	10/9/2014	**33095**
Eun	Chu	Kim	10/9/2014	**33096**
Carling	Frances	McMichael	10/9/2014	**33097**
Russel		Myers	10/9/2014	**33098**
Peter	Kes	Rath	10/9/2014	**33099**
Eric	Ryan	Schaid	10/9/2014	**33100**
Jason	Hale	Fitch	10/16/2014	**33101**
Daniel	Lee	Mendez	10/16/2014	**33102**
Alison	Lea	Stamos	10/16/2014	**33103**
Anh-Tu	Thuy	Vu	10/16/2014	**33104**
Jason	Luke	Hodges	10/17/2014	**33105**
Jennifer	Melanie	Mulford	10/17/2014	**33106**
Regina	Marcella	Adams	10/21/2014	**33107**
Thomas	Michael	Drzemala	10/21/2014	**33108**
Robert	Richard	Fano	10/21/2014	**33109**
Trevor	Ross	Miller	10/21/2014	**33110**
Tina	Dawn	Pearl	10/21/2014	**33111**
Kimia		Akhavan	10/24/2014	**33112**
Andrew	Bradley	Buser	10/24/2014	**33113**
Misty	Rhiannon	Hutton	10/24/2014	**33114**
Faiz		Mashood	10/24/2014	**33115**
John	C	Argerich, Jr	10/30/2014	**33116**
Jason	Joseph	Cindric	10/30/2014	**33117**
Kim		Nguyen	10/30/2014	**33118**
Daniel	Alan	Woodward	10/30/2014	**33119**
Andres	Gabriel	Garcia	11/6/2014	**33120**
Nya		Jahdai-Brown	11/13/2014	**33121**
Jennifer	Nichole	Maltby	11/13/2014	**33122**
Tania	Ayse	Williams	11/13/2014	**33123**

Karla		Mehlenbacher	11/14/2014	**33124**
Patrick	Sweigert	Ryan	11/14/2014	**33125**
Nicholas	Adam	Sorenson	11/14/2014	**33126**
Sanjeni	Ramesh	Patel	11/20/2014	**33127**
Derek	Quan	Pham	11/20/2014	**33128**
Jasmeen		Singh	11/20/2014	**33129**
Aimee	Marie	Bautista	12/4/2014	**33130**
Ameriah	Arbelyn	Beam	12/4/2014	**33131**
Christopher	Geoffrey	Canning	12/4/2014	**33132**
Joel	Wendell	Huff	12/4/2014	**33133**
Michael	Allen	Lopez	12/4/2014	**33134**
Adriana		Mekhael	12/4/2014	**33135**
Liesel	Gabrielle	Orend	12/4/2014	**33136**
Hedieh		Rastegar Aria	12/4/2014	**33137**
Gregory	Allan	Smith	12/4/2014	**33138**
Kris	Michael	Isakson	12/5/2014	**33139**
Sean	Gregory	Levesque	12/5/2014	**33140**
Matthew	Nielsen	Smith	12/5/2014	**33141**
David	Justin	Valle	12/12/2014	**33142**
Devin	Kent	Weatherley	12/12/2014	**33143**
Maymanat	Shadi	Ashtiani	12/16/2014	**33144**
Luka	Charles	Musich	12/16/2014	**33145**
Jeffrey	Allen	Spaulding	12/16/2014	**33146**
Kian	Mohammad Hakimi	Javid	12/17/2014	**33147**
Joshua	Daniel	Wideman	12/17/2014	**33148**
Kevin	Lane	Hummel	12/19/2014	**33149**
David	Salvatore	Sosa	12/19/2014	**33150**
John	David	Appleman	12/31/2014	**33151**
Devon	Leigh	Gaston	12/31/2014	**33152**
George		Boghozian	12/31/2014	**33153**
Jeffrey	Luke	Boyajian	12/31/2014	**33154**
Tamara	Lee	MacIntyre	12/31/2014	**33155**
Sachin	Amol	Narvekar	12/31/2014	**33156**

STATE OF CALIFORNIA
BOARD OF CHIROPRACTIC EXAMINERS

EDMUND G. BROWN JR., GOVERNOR

MEMORANDUM

Date: February 12, 2015

To: BOARD MEMBERS

From: Robert Puleo, Executive Officer RP

Subject: **Ratification for New Continuing Education Providers**

This is to request that the Board ratify the continuing education providers at the public meeting on February 12, 2015.

CONTINUING EDUCATION PROVIDERS	DATE APPROVED
1. Kurt Spurgin, DC, and Dennis Spurgin, DC	02/12/15
2. National Provider Compliance Corp	02/12/15
3. David M Bleiler, DC	02/12/15
4. Stephen Harkins, DC	02/12/15
5. Mitchell Brian Mays, DC	02/12/15
6. Neil Asher Healthcare	02/12/15
7. Premier Research Labs	02/12/15
8. Scott Sawyer, DC	02/12/15
9. American Chiropractic Association	02/12/15
10. Chad D Warshel, DC	02/12/15
11. Carol J Phillips, DC	02/12/15
12. Anna Manayan	02/12/15
13. Gregory Melvin, DC	02/12/15
14. Mark R Algee, DC	02/12/15
15. Marcus Ettinger, DC	02/12/15
16. Marc Moramarco, DC	02/12/15

STATE OF CALIFORNIA

BOARD OF CHIROPRACTIC EXAMINERS

EDMUND G. BROWN JR., GOVERNOR

MEMORANDUM

Date: February 2, 2015

To: **Board Members**

From:

Robert Puleo
Executive Officer

Subject: **Ratification of Formerly Denied License Applications**

The Board of Chiropractic Examiners (Board) denies licensure to applicants who do not meet all statutory and regulatory requirements for a chiropractic license in California. An applicant has 60-days after the denial is issued to appeal the decision. If the applicant does not submit an appeal to the Board, the denial is upheld.

During October 1, 2014 and December 31, 2014, staff reviewed and confirmed that applicants met all statutory and regulatory requirements for licensure. There were no denials or appeals during this time period.

At this time, no ratification is necessary.

If you have any questions or concerns, please contact me at your earliest opportunity.

BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

NOTICE OF TELECONFERENCE
LICENSING, CONTINUING EDUCATION & PUBLIC RELATIONS COMMITTEE MEETING

January 22, 2014
3:00 p.m.

One or more Committee Members will participate in this meeting at the teleconference sites listed below. Each teleconference location is accessible to the public and the public will be given an opportunity to address the Licensing, Continuing Education and Public Relations Committee at each teleconference location. The public teleconference sites for this meeting are as follows:

Teleconference Meeting Locations:

Corey Lichtman, DC
538 Stevens Ave.
Solana Beach, CA 92075
(858) 481-1889

Heather Dehn, DC
John Roza, Jr., DC
901 P St, #142A
Sacramento, CA 95814
(916) 263-5355

AGENDA

1. **Call to Order**

2. **Approval of Minutes**
   October 2, 2014

3. **Review and Discussion on Strategic Plan Action Items:**
   - Goal 1- Licensing
   - Goal 3 - Professional Qualifications and Continuing Education
   - Goal 5 - Public Relations and Outreach

4. **Review and Discussion Regarding Proposed Outreach Publications**
   - About the Board
   - A Consumer's Guide to Chiropractic

5. **Public Comment**
   Note: The Committee may not discuss or take action on any matter raised during this public comment section that is not included on this agenda, except to decide whether to place the matter on the agenda of a future meeting. [Government Code Sections 11125, 11125.7(a).] Public comment is encouraged; however, if time constraints mandate, comments may be limited at the discretion of the Chair.

6. **Future Agenda Items**

7. **Adjournment**

LICENSING, CONTINUING EDUCATION
& PUBLIC RELATIONS COMMITTEE

Heather Dehn, D.C., Chair
John Roza Jr., D.C.
Corey Lichtman, D.C.

Meetings of the Board of Chiropractic Examiners' Committee are open to the public except when specifically noticed otherwise in accordance with the Open Meeting Act. Public comments will be taken on agenda items at the time the specific item is raised. The Board's Committee may take action on any item listed on the agenda, unless listed as informational only. All times are approximate and subject to change. Agenda items may be taken out of order to accommodate speakers and to maintain a quorum. The meeting may be cancelled without notice. For verification of the meeting, call (916) 263-5355 or access the Board's Web Site at www.chiro.ca.gov.

The meeting facilities are accessible to individuals with physical disabilities. A person who needs a disability-related accommodation or modification in order to participate in the meeting may make a request by contacting Marlene Valencia at (916) 263-5355 ext. 5363 or e-mail marlene.valencia@chiro.ca.gov or send a written request to the Board of Chiropractic Examiners, 901 P Street, Suite 142A, Sacramento, CA 95814. Providing your request at least five (5) business days before the meeting will help to ensure availability of the requested accommodation.

BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

NOTICE OF PUBLIC MEETING

TELECONFERENCE - GOVERNMENT AFFAIRS & STRATEGIC PLANNING COMMITTEE

January 23, 2015, 9:00 a.m.

One or more Committee Members will participate in this meeting at the teleconference sites listed below. Each teleconference location is accessible to the public and the public will be given an opportunity to address the Government Affairs and Strategic Planning Committee at each teleconference location. The public teleconference sites for this meeting are as follows:

Teleconference Meeting Locations:

Julie Elginer, Dr. PH
Board of Chiropractic Examiners
901 P Street, Suite 142A
Sacramento, CA 95814
(916) 263-5355

Dionne McClain, D.C.
McClain Sports & Wellness Inc.
6360 Wilshire Blvd. #410
Los Angeles, CA 90048
(323) 653-1014

Frank Ruffino, Public Member
Department of Veterans Affairs
700 E. Naples Court
Chula Vista, CA 91911
(619) 205-1415

AGENDA

1. **CALL TO ORDER**

2. **Approval of Minutes**
   October 1, 2014

3. **Review of the Board Member Administrative Manual**

4. **Review of Recently Enacted Legislation**
   - AB 809 (Logue, Ch 404) – Patient Consent for Telehealth Services
   - AB 1702 (Maienschein, Ch 410) – Denying or Delaying Licensure Due to Incarceration
   - AB 1711 (Cooley, Ch 779) – Administrative Procedures Act: Economic Impact Assessment
   - AB 2396 (Bonta, Ch 737) – Denial of Licensure Based on Expunged Convictions
   - AB 2720 (Ting, Chapter 510) – Record of Action Taken at Public Meetings
   - SB 1159 (Lara, Ch 752) – Use of ITINs on Licensure Applications
   - SB 1226 (Correa, Ch 657) – Expediting Applicants from the Military
   - SB 1243 (Lieu, Ch 395) – DCA-Wide Reforms
   - SB 1256 (Mitchell, Ch 256) – Third Party Medical Creditors

5. **Review and Discussion of BCE Strategic Plan Goals Assigned to the Government Affairs & Strategic Plan Committee**
   - Goal 4 – Organizational Effectiveness
   - Goal 7 – Government Affairs

6. **PUBLIC COMMENT FOR ITEMS NOT ON THE AGENDA**
   Note: The Committee may not discuss or take action on any matter raised during this public comment section that is not included on this agenda, except to decide whether to place the matter on the agenda of a future meeting. [Government Code Sections 11125, 11125.7(a).] Public comment is encouraged; however, if time constraints mandate, comments may be limited at the discretion of the Chair.

7. **FUTURE AGENDA ITEMS**

8. **ADJOURNMENT**

GOVERNMENT AFFAIRS COMMITTEE
Julie Elginer, Dr. PH, Chair
Dionne McClain, D.C.
Frank Ruffino, Public Member

The Board of Chiropractic Examiners' paramount responsibility is to protect the health, welfare, and safety of the public through licensure, education, and enforcement in chiropractic care.

Committee Meetings of the Board of Chiropractic Examiners are open to the public except when specifically noticed otherwise in accordance with the Open Meeting Act. Public comments will be taken on agenda items at the time the specific item is raised. The Committee may take action on any item listed on the agenda, unless listed as informational only. All times are approximate and subject to change. Agenda items may be taken out of order to accommodate speakers and to maintain a quorum. The meeting may be cancelled without notice. For verification of the meeting, call (916) 263-5355 or access the Board's Web Site at **www.chiro.ca.gov.**

The meeting facilities are accessible to individuals with physical disabilities. A person who needs a disability-related accommodation or modification in order to participate in the meeting may make a request by contacting Marlene Valencia at (916) 263-5355 ext. 5363 or e-mail marlene.valencia@dca.ca.gov or send a written request to the Board of Chiropractic Examiners, 901 P Street, Ste. 142A Sacramento, CA 95814. Providing your request at least five (5) business days before the meeting will help to ensure availability of the requested accommodation.

Board Member Administrative Manual

Handout will be provided at/or before Board Meeting

02/12/2015

STATE OF CALIFORNIA
dca
DEPARTMENT OF CONSUMER AFFAIRS

BUSINESS, CONSUMER SERVICES, AND HOUSING AGENCY / GOVERNOR EDMUND G. BROWN JR.
Executive Office
1625 N. Market Boulevard, Suite S-308, Sacramento, CA 95834
P (916) 574-8200 F (916) 574-8613 | www.dca.ca.gov

MEMORANDUM

DATE:	December 21, 2014
TO:	Executive Officers/Bureau Chiefs/Division Chiefs Department of Consumer Affairs
FROM:	Awet Kidane, Director Department of Consumer Affairs
SUBJECT:	**2014 Legislation Impacting All Department of Consumer Affairs Licensing Programs**

In order to assist with compliance, the Department of Consumer Affairs (Department) is notifying each of its programs about legislation passed this year that will have broad impact across all programs. This memorandum outlines these new laws and what is required. Unless otherwise stated, every bill takes effect on January 1, 2015. If you have questions or concerns regarding any of the information provided in this memo, please contact Justin Paddock, the Assistant Deputy Director for Legislation at (916) 574-7800 or justin.paddock@dca.ca.gov. You may also wish to contact your legal counsel as well.

AB 809 (Logue, Chapter 404) – Patient Consent for Telehealth Services
This bill revises the patient consent provisions related to the use of telehealth services by health care providers. The bill allows written consent in addition to verbal consent and specifies that the consent is valid for a designated course of health care and treatment. This bill took effect September 18, 2014.

This bill impacts healing arts programs ONLY. Each healing arts program may wish to provide outreach to its licensees regarding the changes and how this legislation may alter the regulation of telehealth by the program.

AB 1702 (Maienschein, Chapter 410) – Denying or Delaying Licensure Due to Incarceration
This bill prohibits programs within the Department from denying a license or delaying the processing of licenses based solely on any licensure requirements having been completed during an applicant's incarceration.

Programs should review their licensing procedures to ensure that the processing of applications is not delayed due solely to licensure requirements being fulfilled during incarceration. Additionally, program regulations should be reviewed to identify any conflicting rules that may need to be revised.

AB 1711 (Cooley, Chapter 779) – Administrative Procedures Act: Economic Impact Assessment

This bill requires state agencies to include an economic impact assessment in its published initial statement of reasons document for all proposed regulations. The bill also requires the Department of Finance to provide, and periodically update, instructions on how to prepare the economic impact assessment, which will be placed in the State Administrative Manual.

The Department's regulatory process already incorporates these requirements and therefore, there should be no implmentation impact from this bill.

AB 2396 (Bonta, Chapter 737) – Denial of Licensure Based on Expunged Convictions

This bill prohibits a licensing authority under the Department from denying a license based solely on a prior conviction if the conviction has been dismissed pursuant to Penal Code expungement procedures.

The Department's Legal Division is providing guidance to all the licensing programs regarding implementation of this legislation. If you have any questions or concerns, please contact your legal counsel.

AB 2720 (Ting, Chapter 510) – Record of Action Taken at Public Meetings

This bill amends the Bagley-Keene Open Meeting Act to require all state bodies, including all licensing programs within the Department, to keep a record of, and publicly report, every vote and abstention of each voting member on every action taken by a board, committee, or commission.

The Department's Legal Office will include guidance on complying with this law in its annual memorandum on the Open Meeting Act, which will be issued in January. At a minimum, each program should review its procedures for taking votes, recording them, and memorializing them in meeting minutes to ensure transparency.

SB 1159 (Lara, Chapter 752) – Use of ITINs on Licensure Applications

This bill requires all programs within the Department to accept an individual taxpayer identification number (ITIN) from applicants in lieu of a social security number (SSN) and explicitly directs the Department's licensing programs to issue licenses to individuals qualified for licensure but are not legally present in the United States. All programs must implement this bill no later than January 1, 2016. However, a program cannot begin accepting these numbers prior to January 1, 2015.

The Department's Office of Information Services (OIS) is working on incorporating the necessary changes into BreEZe and legacy systems to ensure full implementation of this bill takes place no later than January 1, 2016. The Department will provide additional guidance on implementation efforts in January 2015. We are asking programs to not begin accepting ITINs from applicants until this additional guidance is given.

SB 1226 (Correa, Chapter 657) – Expediting Applicants from the Military
This bill requires programs under the Department to expedite the licensure process for individuals honorably discharged from the United States Armed Forces. This bill also allows a program to assist the licensure process for these individuals. This bill is operative July 1, 2016. Programs will need regulations to specify what documentation is needed to qualify for the expedited licensure process. If you have questions regarding regulations, please contact your legal counsel.

The expedited licensure process under this bill should be similar to what each program has done to implement the expedited licensure process for military spouses under AB 1904 (Block, Chapter 399, Statutes of 2012). OIS will be working to implement SB 1226 in BreEZe. Due to resource limitations, there are no plans to change the legacy systems to implement SB 1226. Programs not on BreEZe should utilize a manual process for expediting military applicants.

Regarding the assistance to honorably discharged military applicants, this is permissive not mandatory for each program. While permissive, we encourage each program to review how it currently licenses military applicants and determine where, if any, improvements can be made. Some Department programs, the Bureau of Security and Investigative Services (BSIS) and the Contractors' State License Board (CSLB), currently reach out and make staff available to military applicants during the licensure process. If your program tends to have a high volume or percentage of military applicants and is interested in implementing a military assistance program, we suggest your program review the assistance that BSIS and CSLB currently provide to military applicants.

BSIS: Veterans Come First Program
http://www.bsis.ca.gov/customer_service/faqs/veterans.shtml

CSLB: Military Application Assistance Programs
http://www.cslb.ca.gov/Contractors/Applicants/Military/

SB 1243 (Lieu, Chapter 395) – Department-Wide Reforms
This bill makes a number of changes to program authority and requirements:

- It allows a program to provide a meeting notice by regular mail, email, or by both. The program must give each person who requests a notice the option of receiving the notice by regular mail, email, or by both.
- It requires that any program that intends to webcast a meeting, to indicate on the meeting notice that it will be webcasted.
- It extends current telephone disconnect authority from specific Department programs to all programs.
- It requires the Department to annually report additional enforcement statistics to the Legislature.

If you have any questions regarding implementing a telephone disconnect program, you should contact your legal counsel.

SB 1256 (Mitchell, Chapter 256) – Third Party Medical Creditors
This bill requires all healing arts licensees to present patients with a specified notice and treatment plan that includes estimated costs and items to be pre-paid prior to facilitating a third-party line of credit for payment of medical expenses. The bill also forbids the arrangement of such a credit plan with a patient that is under the influence of anesthesia.

This bill is also impacts healing arts programs ONLY. Each healing arts program may wish to contact its legal counsel for assistance regarding enforcing these new requirements as well as provide outreach to its licensees regarding the changes.

BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

NOTICE OF TELECONFERENCE
ENFORCEMENT COMMITTEE MEETING
January 27, 2015
3:00 p.m.

One or more Committee Members will participate in this meeting at the teleconference sites listed below. Each teleconference location is accessible to the public and the public will be given an opportunity to address the Enforcement Committee at each teleconference location. The public teleconference sites for this meeting are as follows:

Teleconference Meeting Locations:

Sergio Azzolino, DC
1545 Broadway St., #1A
San Francisco, CA 94109
(415) 563-3800

Heather Dehn, DC
Frank Ruffino
901 P St., #142A
Sacramento, CA 95814

AGENDA

1. **Call to Order**

2. **Approval of Minutes**
   October 28, 2014

3. **Discussion and Possible Action on Advertising a Chiropractic Specialty**

4. **Discussion and Possible Action on Proposed Language Regarding Maintenance of Patient Records/Amendments to Title 16, California Code of Regulations Sections 312.2 and 318**

5. **Discussion of Developing Qualifications and Proficiency Standards for Expert Consultants with the Enforcement & Scope of Practice Committee to Define Criteria and Standards for Expert Consultant Selection. [2014-2107 Strategic Plan]**

6. **Public Comment**
   Note: The Committee may not discuss or take action on any matter raised during this public comment section that is not included on this agenda, except to decide whether to place the matter on the agenda of a future meeting. [Government Code Sections 11125 & 11125.7(a).] Public comment is encouraged; however, if time constraints mandate, comments may be limited at the discretion of the Chair.

7. **Future Agenda Items**

8. **Adjournment**

ENFORCEMENT COMMITTEE

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

Meetings of the Board of Chiropractic Examiners' Committee are open to the public except when specifically noticed otherwise in accordance with the Open Meeting Act. Public comments will be taken on agenda items at the time the specific item is raised. The Board's Committee may take action on any item listed on the agenda, unless listed as informational only. All times are approximate and subject to change. Agenda items may be taken out of order to accommodate speakers and to maintain a quorum. The meeting may be cancelled without notice. For verification of the meeting, call (916) 263-5355 or access the Board's Web Site at **www.chiro.ca.gov**.

The meeting facilities are accessible to individuals with physical disabilities. A person who needs a disability-related accommodation or modification in order to participate in the meeting may make a request by contacting Marlene Valencia at (916) 263-5355 ext. 5363 or e-mail marlene.valencia@dca.ca.gov or send a written request to the Board of Chiropractic Examiners, 901 P Street, Suite 142A, Sacramento, CA 95814. Providing your request at least five (5) business days before the meeting will help to ensure availability of the requested accommodation.

MEMORANDUM

DATE	January 20, 2015
TO	Enforcement Committee Members Board of Chiropractic Examiners Department of Consumer Affairs
FROM	Kristy Schieldge, Attorney III, Legal Affairs Division Department of Consumer Affairs
SUBJECT	**Case Law Involving Advertising as a Specialist for Discussion of Item 3 of the Committee's Agenda Regarding "Discussion and Possible Action on Advertising a Chiropractic Specialty"**

Issue

At the last Enforcement Committee Meeting, the Committee requested that information about Medical Board of California's regulations and litigation involving the Dental Board's regulation of advertising specialties be brought to this meeting. I am providing a copy of Title 16, California Code of Regulations section 1363.5 and the following case information and summary for the Committee's review and discussion.

Background and Summary of Cases

In 2000, the Dental Board of California (Dental Board) lost the attached federal court case *Bingham v. Hamilton, (2000)* 100 F.Supp.2d 1233. In that action, the federal court struck down as unconstitutional the Board's proposed regulations on advertising that attempted to restrict advertising as a specialist unless certain requirements were met, including obtaining education from Board-recognized specialty boards or successful completion of a formal advanced education program at or affiliated with an accredited dental or medical school. The Board paid approximately $254,000 to settle that case.

In 2003, plaintiffs Michael Potts, D.D.S. and the American Academy of Implant Dentistry (AAID) ("Plaintiffs") sued the former Director of the Department of Consumer Affairs Kathleen Hamilton, and the Dental Board. Plaintiffs challenged the constitutionality of Business and

Professions Code section 651(h)(5)(A), which governed false and misleading advertising and outlined the conditions under which a dentist could advertise as a "specialist." Section 651 permitted, among other things, a dentist to advertise a specialty if: (i) he or she has completed a specialty education program or is a member of a national specialty board approved by the American Dental Association (ADA); or, (ii) in the absence of ADA accreditation, he or she has attained membership in or been credentialed by an accrediting organization that is recognized by the board as a "bona fide" organization for that area of dental practice.[1]

Consequently, Plaintiff, AAID members could not advertise as specialists, only as "general dentists," despite the fact that their members truthfully earned additional education and training in a specific area. AAID alleged this violated their constitutional rights of free speech.

On September 8, 2004, the federal district court ruled in favor of Plaintiffs in this case, finding the Dental Board's advertising statutes were unconstitutional as applied and that the statute had to be "invalidated." (*Potts v. Hamilton*, 334 F. Supp.2d 1206 is attached.) Plaintiffs sought and received an injunction prohibiting the Dental Board's enforcement of the statute and obtained an order for payment of attorneys' fees in the amount of $324,252.91, which the Dental Board paid. On February 2, 2007, the Ninth Circuit reversed the lower court's judgment for plaintiffs and remanded the case for further proceedings at the District Court level to consider "survey evidence" collected by the Dental Board to show that the advertising was potentially misleading to consumers. (See attached *Potts v. Zettel*, unpublished decision.)

On October 15, 2010, the district court again found against the Dental Board, ruling that Business and Professions Code section 651(h)(5)(A) was unconstitutional because it violated the plaintiffs' First Amendment rights of free speech. On November 18, 2010, the Board filed an appeal, but later settled the matter. It was estimated that the Dental Board expended over 1.5 million dollars to litigate and settle this case. The Dental Board's advertising statute was later repealed. (Stats.2011, ch. 385 (SB 540).)

Attachments: 16 CCR 1363.5
Bingham v. Hamilton (100 F.Supp.2d 1233)
Potts v. Hamilton (334 F.Supp.2d 1206)
Potts v. Zettel February 2, 2007

[1] The amendments to Business and Professions Code section 651(h)(5)(A), challenged in this later action, essentially placed into statute those regulations that were struck down by the federal court in the prior *Bingham* case.

WestlawNext

§ 1363.5. Advertising of Specialty Board Certification.
16 CA ADC § 1363.5 BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS (Approx. 8 pages)

Barclays Official California Code of Regulations Currentness
Title 16. Professional and Vocational Regulations
Division 13. Medical Board of California [FNA1]
Chapter 2. Division of Medical Quality
Article 5. Advertising and Standards of Practice (Refs & Annos)

16 CCR § 1363.5

§ 1363.5. Advertising of Specialty Board Certification.

(a) As used in this section,

(1) "specialty board" means a board or association which certifies physicians in a specialty or subspecialty area of medicine.

(2) "Specialty or subspecialty area of medicine" means a distinct and well-defined field of medical practice. It includes special concern with diagnostic and therapeutic modalities of patients' health problems, or it may concern health problems according to age, sex, organ system, body region, or the interaction between patients and their environment. A medical specialty promotes the standards of practice within its specialty association.

(b) If a physician advertises that he or she is certified by a specialty board or association in a specialty or subspecialty area of medicine and that specialty board or association is not a member board of the American Board of Medical Specialties (ABMS) or does not have a postgraduate training program approved by the Accreditation Council for Graduate Medical Education (ACGME) or the Royal College of Physicians and Surgeons of Canada (RCPSC), then the specialty board or association shall be approved by the Division of Licensing and shall comply with all of the following requirements:

(1) The primary purpose of the specialty board shall be certification in a medical specialty or subspecialty. The specialty board shall encompass the broad areas of the specialty or subspecialty.

(2) The specialty board shall not restrict itself to a single modality or treatment which may be part of a broader specialty or subspecialty.

(3) If the specialty board certifies professionals other than physicians, the specialty board shall not represent either that (i) the criteria set forth in these regulations or (ii) the medical board's approval of the specialty board's certification program is applicable to nonphysicians.

(4) The specialty board shall be a nonprofit corporation or association, and it shall have at least a total of 100 members located in at least one-third of the states who shall possess a clear and unrestricted license to practice medicine.

(5) The specialty board shall have articles of incorporation, a constitution, or a charter and bylaws which describe its operation. The bylaws shall:

(A) provide for an independent and stable governing body with staggered, limited terms of not more than six years that is internally-appointed or selected by the members.

(B) set forth the requirements and policies for certification by the specialty board.

(C) require that the specialty board promote the public interest by contributing to improvement of medicine by establishing requirements and evaluating applicants who apply.

(D) require that the specialty board determine whether applicants have received adequate preparation in accord with standards established by the specialty board.

(E) require evidence that applicants have acquired capability in a specialty or subspecialty area of medicine and will demonstrate special knowledge in that field.

(F) require that the specialty board conduct comprehensive evaluations of the knowledge and experience of applicants.

(6) The specialty board shall have standards for determining that those who are certified possess the knowledge and skills essential to provide competent care in the designated specialty or subspecialty area.

(7) More than 80 percent of the specialty board's revenue for continuing operations shall be from certification and examination fees, membership fees and interest and investment income.

(8)(A) Except as provided in subparagraph (B) or (C) of this paragraph (8), the specialty board shall require all applicants who are seeking certification to have satisfactorily completed a postgraduate training program accredited by the ACGME or the RCPSC that includes identifiable training in the specialty or subspecialty area of medicine in which the physician is seeking certification. This identifiable training shall be deemed acceptable unless determined by the Division of Licensing to be either (1) inadequate in scope, content and duration in that specialty or subspecialty area of medicine in order to protect the public health and safety or (2) not equivalent in scope and content to the residency training required for board certification by any related ABMS board for the specific conditions, disease processes and surgical procedures within the scope of the applicant certifying board's examination and certification.

(B) If the training required of applicants seeking certification by the specialty board is other than ACGME or RCPSC accredited postgraduate training, then the specialty board shall have training standards that include identifiable training in the specialty or subspecialty area of medicine in which the physician is seeking certification and that have been determined by the Division of Licensing to be equivalent in scope, content and duration to those of an ACGME or RCPSC accredited program in a related specialty or subspecialty area of medicine. This training shall be evaluated by the Division of Licensing to ensure that its scope, content and duration are equivalent to those of an ACGME or RCPSC accredited program and are adequate for training in that specialty or subspecialty area of medicine in order to protect the public health and safety.

(C) In lieu of the postgraduate training required under subparagraph (A) or (B) of this paragraph (8), the specialty board shall require applicants seeking certification to have completed (1) a minimum of six years of full time teaching and/or practice in the specialty or subspecialty area of medicine in which the physician is seeking certification and (2) a minimum of 300 hours of continuing medical education in the specialty or subspecialty area of medicine in which the physician is seeking certification which is approved under Section 1337 and 1337.5 of these regulations. Any teaching experience acceptable under this subparagraph shall have been in a postgraduate training program accredited by the ACGME or RCPSC or that meets the standards set forth in subparagraph (B) that includes identifiable training in the specialty or subspecialty area of medicine to be certified. This training shall be evaluated by the Division of Licensing and determined to be equivalent in scope, content, and duration to those of an ACGME or RCPSC accredited program in a related specialty or subspecialty area of medicine and to be adequate for training in that specialty or subspecialty area of medicine in order to protect the public health and safety. Teaching or practice experience accepted under this subparagraph shall be evaluated by and acceptable to the credentials committee of the specialty board pursuant to standards that are (1) specified in the bylaws of the specialty board and (2) approved by the Division of Licensing in accordance with criteria set forth in these regulations.

Physicians applying for certification who qualify under this subparagraph shall be required by the specialty board to have satisfactorily completed an ACGME or RCPSC accredited residency training program. This residency shall have provided training in the conditions and disease processes that are included in the new specialty.

Physicians who are certified by specialty boards under this subparagraph which are incorporated, or organized as an association on the effective date of these regulations, may advertise their board certification for three years from the effective date of these regulations. During that time, the specialty board shall demonstrate to the satisfaction of the Division of Licensing that there is in existence one or more postgraduate training programs that include identifiable training in the specialty or subspecialty area of medicine to be certified that meet the requirements of subparagraph (A) or (B) of this paragraph (8); then the specialty board's approval shall be permanent unless withdrawn under subsection (c). This training shall be

evaluated by the Division of Licensing and determined to be equivalent in scope, content, and duration to those of an ACGME or RCPSC accredited program in a related specialty or subspecialty area of medicine and to be adequate for training in that specialty or subspecialty area of medicine in order to protect the public health and safety. If a specialty board cannot demonstrate its equivalency to ABMS boards in the three years following the effective date of these regulations, its members may not thereafter advertise certification by that board. This period may be extended for a year if the Division of Licensing determines that the specialty board is making a good faith effort towards achieving equivalency to ABMS boards.

Physicians who are certified by specialty boards under this subparagraph which are incorporated, or organized as an association after the effective date of these regulations, may not advertise their certification until the specialty board is determined by the Division of Licensing to be equivalent to ABMS boards. The specialty board shall demonstrate to the satisfaction of the Division of Licensing that there is in existence one or more postgraduate training programs that include identifiable training in the specialty or subspecialty area of medicine to be certified that meet the requirements of subparagraph (A) or (B) of this paragraph (8). This training shall be evaluated by the Division of Licensing and determined to be equivalent in scope, content, and duration to those of an ACGME or RCPSC accredited program in a related specialty or subspecialty area of medicine and to be adequate for training in that specialty or subspecialty area of medicine in order to protect the public health and safety.

(9) Except as provided in subparagraph (8)(C) above, at the time of application for approval to the Division of Licensing, a specialty board shall demonstrate that one or more postgraduate training programs are in existence and that these programs provide identifiable training in the specialty or subspecialty area of medicine in which physicians are seeking certification. This training shall be evaluated by the Division of Licensing and determined to be equivalent in scope, content and duration to those of an ACGME or RCPSC accredited program in a related specialty or subspecialty area of medicine and to be adequate for training in that specialty or subspecialty area of medicine in order to protect the public health and safety.

The specialty board shall submit a plan that (A) estimates the number of physicians to be certified through subsection (b)(8)(C), above; (B) specifies the number and location of post graduate training programs developed and to be developed; the number of trainees completing the training annually; (C) demonstrates the equivalency of those programs, as provided for in subsection (b)(8)(B), above; (D) provides for monitoring to evaluate the quality of existing programs; and (E) allows for upgrading of the parameters of the specialty or subspecialty area of medicine to accommodate new developments.

Every year the specialty board shall report to the Division of Licensing its progress in implementing the plan for postgraduate training programs in the specialty or subspecialty area of medicine in which physicians are seeking certification. Failure to so report shall be grounds for withdrawal of approval by the division. Failure of a specialty board to establish to the satisfaction of the division that it is in compliance with its plan, as stated in its original submission to the division, shall be grounds for withdrawal of the division's approval of the specialty board. Failure of a specialty board to provide evidence that the postgraduate training programs are equivalent in scope, content and duration to those of ACGME or RCPSC accredited programs shall be grounds for withdrawal of the approval.

(10) The specialty board shall require all physicians who are seeking certification to successfully pass a written or an oral examination or both which tests the applicants' knowledge and skills in the specialty or subspecialty area of medicine. All or part of the examinations may be delegated to a testing organization. All examinations shall be subject to a psychometric evaluation. The examinations shall be a minimum of sixteen (16) hours in length. Those specialty boards which require as a prerequisite for certification, prior passage of an ABMS examination in a related specialty or subspecialty area, may grant up to eight hours credit for the ABMS qualifying board examination toward the sixteen (16) hour testing requirement.

(11) The specialty board shall issue certificates to those physicians who are found qualified under the stated requirements of the specialty board.

(12) The specialty board shall assist in maintaining and elevating the standards of graduate medical education and facilities for specialty training in medicine in collaboration with other concerned organizations and agencies, and have a mechanism for assisting accrediting agencies in the evaluation of training programs.

(c)(1) Upon request the Division of Licensing will approve a specialty board if it meets the criteria set forth in these regulations. The division may withdraw the approval of a specialty board if the division finds that it fails to meet the criteria set forth in these regulations.

(2) Within 30 working days of receipt of an application for specialty board approval, the division shall inform the applicant in writing that it is either complete and accepted for filing and referral to a medical consultant selected by the division or that it is deficient and what specific information or documentation is required to complete the application.

(3) Within 918 calendar days from the date of filing of a completed application, the division shall inform the applicant in writing of its decision regarding the applicant's approval as a specialty board.

(4) The division's time periods for processing an application from the receipt of the initial application to the final decision regarding approval or disapproval based on the division's actual performance during the two years preceding the proposal of this section were as follows:

(A) Minimum - 646 days.

(B) Median - 714 days.

(C) Maximum - 918 days.

(d) Specialty boards approved by the Division of Licensing shall certify every three years from the date of approval that they continue to meet the requirements of these regulations.

(e) The Division of Licensing shall conduct such evaluations as it deems appropriate to ensure that applicant boards applying to the division meet the criteria of these regulations.

Note: Authority cited: Sections 651 and 2018, Business and Professions Code; and Section 15376, Government Code. Reference: Section 651, Business and Professions Code; and Section 15376, Government Code.

HISTORY

1. New section filed 1-27-94; operative 2-28-94 (Register 94, No. 4).

2. Amendment of subsections (c)(2) and (c)(3) and new subsections (c)(4)-(c)(4)(C) filed 3-24-99; operative 4-23-99 (Register 99, No. 13).

This database is current through 1/2/15 Register 2015, No. 1

16 CCR § 1363.5, 16 CA ADC § 1363.5

End of Document

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Bingham v. Hamilton
United States District Court, E.D. California. May 15, 2000 100 F.Supp.2d 1233 *(Approx. 12 pages)*

Original Image of 100 F.Supp.2d 1233 (PDF)

100 F.Supp.2d 1233
United States District Court,
E.D. California.

Perry J. BINGHAM, D.D.S., and the American Academy of Implant Dentistry, Plaintiffs,
v.
Cathleen HAMILTON, in her Official Capacity as Director, California Department of Consumer Affairs, et al., Defendants.

No. CIV. S-99-0499 DFL JFM. May 15, 2000.

Dentist and the American Academy of Implant Dentistry (AAID) brought action challenging the California State Board of Dental Examiners' enforcement policy prohibiting the advertisement of certain credentials by California licensed dentists. Upon plaintiffs' motion for summary judgment, the District Court, Levi, J., held that board's enforcement policy violated First Amendment to extent that it prohibited advertisement of AAID credentials unless the advertising dentist had at least one year of post graduate academic study in implant dentistry.

Motion granted.

West Headnotes (9)

Change View

1 Federal Courts Fitness and hardship
In considering whether a case is ripe for review, a court must evaluate the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

2 Federal Courts Fitness and hardship
A claim is fit for decision, for purposes of ripeness analysis, if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.

3 Federal Courts Environment and health
Although regulation containing policy for advertising of credentials issued by recognized dental specialty boards and associations was not yet operative, suit challenging California State Board of Dental Examiners' enforcement policy prohibiting advertisement of certain credentials by California licensed dentists was ripe for adjudication since record was developed, the dispute was primarily legal, and plaintiffs would suffer hardship with continued delay; if dentist were to advertise his American Academy of Implant Dentistry (AAID) credentials, he would violate statute and could be immediately subject to sanctions, including revocation of his license. West's Ann.Cal.Bus. & Prof.Code § 651; Cal.Code Regs. title 16, § 1054.

5 Cases that cite this headnote

4 Federal Courts Younger abstention
Younger abstention only applies to proceedings that are judicial in nature.

5 Federal Courts Particular Cases, Contexts, and Questions
Agency's review of proposed regulation for compliance with the necessity and clarity standards of Government Code was not a judicial proceeding, and *Younger* abstention, therefore, did not apply.

SELECTED TOPICS

Health

Regulation

Commercial Speech Protection of Its Advertising

Business or Professional Services

Commercial Speech Protection of Its Advertising

Federal Courts

Judicial Decision and Hardship

Right to Decline Jurisdiction; Abstention Doctrine

State Court Review of Denial and Federal Court Abstention

Secondary Sources

B. Jurisdiction Over Parties—Personal Jurisdiction

Cal. Prac. Guide Civ. Pro. Before Trial Ch. 3-B

...[3:130] Assuming the action is filed in a court with subject matter jurisdiction, the next step is to determine whether that court has power to render an effective judgment against the defendants invol...

Appropriateness of Federal Court Abstention Under Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483, Given the Existence of Concurrent Parallel Proceeding

193 A.L.R. Fed. 291 (Originally published in 2004)

...This annotation collects and analyzes cases in which the federal courts have discussed or determined the appropriateness of a district court's abstention from a federal proceeding given the existence o...

When Are Proceedings Parallel so as to Permit Federal Court Abstention Under Colorado River Water Conservation Dist. v. U. S., 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483, 9 Env't. Rep. Cas. (BNA) 1916

176 A.L.R. Fed. 517 (Originally published in 2002)

...This annotation collects and analyzes cases in which federal courts have discussed or determined whether a concurrent action in a state or foreign court is parallel to a federal action for the purpose ...

See More Secondary Sources

Briefs

Joint Appendix

2010 WL 723711
Krupski v. Crociere
Supreme Court of the United States.
February 24, 2010

...Plaintiff, WANDA KRUPSKI, by and through her undersigned attorneys, sues Defendant, COSTA CRUISE LINES, N.V., L.L.C., d/b/a COSTA CRUISE LINES, and alleges as follows: 1. That this is a cause of action...

Brief for the Petitioner

2013 WL 3362093
Sprint Communications Company, L.P. v. Jacobs

6 Constitutional Law Health care
Health Advertising
Dentists' advertisement of their American Academy of Implant Dentistry (AAID) credentials constituted commercial speech protected under the First Amendment. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

7 Constitutional Law Reasonableness; relationship to governmental interest
Commercial speech that is not false, deceptive, or misleading can be restricted, but only if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest. U.S.C.A. Const.Amend. 1.

8 Constitutional Law Business or professional services
With regard to advertising of credentials from professional organizations, state may not, under First Amendment, completely ban statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations. U.S.C.A. Const.Amend. 1.

9 Constitutional Law Health care
Health Advertising
California State Board of Dental Examiners' enforcement policy violated First Amendment to extent that it prohibited advertisement of American Academy of Implant Dentistry (AAID) credentials unless the advertising dentist had at least one year of post graduate academic study in implant dentistry; board failed to show that advertisement of AAID credentials was inherently misleading, that advertisement of AAID credentials would mislead the public into believing that the dentist placing the advertisement had at least one year of post graduate academic work in implant dentistry or that any potential for consumer deception could not be addressed by disclosure requirements rather than prohibition. U.S.C.A. Const.Amend. 1; West's Ann.Cal.Bus. & Prof.Code § 651.

4 Cases that cite this headnote

Attorneys and Law Firms

*1234 Richard W Nichols, McDonough Holland and Allen, Sacramento, CA, Frank R Recker, pro hac vice, Frank R Recker and Associates, Marco Island, FL, for Plaintiffs.

Joel S Primes, Attorney General's Office of the State of California, Sacramento, CA, for Defendant.

MEMORANDUM OF OPINION AND ORDER

LEVI, District Judge.

This is a First Amendment commercial speech case in which plaintiffs Perry Bingham and the American Academy of Implant Dentistry (AAID) challenge the California State Board of Dental Examiners' ("California Dental Board" or "Dental Board") enforcement policy prohibiting the advertisement of certain credentials by California licensed dentists. Plaintiffs now move for summary judgment. For the reasons stated below, the motion will be granted.

I.

Implant dentistry consists of the placing of "devices for attaching artificial replacement teeth to the same bones to which natural teeth are anchored."[1] (Pls.' Exh. DD, Defs.' Regulatory File, at 546, AAID Position Paper: Specialty Recognition and the Future of Dental Implants.) This case arises from the interaction of four sets of facts or circumstances concerning the practice of implant dentistry. First, any dentist with a general license to practice as a dentist may perform implant dentistry in California. There is no requirement of any special training or education beyond that required for the license to practice as a dentist. As a consequence, any licensed dentist may advertise that he or she practices implant dentistry. Second, implant dentistry is not one of the eight specialities recognized by the American Dental

Supreme Court of the United States.
June 26, 2013

...Sprint Communications Company, L.P., ("Sprint") is a limited partnership organized under Delaware law that primarily provides telecommunications services to the public. Sprint's partners include U.S. T...

Joint Appendix

2002 WL 32102932
DOLE FOOD COMPANY, et al., Petitioners, v. Gerardo Dennis PATRICKSON, et al., Respondents. DEAD SEA BROMINE CO., LTD., et al, Petitioners, v. Gerardo Dennis PATRICKSON, et al., Respondents.
Supreme Court of the United States.
August 23, 2002

...Pursuant to Hawaii Rule of Civil Procedure 14 and within ten days after serving its original answer, defendant Dole Food Company, Inc. ("Dole") hereby files its third-party complaint complaining of Dea...

See More Briefs

Trial Court Documents

POINTE SAN DIEGO RESIDENTIAL COMMUNITY L.P., a California limited partnership and Gosnell Builders Corporation of California, a California corporation, Plaintiffs, v. W.W.I. PROPERTIES, LLC., a California limited liability company; Astra Management Corporation, a California corporation; Palomba Weingarten, an individual Peter Wenner & Associates; Atlas Homes, LLC, a California limited liability a California corporation and Does 1 through 50,

2002 WL 34077966
POINTE SAN DIEGO RESIDENTIAL COMMUNITY L.P., a California limited partnership and Gosnell Builders Corporation of California, a California corporation, Plaintiffs. v. W.W.I. PROPERTIES, LLC., a California limited liability company; Astra Management Corporation, a California corporation; Palomba Weingarten, an individual Peter Wenner & Associates; Atlas Homes, LLC, a California limited liability a California corporation and Does 1 through 50,
Superior Court of California, San Diego County
March 04, 2002

...The plaintiffs/cross defendants were represented by Steven Strauss, Frank Tobin and Paul Tyrell. Defendants/cross-complainants were represented by Douglas Reynolds, R. Gaylord Smith and Alan Greenberg....

City of Cotati v. Cashman

2000 WL 35728036
City of Cotati v. Cashman
Superior Court of California, Sonoma County
February 01, 2000

...Cmm. 19 The defendants' motion to strike the complaint under CCP §425.16 was heard by this Court on December 6, 1999. Plaintiff appeared by and through its attorneys, Jeffrey Walter and Henry Hasler; ...

Abcede v. Hosp. Corp. of America

2014 WL 5502476
Abcede v. Hosp. Corp. of America
Superior Court of California, Ventura County
July 01, 2014

...TIME: 03:21:00 PM DEPT. 20 CLERK Christine Schaffels EVENT TYPE: Ruling on Submitted Matter CASE CATEGORY: Civil - Unlimited CASE TYPE: Wrongful Termination The Court, having previously taken the Moti...

See More Trial Court Documents

Association (ADA) and therefore no ADA credentials are available in implant dentistry as a distinct field or specialty. However, the ADA does award credentials in oral surgery, periodontics, and prosthodontics, fields that include implant dentistry, but that require extensive post graduate academic training. (*See* Berger Decl. ¶¶ 3–4.) Third, the AAID, a national dentist organization founded in 1953 with some 211 California members, (*see* Compl. ¶ 13), arguably fills the gap between the general dentist and the ADA specialist by awarding the credentials of "Fellow" and "Diplomate" in implant dentistry to licensed dentists who *1235 have completed certain requirements.[2] These requirements include testing, several hundred hours of continuing education in implant dentistry, and clinical experience also in implant dentistry. (*See* Shuck Aff. at 1.) The AAID requirements, however, do not include post graduate academic training at an accredited dental or medical school.

Finally, as applied to dentists, Cal. Bus. & Prof.Code § 651(h)(5)(A) allows a dentist to advertise credentials or a specialty certification awarded by a private or public board only if that board or agency is recognized by the California Dental Board. Until recently the California Dental Board appeared to rely upon the ADA in making recognition decisions. More recently, however, as a result of the predecessor lawsuit to this action, the California Dental Board has developed its own recognition standards which have been reduced to a proposed regulation.

Plaintiff Bingham is a California licensed dentist practicing general dentistry. He is a member of the AAID and has been awarded the "Fellow" and "Diplomate" rankings in implant dentistry from that organization. Not surprisingly, Bingham and other members of the AAID want to advertise their AAID credentials and have sought permission to do so from the Dental Board. As explained below, the California Dental Board's legal position has undergone some development in the course of this litigation. Its bottom line has not changed, however. It does not recognize the AAID or its credentials, and it states that under § 651(h)(5)(A), Cal. Bus. & Prof.Code, it is entitled to take enforcement action against any dentist who advertises AAID credentials unless the dentist has one academic year studying implant dentistry at an accredited dental or medical school.

A. Prior Litigation History

The plaintiffs first challenged the California Dental Board's position in an action filed in September 1997. The court dismissed that action as unripe. *See Bingham v. Berte*, Civ. No. S--97–1817 DFL JFM (*Bingham I*), Order of Jan. 15, 1998. At the time of the prior action, the Dental Board followed an informal policy of deferring to the ADA as to which credentials and specialities should be recognized. In the federal action, plaintiffs argued that the ADA improperly had declined to recognize implant dentistry in order to protect other existing specialities from competition. Whatever the merits of that position, the court concluded that those arguments had not been presented to the Dental Board in the first instance and that plaintiffs had not yet sought a declaratory decision from the Dental Board either approving or disapproving a particular proposed advertisement. Thus, prior to litigating their claim in federal court, the plaintiffs were ordered to "seek relief from the Dental Board directly."[3] *Id.* at 4. The court noted:

> The Dental Board also must consider whether a flat ban on any advertisement of AAID credentials—even if accompanied by appropriate disclaimers—is required to protect the public from misleading advertising. The Dental Board may well conclude that the proposed advertisement should be permitted. Even if it reaches a different conclusion, the record will be far clearer as to why the Dental Board concludes that such a *1236 ban is justified in the circumstances here.
> *Id.*

On February 9, 1998, the plaintiffs requested, by letter, a declaratory decision from the Dental Board under the terms of Cal. Gov.Code § 11465.20.[4] (*See* Compl. ¶ 8.) Despite an exchange of letters between counsel for plaintiffs and counsel for defendants, no action has ever been taken by the Dental Board on plaintiffs' request for a declaratory decision, presumably because at roughly the same time as the request the Dental Board began drafting a regulation to address the issues presented by *Bingham I*.

On March 15, 1999, the plaintiffs again filed a complaint in federal court, "containing substantially the same legal assertions" as the earlier September 29, 1997 complaint. (Compl.¶ 6.) Since the filing of that complaint, the Dental Board has proposed Cal.Code Regs. tit. 16 § 1054 as its mechanism to enforce Cal. Bus. & Prof.Code § 651.

B. The Dental Board's Current Interpretation of § 651

Although § 1054 has not gone into effect, the Dental Board currently interprets and enforces Cal. Bus. & Prof.Code § 651 according to the standards contained in the proposed regulation.[5] According to the Executive Officer of the Dental Board, "[t]he Board policy for advertising of credentials issued by Recognized Dental Specialty Boards and Associations is expressed in proposed Section 1054."[6] (Coleman Decl. ¶ 11.)

Thus, the Dental Board's current policy under Cal. Bus. & Prof.Code § 651 is that:

(a) A dentist may advertise that he or she has credentials from one of the dental specialty boards recognized by the Board of Dental Examiners of the State of California, pursuant to Section 1054.

(b) A dentist may not advertise credentials granted by a private or public board or parent association which is not recognized pursuant to Section 1054, unless:

(1) The private or public board or parent association which grants the credentials currently requires:

(A) The successful completion of a formal advanced education program at or affiliated with an accredited dental or medical school equivalent to at least one academic year beyond the predoctoral curriculum;

(B) Successful completion of an oral and written examination based on pyschometric principles; and

(C) Training and experience subsequent to successful completion of (A) and (B) above, to assure competent practice in the dental discipline as determined by the private or public board or parent association which grants the credentials.

*1237 (2) Any advertisement which references the dentist's credentials shall include the following statement "[Name of announced dental discipline] is a discipline not recognized as a dental specialty by the Board of Dental Examiners of the State of California."

(3) The dentist discloses that he or she is a general dentist in any advertising which references the dentist's credentials.

Cal.Code Regs. tit. 16 § 1054.1 (proposed).

The AAID is not recognized by the Dental Board. Thus, under the Dental Board's current enforcement policy, AAID credentials cannot be advertised since they are not earned after an academic year of postdoctoral curriculum at an accredited dental or medical school.[7] Because plaintiff Bingham has not completed one year of post graduate study in implant dentistry, and because the AAID is not recognized by the Dental Board, were he to advertise his AAID credentials, he would violate Cal. Bus. & Prof.Code § 651 and could be subject to sanctions, including revocation of his license. *See* Cal. Bus. & Prof.Code § 652.

Plaintiffs bring this action to challenge the one year educational requirement. They do not attack the Dental Board's disclosure requirements nor do they quarrel with the testing, training and experience requirements.

II. Ripeness

The Dental Board argues that the plaintiffs' claim is not ripe for adjudication because Cal.Code Regs. tit. 16 § 1054 is not yet operative. Instead, the Dental Board argues that the court should abstain from jurisdiction until the regulation goes into effect. The basic problem with this argument, however, is that what is being challenged is the Dental Board's present enforcement policy under § 651, and this policy is now in place and does not wait upon implementation of § 1054.

1 2 "In considering whether a case is ripe for review, a court must evaluate '[1] the fitness of the issues for judicial decision and [2] the hardship to the parties of withholding court consideration.' " *US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (1999) (quoting *Winter v. California Med. Review, Inc.*, 900 F.2d 1322, 1325 (9th Cir.1989)) (brackets in original). "A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Winter*, 900 F.2d at 1325.

3 Unlike the claims in *Bingham I*, the plaintiffs have presented sufficient evidence of the Dental Board's enforcement policy. The Dental Board has conceded in its opposition papers, (*see* Defs.' Opp. Summ. J. at 5), in its answers to the plaintiffs' requests for admissions,[3]

and at oral argument on March 24, 2000, that Bingham and other members of the AAID would be subject to sanctions if they were *1238 to advertise their AAID credentials. It is no longer "speculative" as to whether the plaintiffs would be subject to discipline for advertising AAID credentials. *See Bingham I*, Order of Jan. 15, 1998, at 3. As a result, the controversy is primarily legal: whether the Dental Board's advertising prohibition violates the First Amendment.

The plaintiffs also present a compelling argument for hardship. Over two years have elapsed since the dismissal of *Bingham I*. During this two-year period, Bingham and members of the AAID have been unable to advertise their AAID credentials without justifiable fear of professional discipline from the Dental Board. This injury will persist if their claim is further delayed.

The Dental Board also argues that plaintiffs have failed to exhaust administrative remedies. Yet it is unclear what further steps plaintiffs could take to challenge the Dental Board's present enforcement policy. After *Bingham I* was dismissed, plaintiffs promptly sought declaratory relief from the Dental Board to clarify whether AAID certifications could be advertised under § 651. Although their request for declaratory relief was not acted upon,[9] the Dental Board in fact did clarify and articulate its enforcement policy, and this clarification is embodied in proposed § 1054. There are no administrative remedies left to exhaust.

4 5 Finally, the Dental Board argues that if plaintiffs' claim is ripe for adjudication, the court should nonetheless abstain from exercising its jurisdiction under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), because the Dental Board's proposed regulation is before the OAL in an ongoing administrative proceeding. *Younger* abstention, however, only applies to proceedings that are judicial in nature. *See New Orleans Public Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 370, 109 S.Ct. 2506, 2518, 105 L.Ed.2d 298 (1989). The OAL's review of the proposed regulation for compliance with the necessity and clarity standards of the Government Code is not a judicial proceeding. *Younger* abstention, therefore, does not apply.

Plaintiffs claim is ripe for adjudication. The record is developed, the dispute is primarily legal, and the plaintiffs would suffer hardship with continued delay.

III. Commercial Speech

6 7 The plaintiffs' advertisement of their AAID credentials constitutes commercial speech protected under the First Amendment. *See Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976). The states may prohibit false, deceptive or misleading advertising. *See id.* at 771–72, 96 S.Ct. at 1830–31. "Commercial speech that is not false, deceptive, or misleading can be restricted, but only if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Ibanez v. Florida Dep't of Business and Professional Regulation, Bd. of Accountancy*, 512 U.S. 136, 142, 114 S.Ct. 2084, 2088, 129 L.Ed.2d 118 (1994) (citing *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980)); *see also In re R.M.J.*, 455 U.S. 191, 203, 102 S.Ct. 929, 937, 71 L.Ed.2d 64 (1982).

*1239 A. Commercial Speech in Professional Services

8 The Supreme Court has held that the advertising of credentials from professional organizations is not inherently misleading to the public. In *Peel v. Attorney Registration & Disciplinary Comm'n of Illinois*, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990), a plurality of the Court found that an attorney who designated himself as a "Certified Civil Trial Specialist by the National Board of Trial Advocacy" was not engaged in misleading advertising. In overturning the Illinois Supreme Court's finding that the general public might be misled by the advertisement and could mistakenly believe that the lawyer was more qualified than his peers or had received a credential from an official state organization, the Court held:

> This analysis confuses the distinction between statements of opinion or quality and statements of objective facts that may support an inference of quality. A lawyer's certification ... is a verifiable fact, as are the predicate requirements for that certification. Measures of trial experience and hours of continuing education, like information about what schools the lawyer attended or his or her bar activities, are facts about a lawyer's training and practice. A claim of certification is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success but is simply a fact, albeit

> one with multiple predicates, from which a consumer may or may not draw an inference of the likely quality of an attorney's work in a given area of practice.

Id. at 101, 110 S.Ct. at 2286 (internal citations omitted). Moreover, the Court concluded that even if the public might potentially be misled by a term such as "certified" or "specialist," less restrictive regulations requiring disclosure could address this potential well short of an outright prohibition: "a State might consider screening certifying organizations or requiring a disclaimer about the certifying organizations or the standards of a specialty. A state may not, however, completely ban statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations ...." *Id.* at 110, 110 S.Ct. at 2292–93 (internal citations omitted).

Similarly, in *Ibanez v. Florida Dep't of Business and Professional Regulation, Bd. of Accountancy,* 512 U.S. 136, 114 S.Ct. 2084, 129 L.Ed.2d 118 (1994), the Florida Board of Accountancy reprimanded a lawyer for advertising her credentials as a Certified Financial Planner (CFP)—awarded by a private organization—beside her credentials as a Certified Public Accountant (CPA)—licensed by the Board of Accountancy. The Board of Accountancy argued that the use of the term "certified" in her CFP credentials "inherently mislead[s] the public into believing that state approval and recognition exists." *Id.* at 142, 114 S.Ct. at 2088 (brackets in original).

9 Applying *Peel,* the Court held that without concrete evidence of deception caused by the credentials, the evidence was "not sufficient to rebut the constitutional presumption favoring disclosure over concealment." *Id.* at 145, 114 S.Ct. at 2090 (citation omitted). The Court held that the mere claim that the commercial speech may be potentially misleading cannot supplant the state's "burden to 'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' " *Id.* at 148, 114 S.Ct. at 2090 (quoting *Edenfield v. Fane,* 507 U.S. 761, 771, 113 S.Ct. 1792, 1800, 123 L.Ed.2d 543 (1993)).

The reasoning in *Peel* and *Ibanez* is applicable to any professional advertising, including the advertisement of dental credentials. *See Borgner v. Cook,* 33 F.Supp.2d 1327 (N.D.Fla.1998) (applying *Peel* and *Ibanez* in a suit involving the advertising of dental credentials); *cf. *1240 Parker v. Commonwealth of Kentucky, Board of Dentistry,* 818 F.2d 504 (6th Cir.1987). Under *Peel* and *Ibanez,* then, the Dental Board's prohibition of AAID credentials can only be sustained if there is a real, demonstrable potential that the public may be misled, and if the prohibition is necessary to address this problem, as opposed to lesser measures.

B. AAID Credentials and Commercial Speech

The Dental Board's contention that the advertisement of AAID credentials will mislead members of the public is not persuasive. To begin with, as in *Peel,* there is nothing inherently or necessarily misleading about the advertisement of the AAID's credentials. The Dental Board does not contend that the credentials are meaningless or that the organization is a sham. The AAID is a bona fide organization, and it actually issues credentials according to certain published standards. Thus, the AAID credentials that Bingham and other AAID members desire to advertise exist and members of the public can confirm this fact as well as the predicate acts required for AAID certification. In short, the advertising is not false, deceptive or inherently misleading.

Nonetheless, the Dental Board apparently sees a potential for confusion because consumers might believe that the AAID's credentials are in some way sponsored by the Dental Board. The Board also apparently believes that consumers assume that professional credentials are backed by at least one year of post graduate academic work and further that members of the public may not understand the difference between an AAID certification and the more rigorous requirements of the various ADA specialties. While plausible concerns, the Dental Board has virtually no evidence beyond conjecture that any of these concerns has real substance.[10]

The only evidence that the Dental Board offers that the advertising of AAID credentials would be misleading is conclusory, anecdotal, and speculative. (*See* Coleman Decl., *Bingham I,* ¶ 6 ("In my capacity as Executive Director of the Board, I am aware that there have been complaints regarding consumer confusion caused by dental advertising of specialty board certification in specialty boards not recognized by the ADA."); Berger Decl., *Bingham I,* ¶ 9 ("[T]he public would be mislead [sic] into believing that an AAID or ABOL/ID 'Fellow' or 'Diplomate' had the educational and examination requirements of an oral surgeon and specialist in prosthodontics when in fact they do not."); Atwood Decl. ¶¶ 4–8 (anecdotal

evidence from a dental patient who was allegedly misled by AAID credentials); Cincotta Decl. ¶¶ 5–18 (anecdotal evidence from a lawyer who represents a dental patient who allegedly received inadequate dental care from an AAID accredited dentist).)[11] The Dental Board has not offered any empirical evidence—in the form of studies or surveys—which would support a conclusion that the advertising of AAID credentials would mislead the general public. *See Ibanez*, 512 U.S. at 146, 114 S.Ct. at 2090; *Peel*, 496 U.S. at 106, 110 S.Ct. at 2290. More particularly, there is no evidence that members of the public assume that the AAID credentials at issue here are backed by at least one year of post graduate study in implant dentistry.

Even assuming that the Dental Board had made an adequate evidentiary showing of the potential for deception, it has failed to show that a total prohibition is necessary. **1241* The Dental Board's concern as to sponsorship could be addressed by requiring disclosure in the advertisement that the AAID is not recognized by the Dental Board or the ADA. The proposed regulation requires disclosure that implant dentistry is not a discipline recognized by the Dental Board; an equivalent disclaimer might state that the AAID is not affiliated with the California Dental Board. Similarly, the Dental Board's concern that the public will make incorrect assumptions as to the requirements for certification could be addressed by requiring the advertisement to summarize the requirements for certification. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 375, 97 S.Ct. 2691, 2704, 53 L.Ed.2d 810 (1977).

In short, the Dental Board fails to show that the advertisement of AAID credentials is inherently misleading. It further fails to show that the advertisement of AAID credentials will mislead the public into believing that the dentist placing the advertisement has at least one year of post graduate academic work in implant dentistry. Finally, the Dental Board fails to show that any potential for consumer deception cannot be addressed by disclosure requirements rather than prohibition.

IV. Relief

The court finds and declares that the Dental Board's enforcement policy is unconstitutional to the extent that it prohibits advertisement of AAID credentials unless the advertising dentist has at least one year of post graduate academic study in implant dentistry. The remainder of the Dental Board's enforcement policy under Cal. Bus. & Prof.Code § 651 is not before the court and, therefore, remains undisturbed.

V.

The plaintiffs' motion for summary judgment is GRANTED.

IT IS SO ORDERED.

Footnotes

1 According to the AAID, "[u]nlike most current forms of dentures, which sit on top of the gums or are attached to existing teeth, implants may be inserted into the bone, functioning like an artificial tooth root, or may be placed directly against the bone to support a dental prosthesis." *Id.*

2 The "Fellow" designation is awarded directly by the AAID; the higher rank of "Diplomate" is awarded by the American Board of Oral Implantology/Implant Dentistry, a certifying board sponsored by the AAID. (Compl.¶ 11.)

3 At oral argument on December 5, 1997 in *Bingham I*, the defendants' counsel indicated that the plaintiffs could ask for a declaratory decision from the Dental Board as to whether their proposed advertisement would be in compliance with § 651(h)(5)(A). (Rep.'s Trans. of Proceedings, *Bingham I*, Dec. 5, 1997, at 8.)

4 Following the dismissal of *Bingham I*, defendants' counsel sent a letter to the Dental Board recommending that the Dental Board propose a formal regulation. (*See* Letter from Primes to Coleman, Jan. 22, 1998.)

5 On January 26, 2000, the California Office of Administrative Law (OAL) disapproved the Dental Board's proposed regulation for procedural reasons; according to defendants, OAL disapproved the proposed regulation because it failed to comply with the necessity and clarity standards of Cal. Gov Code § 11349.1. (*See* Coleman Decl. Exh. 2, Decision of Disapproval of Regulatory Action, File No. 99–1214–08S, Feb. 2, 2000, at 1.) At oral argument on March 24, 2000, defendants' counsel stated that the Dental Board had resubmitted

the same proposed regulation to the OAL after addressing the procedural deficiencies, and that it expected approval in April 2000. According to the OAL's Internet web page, it appears that the OAL has approved the regulation and that it is scheduled to become operative on May 24, 2000. *See* <http://ccr.oal.ca.gov/>.

6 Further, at oral argument on March 24, 2000, defendants' counsel conceded that Bingham would violate the Dental Board's current policy, as expressed in the proposed regulation, if he were to advertise credentials awarded by the AAID.

7 At oral argument on March 24, 2000, defendants' counsel indicated that AAID members who have satisfied the requirements of proposed Cal.Code Regs. tit. 16 § 1054.1(b) could advertise their AAID credentials. Thus, AAID credential holders who have completed one post graduate academic year in implant dentistry at an accredited medical or dental school may not be subject to disciplinary action. However, since the defendants have conceded that Bingham has not satisfied those requirements, he cannot advertise his AAID credentials.

8 *See* Defs.' Responses to Pls.' Request for Admissions, No. 36 ("The Board's interpretation and implementation of Section 651 of the Business and Professions Code is outlined in Section 1054, et seq."); *Id.*, No. 37 ("The Board's current interpretation of Section 651 of the California Business and Professions Code is outlined in Section 1054, et seq."); *Id.*, No. 46 ("If the Plaintiff/licensee does not comply Section 1054, the Board would admit that it would be unlawful for him to advertise AAID and ABOI/ID credentials."). *But see id.*, Nos. 3, 19 & 44 (denying that the proposed regulation is the Dental Board's current enforcement policy).

9 "A decision not to issue a Declaratory Decision is within the discretion of the Agency. An Agency's failure to take action within 60 days of receipt of an application constitutes a denial of the application." Cal.Code Regs. tit. 1 § 1274(a). When taking action on an application for a declaratory decision, the Dental Board is required to commence a Declaratory Decision Proceeding with specific notice requirements. *See id.* at § 1272. "Within 60 days of receipt of an application ... the Agency shall serve on the Applicant ... notice of the Declaratory Decision Proceeding." *Id.* at § 1275(a). Since the Dental Board did not respond to the plaintiffs' request within 60 days of its receipt, the Dental Board denied the plaintiffs' application for a declaratory decision.

10 The Dental Board does not contend that one year of post graduate education is required to perform implant dentistry. As discussed in Part I *supra*, any dentist with a general license to practice as a dentist may perform implant dentistry.

11 It is significant to note that the patient's declaration, (Atwood Decl. ¶¶ 4–8), and the lawyer's declaration, (Cincotta Decl. ¶¶ 5–18), only allege that the AAID dentist provided substandard care. The patient alleges that she believed the dentist was well qualified because of the AAID credentials. (See Atwood Decl. ¶¶ 4–8.) As a result, these declarations do little to bolster the Dental Board's claim that the public would be misled by credentials which did not require an academic year of postdoctoral education.

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Potts v. Hamilton
United States District Court, E.D. California. September 8, 2004 334 F.Supp.2d 1206 (Approx. 18 pages)

Reversed and Remanded by Potts v Zettel, 9th Cir.(Cal.), February 2, 2007

Original Image of 334 F.Supp.2d 1206 (PDF)

334 F.Supp.2d 1206
United States District Court,
E.D. California.

Michael L. POTTS, D.D.S., and the American Academy of Implant Dentistry, Plaintiffs,
v.
Kathleen HAMILTON, Director, California Department of Consumer Affairs; Cynthia Gatlin, Executive Officer, California Dental Board; and Alan H. Kaye, D.D.S., President; Michael Pinkerton, Vice-President, Public Member; LA Donna Drury-Klein, R.D.A., Secretary; David L Baron, Public Member; Newton Gordon, D.D.S., Member; Lawrence Hyndley, D.D.S., Member; Patricia Osuna, R.D.H., Member; George Soohoo, D.D.S., Member; Ariane Terlet, D.D.S., Member; and Chester Yokohama, D.D.S., Member, in their official capacities with the California Dental Board, Defendants.

No. CIV-S-03-0348DFL/DAD. Sept. 8, 2004.

Synopsis

Background: Dentist and national dental specialty organization brought action challenging constitutionality of state's prohibitions upon advertising of dental specialty credentials. Plaintiffs moved for summary judgment.

Holdings: The District Court, Levi, J., held that:
1 doctrine of res judicata did not bar action;
2 statute did not regulate only inherently misleading speech; and
3 statute violated First Amendment and had to be invalidated.

Motion granted.

West Headnotes (15)

Change View

1 Judgment Nature and Requisites of Former Recovery as Bar in General
Judgment Nature and Elements of Bar or Estoppel by Former Adjudication
"Claim preclusion" bars relitigation of claims that were raised or could have been raised in prior lawsuit, and requires identity of claims, final judgment on merits in prior lawsuit, and identity of, or privity between, parties in first and second lawsuits.

2 Judgment Nature and Requisites of Former Adjudication as Ground of Estoppel in General
Judgment Scope and Extent of Estoppel in General
"Issue preclusion" bars relitigation of issues actually litigated and decided in prior lawsuit, and requires identity of issues, final judgment on merits in prior lawsuit, full and fair opportunity to litigate issue in prior proceeding, actual litigation and decision of issue in prior proceeding, and necessity of that issue to support final judgment on merits in prior proceeding.

3 Judgment Effect of Change in Law or Facts

SELECTED TOPICS

Constitutional Law
Freedom of Speech, Expression, and Press
False or Misleading Commercial Advertising

Freedom of Speech, Expression, and Press
Protected Speech and Conduct

Judgment
Conclusiveness of Adjudication
County or Municipal Tax

Secondary Sources

§ 296.Regulation of commercial activity
13 Cal. Jur. 3d Constitutional Law § 296
...Although the existence of commercial activity in connection with speech does not prevent such speech from enjoying the constitutional protections of free speech and free press, the Constitution affordi...

§ 262.Nature and scope of protection
13 Cal. Jur. 3d Constitutional Law § 262
...The California Constitution's Free Speech Clause protects commercial speech, at least in the form of truthful and nonmisleading messages about lawful products and services, as does the First Amendment,...

§ 4:7.Covered speech
Cal. Civ. Prac. Civil Rights Litigation § 4:7
...The constitutional right to free speech and press protects most types of speech on all subjects of human interest, including religious, political, social, or economic concerns. [Aaron v. Municipal Cour...

See More Secondary Sources

Briefs

RESPONDENTS' BRIEF ON THE MERITS
2000 WL 172286
Garawan Farming, Inc. v. Veneman
Supreme Court of California.
January 18, 2000
...During the Great Depression, an "unregulated scramble for market share" by agricultural producers caused a collapse of agricultural markets and the agricultural economy. Parallel national and state leg...

Brief of Amicus Curiae Center for Individual Freedom in Support of Petitioners
2003 WL 835292
Nike, Inc. v. Kasky
United States Supreme Court Amicus Brief.
February 28, 2003
...FN1 No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than Amicus or its counsel, make a monetary contribution to the preparation or submission of thi...

BRIEF FOR PETITIONER
1999 WL 1129629
Garawan Farming, Inc. v. Veneman
Supreme Court of California.
November 01, 1999
...This is a challenge to a state law requiring all California plum growers to fund collective

Officials of state dental examiners' board were not precluded, under doctrine of res judicata, from seeking to uphold constitutionality of state's prohibitions upon advertising of dental specialty credentials, despite prior judgment finding that statute violated protection afforded to commercial speech by First Amendment, where regulatory educational requirement in first action entailed "successful completion of a formal advanced education program at or affiliated with an accredited dental or medical school equivalent to at least one academic year beyond the predoctoral curriculum," and statute was subsequently amended to require "successful completion of a formal, full-time advanced education program that is affiliated with or sponsored by a university based dental school and is beyond the dental degree at a graduate or postgraduate level." U.S.C.A. Const.Amend. 1; West's Ann.Cal.Bus. & Prof.Code § 651(h)(5)(A).

4 Judgment Government, State, or Municipality, and Officers, Citizens, or Taxpayers

Court has discretion to relax application of preclusion where defendant is government entity, particularly political sovereign.

5 Constitutional Law False or Deceptive Claims; Misrepresentation

If advertisement is inherently misleading or has in actual practice misled members of consuming public, it is not protected by First Amendment and may be absolutely prohibited. U.S.C.A. Const.Amend. 1.

6 Constitutional Law Reasonableness; Relationship to Governmental Interest

State need not demonstrate that statute banning inherently or actually misleading commercial speech directly and materially advances substantial interest or exhibits reasonable means-end fit. U.S.C.A. Const.Amend. 1.

7 Constitutional Law False or Deceptive Claims; Misrepresentation

If advertisement is merely potentially misleading, in that information could be presented in different way that would not potentially mislead, then it is protected by First Amendment and may not be absolutely prohibited. U.S.C.A. Const.Amend. 1.

8 Constitutional Law False or Deceptive Claims; Misrepresentation

As to potentially misleading advertisements, which are protected by First Amendment, state may insist upon presentation, such as inclusion of additional clarifying information, that removes potential for deception, so long as regulation is no more extensive than necessary to directly and materially advance state's interest. U.S.C.A. Const.Amend. 1.

9 Constitutional Law Deception; Misrepresentation

Professional credentials issued by bona fide credentialing organizations, whose standards are rigorous, objectively clear, and verifiable, cannot be inherently or actually misleading, and thus are protected by First Amendment, because they are statements of objective, verifiable fact, rather than statements of opinion or about quality. U.S.C.A. Const.Amend. 1.

10 Antitrust and Trade Regulation Weight and Sufficiency

Mere speculation about possibility of deception in hypothetical cases does not suffice to show that advertisement is inherently or even potentially misleading.

11 Antitrust and Trade Regulation Advertising, Marketing, and Promotion

In order to regulate potentially misleading advertisement or professional credential, state must provide evidence to show that there is real potential that particular advertisement or credential will mislead public in some way

advertising of their products. Petitioner is a large, family-run fruit farm. Its owners (hereinafter "Gerawan...

See More Briefs

Trial Court Documents

American Civil Liberties Union of Northern California v. City of Redding

2011 WL 8022000
American Civil Liberties Union of Northern California v. City of Redding
Superior Court of California, Shasta County
June 21, 2011

...NATURE OF PROCEEDINGS: FINAL RULING FINAL RULING ON ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION: Plaintiffs seek a preliminary injunction enjoining implementation or enforcement of certain sections o...

Barry B. KAUFMAN and Vans, Inc., individually and on behalf of a class of others similarly situated, Plaintiffs, v. ACS SYSTEMS, INC., Datamart Information Services Corp.; Joe Girdwood; and Does 1-200, Defendants; David L. Amkraut and Joel Amkraut, individually and on behalf of a class of others similarly situated, Plaintiffs, v. Pacific Coast Office Products dba Copier Super Store, a California Corporation and Does 1 through 100, inclusive,

2001 WL 36024164
Barry B. KAUFMAN and Vans, Inc., individually and on behalf of a class of others similarly situated, Plaintiffs, v. ACS SYSTEMS, INC., Datamad Information Services Corp.; Joe Girdwood; and Does 1-200, Defendants; David L. Amkraut and Joel Amkraut, individually and on behalf of a class of others similarly situated, Plaintiffs, v. Pacific Coast Office Products dba Copier Super Store, a California Corporation and Does 1 through 100, inclusive,
Superior Court of California, Los Angeles County
December 12, 2001

...This is a group of cases filed against businesses and individuals which have allegedly engaged in, and continue to engage in, "a pattern and practice of sending unsolicited faxed advertisements of and ...

Environmental Law Foundation v. Laidlaw Transit Services

2008 WL 2157672
Environmental Law Foundation v. Laidlaw Transit Services
Superior Court of California, San Francisco County
January 08, 2008

...The above-entitled cause came on for hearing December 4, 2007 in Department 613, the Honorable Ernest H. Goldsmith, Judge, presiding. Mark Fogelman and Todd Malden of Reed Smith, LLP appeared as counse...

See More Trial Court Documents

12 **Constitutional Law** Health Care
Health Validity
State statute prohibiting advertising of dental specialty credentials not recognized by American Dental Association (ADA) or Dental Board of California did not regulate only inherently misleading speech, and thus could not be upheld against First Amendment challenge on that basis, where credentials conferred by some non-recognized groups were representations of objectively verifiable facts, rather than statements of opinion or quality. U.S.C.A. Const.Amend. 1; West's Ann.Cal.Bus. & Prof.Code § 651(h)(5)(A).

13 **Constitutional Law** False or Deceptive Claims; Misrepresentation
Defendants seeking to uphold validity of commercial speech regulation must provide concrete evidence to show that there is at least real potential that particular advertisement will mislead public in particular way. U.S.C.A. Const.Amend. 1.

14 **Constitutional Law** Health Care
Health Validity
State's prohibition upon advertising of dental specialty credentials not recognized by American Dental Association (ADA) or Dental Board of California was more extensive than necessary to advance state's interest in preventing misleading advertising of professional credentials, and thus statute violated First Amendment and had to be invalidated, even if credentials at issue were potentially misleading, and statute served substantial state interest, where disclaimer requirement would have restricted far less speech than outright prohibition on advertising credentials. U.S.C.A. Const.Amend. 1; West's Ann.Cal.Bus. & Prof.Code § 651(h)(5)(A).

15 **Constitutional Law** Narrow Tailoring
It is within legislature's discretion to choose between narrowly tailored means of regulating commercial speech, and court will not second-guess such choice. U.S.C.A. Const.Amend. 1.

West Codenotes

Unconstitutional as Applied
West's Ann.Cal.Bus. & Prof.Code § 651(h)(5)(A).

Attorneys and Law Firms

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MEMORANDUM OF OPINION AND ORDER

LEVI, District Judge.

This case is a further chapter in the long-running dispute between plaintiffs and the State of California over the State's prohibitions upon the advertising of dental specialty credentials. Plaintiffs challenge a recently enacted California statute restricting the advertising of dental specialty credentials to those credentials recognized by the American Dental Association ("ADA") or the Dental Board of California ("Dental Board"). The court previously found that an earlier version of this statute violated the protection afforded to commercial speech by the First Amendment. *See Bingham v. Hamilton*, 100 F.Supp.2d 1233 (E.D.Cal.2000). This renewed effort to limit the advertising of bona fide credentials fares no better. The advertising of credentials in dental specialties awarded by boards not recognized by the ADA or the Dental Board is not inherently or actually misleading. In addition, even if such

advertising were potentially misleading; the statute is more restrictive than necessary to advance the State's interest in preventing false or misleading advertising of dental specialty credentials. Therefore, the statute violates the First Amendment, and plaintiffs are entitled to summary judgment.

I.

A. The Parties

Plaintiffs are Dr. Michael L. Potts, D.D.S. ("Potts") and the American Academy of Implant Dentistry ("AAID"). Potts is a California-licensed dentist in Camarillo and has been practicing general dentistry since 1975. He holds the credentials of "Fellow" from AAID and "Diplomate" from AAID's certifying board, the American Board of Oral Implantology/Implant *1209 Dentistry ("ABOI/ID"), and he wants to advertise these credentials by listing them after his name. (Pls.' Mot. at 9.)

AAID is a national dental specialty organization which claims approximately 60 credentialed member dentists in California. (*Id.* at 2.) AAID sues in its own name and on behalf of its credentialed members in California. (*Id.*) AAID seeks to advance knowledge, skill, and expertise in the field of implant dentistry. To that end, AAID and ABOI/ID award various credentials to their members who fulfill certain educational, practice, and testing requirements. AAID awards the credentials of "Associate Fellow" and "Fellow," while ABOI/ID awards the higher credential of "Diplomate" (which is often advertised as "Board Certified"). (*Id.* at 1-2.) Besides completion of a dental degree, each of these credentials requires a certain number of years of practice in implant dentistry, completion of a substantial number of hours of continuing education in implant dentistry, completion of a multiple-choice written examination, and presentation of a certain number of cases exhibiting competence in performing various types of implants. (Exs. in Supp. of Pls.' Mot., Ex. B.) None of these credentials requires completion of a graduate or postgraduate education program in implant dentistry at a university-based dental school. (Pls.' Mot. at 9.)

Defendants are the Director of the California Department of Consumer Affairs and the Executive Officer, President, Vice-President, Secretary, and other members of the Dental Board of California. Defendants are charged with enforcing the statute at issue in this case and are sued solely in their official capacities. Plaintiffs seek a declaration that the statute is unconstitutional and an injunction against its enforcement.

B. Background and Prior Litigation

Any dentist with a general license to practice may perform implant dentistry in California.[1] There is no requirement of special training or education in implant dentistry. In addition, a general dentist may advertise that he limits his practice to implant dentistry. (*Id.* at 4-5.) While implant dentistry is an area of dental specialization in the broad sense, it is not a specialty recognized by the ADA or the Dental Board.[2] The current dispute centers around California's refusal to permit dentists to advertise their credentials earned from specialty boards (such as AAID and ABOI/ID) that are not recognized by the ADA or the Dental Board.

In ***Bingham v. Hamilton*, 100 F.Supp.2d 1233 (E.D.Cal.2000) ("*Bingham II*")**, the court held unconstitutional the enforcement policy of the Dental Board and a proposed regulation embodying that policy. At that time, the Dental Board's policy permitted a dentist to advertise a credential awarded by a specialty board only if that board was recognized by the ADA *1210 or by the Dental Board. The policy set out three criteria on which a non-ADA-recognized specialty board must condition the granting of credentials in order to be recognized by the Dental Board: (1) "successful completion of a formal advanced education program at or affiliated with an accredited dental or medical school equivalent to at least one academic year beyond the predoctoral curriculum;" (2) "successful completion of an oral and written examination based on psychometric principles;" and (3) "training and experience subsequent to successful completion of [the education and testing requirements], to assure competent practice in the dental discipline as determined by the ... board ... which grants the credentials." *Id.* at 1236-1237. Dentists holding AAID credentials could not advertise these credentials because AAID did not then-and does not now-require successful completion of a formal advanced education program at an accredited dental school equivalent to at least one academic year beyond the D.D.S. degree.

The plaintiffs in *Bingham II* challenged the one year of postgraduate education requirement under the First Amendment. The court held that the advertising of AAID credentials was not inherently or actually misleading because AAID was a bona fide organization that issued credentials according to objectively verifiable standards. *Id.* at 1240. Further, while the State

has a substantial interest in preventing the general public from being misled that AAID and ABOI/ID credentials are from a board recognized by the ADA or the Dental Board or that such credentials require successful completion of a postgraduate education program at an accredited dental school, this interest could be protected by a required disclaimer without a wholesale prohibition on the listing of the credential. *Id.* at 1240-1241.

C. Business and Professions Code Section 651(h)(5)(A)

Some two years after the Dental Board's regulation and enforcement policy was invalidated in ***Bingham II***, the California legislature enacted § 651(h)(5)(A) of the Business and Professions Code. (*Id.* at 5-7.) The legislative history of this provision shows that its sponsors intended to codify substantially the same advertising restrictions as those embodied by the proposed regulation and enforcement policy struck down in ***Bingham II***. (*Id.; see also* Compl., Exs. D-J.) Section 651(h)(5)(A)(i) specifically addresses dental specialty advertising in specialties recognized by the ADA. For these ADA-recognized specialties, § 651(h)(5)(A)(i) forbids a dentist from holding himself out as a specialist or as being a member of or holding credentials from a certifying board unless that board is recognized by the ADA (or the dentist has completed a specialty education program approved by the ADA). (Defs.' Mot. at 6.) It is undisputed that the AAID and ABOI/ID do not fall into this category because implant dentistry is not an ADA-recognized specialty. (*Id.*; Pls.' Mot. at 8.)

Section 651(h)(5)(A)(ii) regulates specialty advertising by dentists in areas of dentistry that are not recognized as specialties by the ADA. (Defs.' Mot. at 6.) It allows a dentist specializing in one of these areas to advertise credentials awarded by a non-ADA-recognized specialty board (such as AAID and ABOI/ID) only if that board is recognized as a bona fide organization by the Dental Board. In order to be recognized as bona fide, a non-ADA-recognized specialty board must condition credentialing or membership on three requirements that are similar to the three requirements for non-ADA-recognized specialty boards contained in the regulation at issue in ***Bingham II***. These three requirements are: (1) "successful completion of a formal, *1211 full-time advanced education program that is affiliated with or sponsored by a university based dental school and is beyond the dental degree at a graduate or postgraduate level;" (2) "prior didactic training and clinical experience in the specific area of dentistry that is greater than that of other dentists;" and (3) "successful completion of oral and written examinations based on psychometric principles." Cal. Bus. & Prof.Code § 651(h)(5)(A)(ii)(I)-(III). It is undisputed that AAID and ABOI/ID do not condition membership or credentialing on successful completion of a formal, full-time advanced education program at a university-based dental school that is beyond the dental degree. (Defs.' Mot. at 6-7; Pls.' Mot. at 9.) As in ***Bingham II***, plaintiffs challenge this educational requirement as unconstitutional because it completely prevents advertising of AAID and ABOI/ID credentials.

Defendants point out that even if a dentist is not allowed to advertise a specialty credential under § 651(h)(5)(A)(i) or (ii), he may still advertise a practice emphasis in any area of dentistry, as long as he indicates in the advertisement (in capital letters) that he is a general dentist. Cal. Bus. & Prof.Code § 651(h)(5)(A)(iii). In the context of this case, defendants have indicated that nothing in § 651(h)(5)(A) prohibits implant dentists like Potts from advertising that they limit their practices to implant dentistry or that they have completed a certain number of continuing education classes in implant dentistry. (Defs.' Mot. at 7.) Defendants also acknowledge that nothing in § 651(h)(5)(A) prohibits AAID members from advertising that they are "members" of AAID. But Potts may not advertise that he is a "Fellow" of AAID and a "Diplomate" of (or "Board Certified" by) ABOI/ID. He may not indicate to the general public that he is a credentialed member of AAID and ABOI/ID. (*Id.* at 8.) In short, while Potts can advertise that he limits his practice to implant dentistry and has taken courses in implant dentistry, he cannot advertise that he has achieved a measure of expertise as determined by AAID and ABOI/ID.

II.

A. Res Judicata

1 2 Plaintiffs argue that defendants are precluded from contesting the constitutionality of § 651(h)(5)(A) because substantially the same advertising restrictions were held unconstitutional in ***Bingham II*** and defendants had a full opportunity in that action to defend the restrictions. (Pls.' Mot. at 17-19.)[3]

3 4 Defendants do not dispute that the parties in ***Bingham II*** and in this case are identical and that ***Bingham II*** was litigated to a final judgment on the merits. (Defs.' Opp'n at 5-6.) However, defendants contend that no identity of claims or issues exists between this

case and ***Bingham II***. (*Id.* at 6-8; Defs.' Reply at 3-6.) The court agrees. While the claims and factual circumstances are quite similar, they are not the same. The educational requirement in § 651(h)(5)(A)(ii)(I) insists upon "successful completion of a formal, *1212 full-time advanced education program that is affiliated with or sponsored by a university based dental school and is beyond the dental degree at a graduate or postgraduate level." By contrast, the regulatory educational requirement in ***Bingham II*** entailed "successful completion of a formal advanced education program at or affiliated with an accredited dental or medical school equivalent to at least one academic year beyond the predoctoral curriculum." ***Bingham II*, 100 F.Supp.2d at 1236**. Moreover, in ***Bingham II*** there was no dispute by defendants that AAID and ABOI/ID were bona fide organizations who issued bona fide, not sham, credentials. Now that the State legislature has acted to reinvigorate the regulation, defendants contend, and the statute provides, that any organization and credential that does not meet the statutory requirements cannot be bona fide and must be misleading to the public. Finally, the court has discretion to relax application of preclusion where the defendant is a government entity, particularly a political sovereign. For all of these reasons, the court declines to find that defendants are barred by ***Bingham II*** from defending § 651(h)(5)(A).

B. Commercial Speech

Dr. Potts wants to tell prospective and existing patients that he has certain credentials by, for example, displaying a certificate in his office or including the credentials after his name on a business card or telephone book listing. This is a classic form of commercial speech and, unless misleading, would not be subject to prohibition under well-established principles. Where the different professions are concerned, however, the analysis becomes somewhat more complex. Professionals who lack the claimed credential consider that those who would advertise it seek an unfair competitive advantage based on the false premise that the credential equates to a higher level of skill. Moreover, state-approved accrediting organizations believe that they bring expertise and knowledge of the profession and its art to the table, and see their advertising regulations as part of their overall regulation of the profession through the establishment of meaningful standards. Those organizations that are not state-sanctioned see this kind of regulation as protectionist of certain interests and professional groups.

A state may absolutely prohibit commercial speech that is false, deceptive, or misleading. *Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772, 96 S.Ct. 1817, 1830-1831, 48 L.Ed.2d 346 (1976). Where the speech is not deceptive, the state may restrict it "only if the [s]tate shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 142, 114 S.Ct. 2084, 2088, 129 L.Ed.2d 118 (1994) (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980)).

5 6 7 8 Thus, if an advertisement is inherently misleading or has in actual practice misled members of the consuming public, it is not protected by the First Amendment and may be absolutely prohibited. The state need not demonstrate that a statute banning such inherently or actually misleading speech directly and materially advances a substantial interest or exhibits the reasonable means-end fit required under the *Central Hudson* test. However, if an advertisement is merely potentially misleading, in that the information could be presented in a different way that would not potentially mislead, then it is protected by the First Amendment and may not be absolutely prohibited. As to potentially misleading advertisements, the *1213 state may insist upon a presentation-typically the inclusion of additional clarifying information such as a disclaimer-that removes the potential for deception, so long as the regulation is no more extensive than necessary to directly and materially advance the state's interest. *See In re R.M.J.*, 455 U.S. 191, 203, 102 S.Ct. 929, 937-938, 71 L.Ed.2d 64 (1982); *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1106-1107 (9th Cir.2004).

9 10 11 As to the advertising of professional credentials, the Supreme Court has stated that credentials issued by bona fide credentialing organizations, whose standards are rigorous, objectively clear, and verifiable, cannot be inherently or actually misleading because they are statements of objective, verifiable fact, rather than statements of opinion or about quality.[4] *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 101-102, 110 S.Ct. 2281, 2288, 110 L.Ed.2d 83 (1990). However, advertising of such credentials could still potentially be misleading, requiring application of the *Central Hudson* test to any regulation of such advertising. Moreover, mere speculation about the possibility of deception

in hypothetical cases does not suffice to show that an advertisement is inherently or even potentially misleading. The state must provide evidence to show that there is a real potential that a particular advertisement or credential will mislead the public in some way. *Ibanez*, 512 U.S. at 145, 146-147, 114 S.Ct. at 2090-2091. The Court has also cautioned that the determination of whether an advertisement or credential is inherently or potentially misleading is necessarily fact-intensive and case-specific. *Id.* at 146, 114 S.Ct. at 2090.

C. AAID and ABOI/ID Credentials: Inherently Misleading?

Defendants do not contend that any member of the public has actually been misled by AAID or ABOI/ID credentials. Rather, defendants primarily claim that the credentials are inherently misleading, justifying a total ban. Defendants rely heavily on the Ninth Circuit's recent opinion in *American Academy of Pain Management v. Joseph*, 353 F.3d 1099 (9th Cir.2004) ("*Pain Management* "). In *Pain Management*, the Ninth Circuit upheld Business and Professions Code § 651(h)(5)(B), an analogous California statute regulating advertising of medical specialty credentials, against a First Amendment challenge brought by credentialed members of the American Academy of Pain Management ("AAPM"). Section 651(h)(5)(B) forbids California-licensed physicians from advertising that they are certified or eligible for certification by a medical specialty board unless that board is either recognized by the American Board of Medical Specialties ("ABMS") or approved by the Medical Board of California ("Medical Board") as having requirements for certification that are equivalent to those of ABMS-recognized medical specialty boards. *See id.* at 1104. However, the California Attorney General in *Pain Management* clarified that § 651(h)(5)(B) restricts only use of the term "board certified" and its equivalents. Therefore, unlike § 651(h)(5)(A), it does not restrict advertisement of credentials, such as "diplomate" or "fellow," issued by non-recognized medical specialty boards. *Id.* at 1104, 1111.

The *Pain Management* court held that an advertisement using the term "board certified" to denote a credential from a ***1214** non-ABMS-recognized medical specialty board is inherently misleading. *Id.* at 1107-1108. It observed that the term "board certified" is a term of art that has acquired and long held a precise meaning within the medical profession. Within that context, the term "board certified" means only that a doctor has been certified by a board that is a member of ABMS in one of the 23 areas of medical specialization recognized by ABMS. *Id.* at 1104-1105. "Board certified" also conveys that the doctor has achieved "a high level of specialized skill and proficiency." *Id.* at 1105. Since the California legislature defined the term "board certified" in accordance with this meaning in § 651(h)(5)(B), the Ninth Circuit held that an advertisement containing a statement that a doctor is "board certified" by a board not recognized by ABMS would be inherently misleading. *Id.* at 1108.

Defendants argue that just like § 651(h)(5)(B) in *Pain Management*, § 651(h)(5)(A) gives a "special and particular meaning to the advertising of postgraduate accreditations awarded in specific areas of dentistry." (Defs.' Mot. at 10.) Thus, according to defendants, any advertisement of credentials that does not conform to that meaning is inherently misleading. However, this argument does not adequately account for the differences between the statute and factual circumstances in *Pain Management* and the statute and factual circumstances in this case.

The statute in *Pain Management* has a far narrower regulatory scope than the statute in this case. Section 651(h)(5)(B) restricts only use of the specific term "board certified" and its equivalents, such as "certified by a board," "board eligible," and "eligible for board certification." *Pain Management*, 353 F.3d at 1104-1105 n. 3, 1111. By contrast, § 651(h)(5)(A) restricts advertisement of all credentials awarded by dental specialty boards, including terms like "fellow," "diplomate," and the like. The court in *Pain Management* addressed only whether use of the specific term "board certified" was inherently misleading in the context of that case-in particular, the unique, long established meaning of the term "board certified"; it did not hold that any advertisement of professional credentials not authorized by statute would be, for that reason alone, inherently misleading. Such an expansive view of *Pain Management* would place it in conflict with Supreme Court precedents such as *Peel* and *Ibanez* and effectively would remove all First Amendment protection from this area by permitting state legislatures to declare that all deviations from legislatively sanctioned terms and standards were inherently misleading and, therefore, subject to outright prohibition.

The *Pain Management* court relied on a particular record demonstrating that the term "board certified" had acquired a fixed, technical meaning within the medical profession, and that the California legislature had simply codified that meaning in § 651(h)(5)(B). *Id.* at 1104-1105 (quoting *Peel*, 496 U.S. at 102 n. 11, 110 S.Ct. at 2288 n. 11). By contrast, defendants in

this case have provided scant evidence that all dental specialty credentials, or even terms such as "diplomate" or "specialist," have similarly acquired a fixed, technical meaning within the dental profession. (*See* Defs.' Mot. at 3; Neumann Decl. ¶¶ 6, 11; McGinley Decl. ¶ 4.)[5] The statute in ***1215** *Pain Management* explicitly defined the term "board certified" to accord with its historical meaning within the medical profession. *See* Cal. Bus. & Prof.Code § 651(h)(5)(B). There is no equivalent definition for "board certified," "diplomate," "fellow," or any other type of credential to be found in § 651(h)(5)(A). Nor is there evidence of a well-established, specialized meaning accorded to all dental specialty credentials in the same way that the term "board certified" has become a term of art within the medical profession.

Finally, unlike the American Academy of Pain Management, AAID and ABOI/ID are bona fide credentialing organizations whose standards are rigorous, objectively clear, and verifiable.[6] In addition to attainment of a dental degree, each credential issued by AAID and ABOI/ID requires a certain number of years of practice in implant dentistry, completion of a substantial number of hours of continuing education in implant dentistry, completion of a written examination, and presentation of a certain number of cases demonstrating proficiency in performing various types of dental implants. (Exs. in Supp. of Pls.' Mot., Ex. B.) By contrast, anyone with two years experience working with patients experiencing pain who successfully completed a two-hour, 100-question multiple choice examination could become a "board certified" member of AAPM. *Pain Management*, 353 F.3d at 1103. Moreover, there was evidence indicating that more than eighty percent of AAPM's members had not taken that examination, but rather had been grandfathered in. *Id.* The factual circumstances of *Pain Management* come very close to *Peel's* definition of a sham organization, since AAPM apparently ***1216** made little inquiry into applicants' fitness and conferred membership on applicants almost indiscriminately. AAID and ABOI/ID are in a very different position, awarding their credentials only to applicants who have fulfilled rigorous criteria that are objectively clear and verifiable. Since these credentials are representations of objectively verifiable facts, rather than statements of opinion or quality, such credentials cannot be considered inherently misleading. *Peel*, 496 U.S. at 101-102, 110 S.Ct. at 2288.

12 In light of the differences between the statute and factual circumstances in *Pain Management* and the statute and factual circumstances in this case, and *Peel's* favorable treatment of credentials like those issued by AAID and ABOI/ID, the credentials issued by AAID and ABOI/ID cannot be considered inherently misleading. It follows that § 651(h)(5)(A) cannot be sustained on the ground that it regulates only inherently misleading speech.

D. AAID and ABOI/ID Credentials: Potentially Misleading?

13 In *Ibanez*, the Supreme Court held that defendants seeking to uphold the validity of a commercial speech regulation must provide concrete evidence to show that there is at least a real potential that a particular advertisement will mislead the public in a particular way. *Ibanez*, 512 U.S. at 145, 146-147, 114 S.Ct. at 2090-2091. Mere speculation as to the potential for deception in hypothetical cases does not suffice. *Id.* In ***Bingham II***, the defendants presented only "conclusory, anecdotal, and speculative" evidence to show that AAID and ABOI/ID credentials carried with them a potential to mislead the public. ***Bingham II*, 100 F.Supp.2d at 1240.** The court held that by failing to produce any empirical evidence, defendants had failed to carry their burden under *Ibanez*. *Id.*

In this case, defendants provide two surveys to show that AAID and ABOI/ID credentials are potentially misleading. One survey ("the Cogan mall survey") was conducted at malls in various parts of California and surveyed 200 people. (Cogan Decl., Report, pp. 10-11, 13.) Respondents were shown one of four different mock-ups of a fictitious advertisement for a dentist who is a Fellow of AAID and a Diplomate of ABOI/ID (also tested as Board Certified by ABOI/ID). (*Id.*, pp. 12-13.) Two of these mock-ups contained the AAID and ABOI/ID credentials without a disclaimer, and two featured the credentials with a disclaimer.[7] (*Id.*, p. 12.) The Cogan mall survey purports to demonstrate that most members of the public mistakenly believe (1) that completion of a full-time postgraduate education program beyond the D.D.S. degree is required to earn these credentials and (2) that AAID and ABOI/ID are recognized by the ADA and the Dental Board. (*Id.*, pp. 14-26.)

The other survey ("the Kamins phone survey") was conducted by telephone and also surveyed 200 people. (Kamins Decl., Ex. 3, pp. 2-3.) Respondents were asked questions about whether they thought that AAID and ABOI/ID credentials indicate that the holder is a specialist in implant dentistry, whether a specialist in implant dentistry must complete "some form of full-time training within an accredited dental ***1217** school affiliated with a university," and whether AAID and ABOI/ID credentials imply that implant dentistry is a dental specialty

recognized by the ADA. (*Id.*, pp. 3-5.) The Kamins phone survey resulted in high levels of affirmative responses to each of the preceding questions. (*Id.*)

These two surveys are of only limited value in determining whether AAID and ABOI/ID credentials are potentially misleading. Each suffers from serious deficiencies that render its significance open to question. The Cogan mall survey is not a probability sample, since respondents were not pre-selected in a random manner from across the general population. Because of the selection bias in the sampling procedure, no reliable extrapolation can be made from the results of this convenience sample to the general population of California. (*See* Stokes Decl., Report, p. 2.) More significantly, both the Cogan mall survey and the Kamins phone survey asked leading and compound questions of respondents. The leading questions tend to suggest their own answer and may well have guided respondents to a particular answer.[8] (*See id.*, p. 3.) The compound questions contain two or more elements, making it impossible to determine which element the respondent addressed in his or her response. (*See id.*) The Kamins phone survey in particular asked respondents questions that were quite long and convoluted, making it unlikely that most respondents remembered the beginning of the question once the interviewer reached the end of the question and requested a response.[9] (*See id.*)

Even if the results of these surveys were deemed reliable, many of the responses are not relevant to the question at hand. Most of the questions in each survey do not measure the percentage of the general public that believes that-without regard to AAID or ABOI/ID credentials-implant dentistry is a dental specialty recognized by the ADA or the Dental Board.[10] ***1218** The surveys also do not assess the background understanding of the general public regarding how much education a specialist in implant dentistry is required to complete. It is impossible to determine what, if any, misleading effect AAID and ABOI/ID credentials have, because there is no control set against which this effect can be measured.

Finally, although the Cogan mall survey tested the effect of various disclaimers on public perceptions regarding the educational requirements for and sponsorship of AAID and ABOI/ID credentials, these results are also of little help to defendants. First, the Cogan mall survey was conducted in a manner that renders its results far from reliable. Leaving aside the fact that it is not a scientific probability survey, it also tested mall shoppers who had been to a dentist in the past two years. (Cogan Decl., Report, p. 13.) It did not target people who had been to an implant dentist, who required the services of an implant dentist, or even who knew what implant dentistry is. This is the audience that could be expected to study implant dentistry advertisements with care, and rely upon them in choosing a dentist, whereas the average mall shopper who has merely seen a general dentist in the past two years might not be so careful.

More significantly, the disclaimers that were tested did reduce public misperceptions about the educational requirements for and sponsorship of AAID and ABOI/ID credentials. The website disclaimer reduced the number of people who thought that such credentials require completion of some education beyond a general dental degree from 66% to 52%, while the ADA non-recognition disclaimer reduced this number from 78% to 50%. (*Id.*, p. 16.) Furthermore, the ADA non-recognition disclaimer reduced the number of people who thought that AAID and ABOI/ID credentials are recognized by the ADA and the Dental Board from 70% to 18%. (*Id.*, p. 20.) These numbers indicate that a carefully worded disclaimer can be quite effective at reducing the general public's confusion as to the educational requirements for and sponsorship of AAID and ABOI/ID credentials.

It is doubtful that these two surveys, standing alone, satisfy the standard articulated by the Supreme Court in *Ibanez*. However, it is not necessary to resolve this question. Assuming that these two surveys do meet the *Ibanez* threshold to demonstrate that AAID and ABOI/ID credentials are potentially misleading, § 651(h)(5)(A) can survive plaintiffs' challenge only if it satisfies the remaining three elements of the *Central Hudson* test. It does not.

E. Is Section 651(h)(5)(A) More Extensive than Necessary to Directly and Materially Advance the State's Interest in Preventing Misleading Advertising of Professional Credentials?

14 Even assuming that AAID and ABOI/ID credentials are potentially misleading, the statute as applied to those credentials cannot withstand scrutiny under the remaining factors of the *Central Hudson* test because the regulation, in the form of a prohibition, is more extensive than necessary to advance the State's interest in preventing misleading advertising of professional credentials.

There is no dispute that § 651(h)(5)(A) serves a substantial state interest. The Supreme Court and the Ninth Circuit have long recognized that states have a substantial interest in regulating advertising by *1219 professionals to prevent deception of the general public. *In re R.M.J.*, 455 U.S. at 202, 102 S.Ct. at 937; *Pain Management*, 353 F.3d at 1108-1109. Defendants contend that California has a substantial interest in preventing the general public from being misled that a credential awarded by a non-ADA-recognized dental specialty board has the same requirements as a credential awarded by an ADA-recognized dental specialty board. This is a substantial interest.

Furthermore, § 651(h)(5)(A) directly and materially advances this interest. The purpose of § 651(h)(5)(A) is to prevent members of the public from thinking that credentials from non-ADA-recognized dental specialty boards convey the same assurance of competence and skill as a credential from an ADA-recognized dental specialty board. The real concern of the legislature in enacting this statute was that "credentials" issued for a fee by fly-by-night, Internet-based dental specialty "boards" would confuse the public into thinking that they were equivalent to a bona fide credential issued by an ADA-recognized or equivalent dental specialty board. (Pls.' Mot. at 6-7; Compl., Exs. D-J.) The legislature's solution was to ban advertisement of any credential that is not awarded by a dental specialty board that is recognized by either the ADA or the Dental Board. This solution does directly and materially advance the State's purpose. Whether it does so in a manner more restrictive than necessary is the inquiry under the last part of the *Central Hudson* test.

15 The Supreme Court has emphasized that the final element of the *Central Hudson* inquiry is not a least restrictive means analysis. *Bd. of Trs. v. Fox*, 492 U.S. 469, 479-480, 109 S.Ct. 3028, 3034-3035, 106 L.Ed.2d 388 (1989). Rather, defendants must demonstrate "a reasonable fit between the legislature's ends and the means chosen to accomplish those ends. The fit need not be perfect nor the single best to achieve those ends, but one whose scope is narrowly tailored to achieve the legislative objective." *Pain Management*, 353 F.3d at 1111 (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 632, 115 S.Ct. 2371, 2380, 132 L.Ed.2d 541 (1995)). It is within the legislature's discretion to choose between narrowly tailored means of regulating commercial speech, and a court will not second-guess such a choice. *Id.* (citing *Fox*, 492 U.S. at 479, 109 S.Ct. at 3034).

In *Pain Management*, the Ninth Circuit ruled in an alternative holding that even if the statute did not regulate only inherently misleading speech it would still survive First Amendment scrutiny under the remainder of the *Central Hudson* test. The *Pain Management* court determined that the mechanism set up by § 651(h)(5)(B) to screen use of the term "board certified" in physician advertising was narrowly tailored to achieve the State's interest in eliminating misleading uses of the term "board certified" in physician advertising. *Id.* While the court acknowledged that less restrictive alternatives existed, such as freely allowing use of the term "board certified" accompanied by a disclaimer, it applied the Supreme Court's teaching in *Fox* that the *Central Hudson* test is not a least restrictive means inquiry and recognized that the statute at issue represented a reasonable fit between the legislature's purpose and the means chosen to accomplish that purpose. *Id.*

Important to the *Pain Management* court's analysis under this part of the *Central Hudson* test was the salient fact that § 651(h)(5)(B) restricts only use of the term "board certified" and does not restrict all advertisement of credentials awarded by non-recognized medical specialty boards. *Id.* The court specifically noted that the defendants in that case had *1220 conceded that an AAPM member could advertise that he or she is a Diplomate of AAPM, but simply could not use the words "board certified" in the advertisement. *Id.*

Defendants in this case now argue that § 651(h)(5)(A) is identical in all material respects to the statute at issue in *Pain Management*, and seek to take advantage of the *Pain Management* holding free of the critical concessions offered to secure that holding. But the two statutes are clearly different. The statute in this case forbids dentists from advertising any dental specialty credential not recognized by the ADA or the Dental Board, and is therefore distinctly broader in scope than the statute in *Pain Management*. In light of this critical distinction, one that the Ninth Circuit highlighted in the *Pain Management* opinion, the outcome of the reasonable fit analysis in this case has not been foreordained by *Pain Management*.

Section 651(h)(5)(A) is not narrowly tailored and is more extensive than necessary to achieve the State's interest in preventing misleading advertising of dental specialty credentials. Prohibiting the advertising of any credential that is not recognized by the ADA or the Dental Board or awarded by a board with equivalent requirements is substantially overbroad. A disclaimer requirement would restrict far less speech than an outright

prohibition on advertising these credentials. Defendants' concern about consumer confusion as to sponsorship could be addressed by requiring a disclaimer that AAID and ABOI/ID are not recognized by or affiliated with the ADA or the Dental Board. The goal of assuring that consumers are not misled about the educational requirements for AAID and ABOI/ID credentials could be achieved by requiring advertisements to list the educational requirements for those credentials or to direct consumers to an Internet website containing that information. *See Bingham II*, **100 F.Supp.2d at 1240-1241.** At least in the context of the circumstances here, involving a legitimate professional organization and genuine credentials as opposed to a sham arrangement, these kinds of disclaimers should suffice to protect the State's interests. Defendants' own surveys accord with this conclusion.

While a court may not invalidate a statute that goes "only marginally beyond what would adequately have served the governmental interest," the statute in this case is "substantially excessive, disregarding far less restrictive and more precise means." *Fox*, 492 U.S. at 479, 109 S.Ct. at 3034 (internal quotation marks and citations omitted). Therefore, § 651(h)(5)(A) violates the First Amendment and must be invalidated.

III.

Accordingly, the court finds and declares that § 651(h)(5)(A) is unconstitutional as applied to the advertisement of AAID and ABOI/ID credentials by dentists who have not completed a formal, full-time advanced education program that is affiliated with or sponsored by a university-based dental school and is beyond the dental degree at a graduate or postgraduate level. *See* Cal. Bus. & Prof.Code § 651(h)(5)(A)(ii)(I). The court will schedule a status conference in this case to allow the parties an opportunity to address the scope and timing of the injunctive relief plaintiffs have requested so that defendants may have an opportunity to develop an appropriate disclaimer. Plaintiffs' motion for summary judgment is GRANTED, and defendants' motion for summary judgment is DENIED.

IT IS SO ORDERED.

Footnotes

1 "Implant dentistry consists of the placing of devices for attaching artificial replacement teeth to the same bones to which natural teeth are anchored.... According to the AAID, unlike most current forms of dentures, which sit on top of the gums or are attached to existing teeth, implants may be inserted into the bone, functioning like an artificial tooth root, or may be placed directly against the bone to support a dental prosthesis." ***Bingham v. Hamilton*, 100 F.Supp.2d at 1234 n. 1** (citations and internal quotation marks omitted).

2 The ADA recognizes only nine areas of dental specialization and accredits boards to award credentials in each of these areas. These nine areas are: oral and maxillofacial surgery; prosthodontics; periodontology; oral and maxillofacial radiology; oral pathology; public health dentistry; endodontics; orthodontics and dentofacial orthopedics; and pediatric dentistry. (Pls.' Mot. at 3.)

3 Claim preclusion bars relitigation of claims that were raised or could have been raised in a prior lawsuit. It requires an identity of claims, a final judgment on the merits in the prior lawsuit, and identity of, or privity between, the parties in the first and second lawsuits. *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir.2001). Issue preclusion bars relitigation of issues actually litigated and decided in a prior lawsuit. It requires an identity of issues, a final judgment on the merits in the prior lawsuit, a full and fair opportunity to litigate the issue in the prior proceeding, actual litigation and decision of the issue in the prior proceeding, and the necessity of that issue to support a final judgment on the merits in the prior proceeding.

4 By contrast, the Court noted that advertising of credentials "issued by an organization that had made no inquiry into [an applicant's] fitness, or by one that issued certificates indiscriminately for a price," could be inherently or actually misleading. *Peel*, 496 U.S. at 102, 110 S.Ct. at 2288. This is not the circumstance presented here.

5 Defendants provide two declarations to support their position that credentials like "diplomate" have acquired a fixed, technical meaning within the dental profession. The Neumann Declaration simply asserts that the terms

"diplomate" and "board certified" have historically been used to denote someone who has completed all the requirements of an ADA-recognized specialty certifying board. (Neumann Decl. ¶ 11.) Such conclusory statements cannot substitute for evidence establishing such a historical meaning for all dental specialty credentials. The McGinley Declaration states that the dental insurance industry in California understands the term "board certified" to designate someone who has completed the requirements for certification in an ADA-recognized dental specialty. (McGinley Decl. ¶ 4.) This declaration addresses only use of the term "board certified" and therefore says nothing about the meaning of other dental specialty credentials, such as "diplomate."

6 Defendants argue that the requirements for these credentials have changed since the decision in ***Bingham II***, and that they cannot therefore be considered objectively clear or verifiable, as those terms were used in *Peel*. (Defs.' Mot. at 11-14.) Defendants have presented some evidence that the methods of qualifying for the credentials have been altered and that some of the substantive requirements have changed in minor ways. (*See generally* Shuck Dep., Fay Decl., Ex. 1; Potts Dep., Fay Decl., Ex. 2.) None of this evidence indicates that the prerequisites for AAID and ABOI/ID credentials are not objectively clear and verifiable. They are readily accessible on the websites of AAID and ABOI/ID, and they are not susceptible to subjective manipulation. *See* http://www.aaid-implant.cnch ost.com/memberservices/credentials/AFExamRequirements.pdf (last visited August 23, 2004) (Associate Fellow requirements); http://www.aaid-implant.cnchost.com/mem berservices/credentials/FExamRequirements.pdf (last visited August 23, 2004) (Fellow requirements); http:// www.aboi.org/requirem.htm (last visited August 23, 2004) (Diplomate requirements). Furthermore, even where a credentialed AAID member has attained "Fellow" or "Diplomate" status under an older method of qualification, there is no evidence in the record to suggest that the previous requirements are substantively different or less rigorous than the current requirements. Defendants' position strongly implies that any credentialing organization whose requirements have changed in any way would not be bona fide as contemplated by the *Peel* Court. Such a proposition is altogether too broad, as it would in all likelihood exclude most credentials from the protections of the First Amendment on the ground that they are inherently misleading. In sum, nothing defendants have presented detracts from the conclusion that AAID and ABOI/ID are bona fide credentialing organizations whose requirements are rigorous, objectively clear, and verifiable. *See Peel*, 496 U.S. at 101-102, 110 S.Ct. at 2288.

7 One of the two mock-ups containing the credentials "Diplomate of [ABOI/ID]" and "Fellow of [AAID]" included a disclaimer stating that "[t]he Diplomate and Fellow designations are awarded on the achievement of certain qualifications which can be found at www.aboi.org." (Cogan Decl., Display, Ad # 1B.) One of the two mock-ups containing the credential "Board Certified by [ABOI/ID]" included a disclaimer stating that "The [ABOI/ID] is not an accrediting organization that is recognized by the [ADA] or the [Dental Board]." (*Id.*, Ad # 2B.)

8 For example, the Kamins phone survey asked the following leading questions: "Do you believe that the [ADA] recognizes implant dentistry as one of their nine sanctioned dental specialties?" "In your opinion, is part of the requirement to be considered a 'specialist in implant dentistry', the completion of some form of full-time training within an accredited dental school?" "Must this dental school be affiliated with a university?" (Kamins Decl., Ex. 3, 1st questionnaire, p. 3, questions 1, 4a, & 4b.) The Cogan mall survey asked the following leading questions: "Do you think that this dentist has or has not completed additional dental education beyond his general dental degree?" "Do you think that the [AAID] and the [ABOI/ID] are accrediting organizations recognized by the [ADA]?" "Do you think this dentist is a specialist in performing dental implants?" (Cogan Decl., Questionnaires & Instructions.)

9 For example, the Kamins phone survey asked the following question: "If a dentist promoted himself or herself as a 'fellow' of the American Academy of Implant Dentistry and has achieved the distinction of 'diplomate' of the

American Board of Oral Implantology through successful completion of experiential, educational and testing requirements, would you consider that dentist to be a 'specialist' in implant dentistry?" (Kamins Decl., Ex. 3, 1st questionnaire, p. 3, question 3.)

10 One question in the Kamins phone survey did seek to determine what percentage of the general public thinks that implant dentistry is an ADA-recognized specialty, without mention of AAID and ABOI/ID credentials, and therefore what effect the mention of AAID and ABOI/ID credentials has on that percentage. (*See* Kamins Decl., Ex. 3, pp. 4-5.) The results from this question seem to indicate that AAID and ABOI/ID credentials have relatively little effect on public perceptions about whether implant dentistry is an ADA-recognized dental specialty. Forty-three percent of respondents said that they thought implant dentistry is an ADA-recognized specialty without mention of AAID and ABOI/ID credentials, while 54.5% of respondents thought that implant dentistry is an ADA-recognized specialty once AAID and ABOI/ID credentials were mentioned. (*See Id.*) This is an increase of only 11.5%, which provides little support for the proposition that AAID and ABOI/ID credentials carry with them a real, concrete potential to mislead the public about whether implant dentistry is an ADA-recognized specialty or whether AAID and ABOI/ID credentials are recognized by the ADA.

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Potts v. Zettel
United States Court of Appeals, Ninth Circuit. February 2, 2007 220 Fed.Appx. 559 *(Approx. 6 pages)*

220 Fed.Appx. 559
This case was not selected for publication in the Federal Reporter.
Not for Publication In West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)
United States Court of Appeals,
Ninth Circuit.

Michael L. POTTS; The American Academy of Implant Dentistry, Plaintiffs –Appellees,
v.
Charlene ZETTEL, in her official capacity as Director; Cynthia Gatlin, Executive Officer, California Dental Board; Alan Kaye, DDS, President, California Dental Board; La Donna Drury–Klein; David I. Baron; Newton Gordon, DDS; Lawrence Hyndley, DDS; Patricia Osuna, RDH; George Soohoo, DDS; Chester Yokohama, DDS; Kamran Sahabi, DDS; Kevin Biggers; Brandon Hernandez, Defendants–Appellants.
Michael L. Potts; The American Academy of Implant Dentistry, Plaintiffs –Appellees,
v.
Cynthia Gatlin, Executive Officer, California Dental Board; Alan Kaye, DDS, President, California Dental Board; La Donna Drury–Klein; David I. Baron; Newton Gordon, DDS; Lawrence Hyndley, DDS; Patricia Osuna, RDH; George Soohoo, DDS; Chester Yokohama, DDS; Kathleen Hamilton, in her official capacity as director; Michael Pinkerton, Vice President, Public Member; Ariane Terlet, DDS, Defendants–Appellants,
and
Office of the Attorney General, Defendant.

Nos. 05–15324, 05–16247. Argued and Submitted Nov. 14, 2006. Filed Feb. 2, 2007.

Synopsis

Background: Dentist and national dental specialty organization brought action against officials of state dental examiners' board, challenging constitutionality of state's prohibitions upon advertising of dental specialty credentials. The United States District Court for the Eastern District of California, David F. Levi, J., 334 F.Supp.2d 1206, granted summary judgment in favor of plaintiffs, and officials appealed.

Holdings: The Court of Appeals held that:
1 doctrine of res judicata did not bar officials from seeking to uphold constitutionality of the statute;
2 survey evidence as to potentially misleading nature of advertisements that statute would prohibit was admissible; and
3 genuine issue of material fact existed as to whether advertising of dental specialty credentials was potentially misleading, precluding summary judgment.

Reversed and remanded.

West Headnotes (5)

Change View

1 **Judgment** Effect of Change in Law or Facts
Officials of state dental examiners' board were not precluded, under doctrine of res judicata, from seeking to uphold constitutionality of state's prohibitions upon advertising of dental specialty credentials, despite prior judgment finding that statute violated protection afforded to commercial speech by First Amendment,

SELECTED TOPICS

Judgment
Merger and Bar of Causes of Action and Defenses
Res Judicata Effect of the Prior Decision

Admissibility
Suppression of Allegedly Illegal Blood Test Evidence

Federal Civil Procedure
Judgment
Material Fact Issues

Secondary Sources

§ 14:15.Same cause of action
1 Cal. Affirmative Def. § 14:15 (2d ed.)
...Res judicata bars relitigation of the same cause of action. Many cases speak of the requirement as demanding that the causes of action be 'identical.' Res judicata is a complete bar only when the secon...

§ 4409Claim Preclusion—Continuing and Renewed Conduct
18 Fed. Prac. & Proc. Juris. § 4409 (2d ed.)
...Claim preclusion analysis may be sorely tested by disputes that arise out of a number of events. Often issue preclusion is sufficient to foreclose subsequent litigation. When issue preclusion fails, ho...

§ 4443"On the Merits"—Admissions, Stipulations, and Consent Judgments
18A Fed. Prac. & Proc. Juris. § 4443 (2d ed.)
...Even apart from default, preclusion questions may arise from judgments that rest on uncontested foundations. Particular issues may have been admitted in the pleadings or in response to formal requests ...

See More Secondary Sources

Briefs

Respondents' Brief In Opposition
2000 WL 33999498
Daniel MONAHAN, et al., Petitioners, v. NEW YORK CITY DEPARTMENT OF CORRECTION, et al., Respondents.
Supreme Court of the United States.
October 31, 2000
...FN* Counsel of Record Respondents, New York City Department of Correction, et al. ("respondents"), respectfully request that this Court deny the petition by petitioners, Daniel Monahan, et al. ("peti...

JOINT APPENDIX, VOL. II
2008 WL 5422692
Caperton v. A.T. Massey Coal Company, Inc.
Supreme Court of the United States.
December 29, 2008
...D.C. Offut, Jr. Stephen Burchett Parry W. Oxley David E. Rich Offut, Fisher & Nord Huntington, West Virginia Bruce E. Stanley Turek F. Abdalla Reed Smith LLP Pittsburgh, Pennsylvania Attorneys for Appe...

Petition for a Writ of Certiorari
2000 WL 33999497
Daniel MONAHAN, et al., Petitioners, v. NEW YORK CITY DEPARTMENT OF CORRECTIONS, et al., Respondents.
Supreme Court of the United States.
September 06, 2000
...The parties to to proceedings below were the petitioners: Daniel Monahan, Evelyn S.

where regulatory educational requirement in first action entailed "successful completion of a formal advanced education program at or affiliated with an accredited dental or medical school equivalent to at least one academic year beyond the predoctoral curriculum," and statute was subsequently amended to require "successful completion of a formal, full-time advanced education program that is affiliated with or sponsored by a university based dental school and is beyond the dental degree at a graduate or postgraduate level." U.S.C.A. Const.Amend. 1; West's Ann.Cal.Bus. & Prof.Code § 651(h)(5)(A).

1 Case that cites this headnote

2 Evidence Results of Experiments
Survey evidence was relevant as to potentially misleading nature of advertisements that state's prohibitions upon advertising of dental specialty credentials would prohibit, and, thus, was admissible in action challenging constitutionality of statute brought by dentist and national dental specialty organization, regardless of whether legislature had benefit of the surveys when it amended the statute. West's Ann.Cal.Bus. & Prof.Code § 651(h)(5)(A).

3 Evidence Acts and Statements Accompanying or Connected with Transaction or Event
Survey evidence as to potentially misleading nature of advertisements that state's prohibitions upon advertising of dental specialty credentials would prohibit fell within hearsay exception for present sense impressions of the declarant, and, thus, was admissible in dentist and national dental specialty organization's action challenging constitutionality of statute. Fed.Rules Evid.Rule 803(1), 28 U.S.C.A.; West's Ann.Cal.Bus. & Prof.Code § 651(h)(5)(A).

4 Evidence Sources of Data
Survey evidence as to potentially misleading nature of advertisements that state's prohibitions upon advertising of dental specialty credentials would prohibit were admissible as the bases of the opinions offered by officials of state dental examiners' board, in dentist and national dental specialty organization's action challenging constitutionality of statute. Fed.Rules Evid.Rule 703, 28 U.S.C.A.; West's Ann.Cal.Bus. & Prof.Code § 651(h)(5)(A).

5 Federal Civil Procedure Civil Rights Cases in General
Genuine issue of material fact existed as to whether advertising of dental specialty credentials was potentially misleading, precluding summary judgment for dentist and national dental specialty organization in their action against officials of state dental examiners' board, challenging constitutionality of state's prohibitions upon advertising of dental specialty credentials as violative of the First Amendment. U.S.C.A. Const.Amend. 1; West's Ann.Cal.Bus. & Prof.Code § 651(h)(5)(A).

Rodriguez, Cecilia Lorde, Luis Almodovar, Fred Silva, Thomas Basil, Robert Nolell, Daniel Foynes, Harvey Ball, Daniel...

See More Briefs

Trial Court Documents

Town of Atherton v. California High Speed Rail Authority

2011 WL 10677730
Town of Atherton v. California High Speed Rail Authority
Superior Court of California, Sacramento County
November 10, 2011

...On October 4, 2010, Petitioners filed a Verified Petition for Peremptory Writ of Mandate and Complaint for Injunctive and Declaratory Relief ("Petition") challenging Respondent California High Speed Ra...

DI GIORGIO CORPORATION, Plaintiff, v. INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA; National Union Fire Insurance Company of Pittsburgh Pennsylvania and Does 1 Through 100, Inclusive, Defendants.

2002 WL 34116546
DI GIORGIO CORPORATION, Plaintiff, v. INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA; National Union Fire Insurance Company of Pittsburgh Pennsylvania and Does 1 Through 100, Inclusive, Defendants.
Superior Court of California, San Francisco County
March 19, 2002

...DEPARTMENT 304 Defendant Insurance Company of the State of Pennsylvania ("ISOP") has moved for summary adjudication of the following issue (as stated in its Notice of Motion filed herein on December 7,...

Goldbert v. Stelmach

2007 WL 4492323
Goldbert v. Stelmach
Superior Court of California, Los Angeles County
May 01, 2007

...[assigned for all purposes to the Honorable Richard A. Adler, Judge, dept. Y.] The demurrers of defendants YUVAL STELMACH and REM LLC to the complaint of plaintiff SHLOMO GOLDBERG came on for hearing i...

See More Trial Court Documents

Attorneys and Law Firms

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Jeffrey M. Phillips, Esq., AGCA—Office of the California, Attorney General, Sacramento, CA, John M. Peterson, Jr., Esq., Howe & Hutton, Ltd., Chicago, IL, Steven P. Means, Esq., Michael Best & Friedrich LLP, Madison, WI, for Defendants–Appellants.

Appeal from the United States District Court for the Eastern District of California, David F. Levi, District Judge, Presiding. D.C. No. CV–03–00348–DFL.

Before: CANBY, COX,* and PAEZ, Circuit Judges.

MEMORANDUM**

Defendants–Appellants Charlene Zettel et al. ("CDB") appeal the district court's summary judgment in favor of Plaintiffs–Appellees Michael Potts and the American Academy of

Implant Dentistry ("Potts") in Potts's challenge to the constitutionality of California Business & Professional Code § 651(h)(5)(A), which regulates the advertisement by dentists of membership and specialty in or credentials received from a national specialty board that is not recognized by the American Dental Association ("ADA"). *Potts v. Hamilton*, 334 F.Supp.2d 1206 (E.D.Cal.2004). Potts, who holds credentials from two non-ADA recognized boards, sought declaratory and injunctive relief, arguing that section 651(h)(5)(A) unconstitutionally restricts commercial speech. After discovery and disclosure of expert witnesses, Potts and CDB filed cross-motions for summary judgment. The district court granted summary judgment for Potts, declared section 651(h)(5)(A) unconstitutional, and enjoined CDB from enforcing it.

1 Although he does not challenge the judgment, Potts renews two arguments that he raised below to CDB's defense of the constitutionality of section 651(h)(5)(A). First, Potts argues that the final judgment in *Bingham v. Hamilton*, 100 F.Supp.2d 1233 (E.D.Cal.2000), has claim—and issue-preclusive effect. We agree with the district court that this argument lacks merit. Because the California legislature significantly amended section 651(h)(5)(A) in 2002, subsequent to the judgment in *Bingham*, neither the claim nor the issues in the instant litigation are substantially identical to those before the court in the prior case.

2 Potts also renews his objection to the survey evidence that CDB presented to prove the potentially misleading nature of the advertisements that section 651(h)(5)(A) would prohibit. The district court properly admitted this evidence over Potts's objections. The legislative record indicates that a significant motivation behind the 2002 amendment was concern over the potential of these advertisements to mislead California consumers. The survey results were probative of their potential to mislead and were therefore relevant, regardless of whether the legislature had the benefit of the surveys when it amended § 651 (h)(5)(A).

3 We also agree that the surveys were not inadmissible hearsay, because they fall within the hearsay exception in Federal Rule of Evidence 803(1), for present sense impressions of the declarant. *See *562 Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 626–27, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) (upholding a commercial speech restriction in part based on survey evidence that demonstrated consumers' states of mind). *See also Schering Corp. v. Pfizer, Inc.*, 189 F.3d 218, 233 (2d Cir.1999); *C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1054 (5th Cir.1981).

4 Finally, the surveys were admissible under Federal Rule of Evidence 703 as the bases of the opinions offered by CDB's experts. Potts's challenge to the surveys' reliability goes to their weight, not their admissibility. *See Prudential Ins. Co. of Am. v. Gibraltar Fin. Corp. of Cal.*, 694 F.2d 1150, 1156 (9th Cir.1983) (citations omitted).

5 Commercial speech receives intermediate protection under the First Amendment. As the party seeking to enforce a restriction on commercial speech, CDB must produce evidence from which a reasonable fact finder could conclude that the advertisement of non-ADA credentials and specialties is potentially misleading; that the government has a substantial interest in regulating this speech; that section 651(h)(5)(A) directly advances this interest; and that the statute restricts no more speech than necessary. *See Central Hudson v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 570, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).[1]

CDB introduced survey, anecdotal, and legislative history evidence in support of its initial burden under *Central Hudson* to show that the speech it seeks to regulate has the potential to mislead. Although the district court properly admitted this evidence, it concluded that the "surveys are of only limited value in determining whether [the advertisements] are potentially misleading." *Potts*, 334 F.Supp.2d at 1216. Consideration of the relative weight of the parties' evidence was inappropriate at the summary judgment stage. *See Molitor v. Am. Pres. Lines, Ltd.*, 343 F.2d 217, 219 (9th Cir.1965). Because the parties' evidence created a material issue of fact regarding the potential of the advertisements to mislead, the district court erred in granting summary judgment for Potts.[2]

In the absence of a full evidentiary record, findings of fact, and conclusions of law, pursuant to Federal Rule of Civil Procedure 52(a), we are unable to determine whether the challenged statute violates Potts's commercial free speech rights, because whether and to what extent the advertisements potentially mislead the public will inform the legal analysis under the third and fourth prongs of *Central Hudson*. We therefore reverse the grant of summary judgment and remand for further proceedings consistent with this disposition. We also vacate the attorney's fees award as premature. We need not address the parties' additional arguments on appeal.

REVERSED and REMANDED.

Parallel Citations

2007 WL 412232 (C.A.9 (Cal.))

Footnotes

* The Honorable Emmett Ripley Cox, Senior Circuit Judge for the Eleventh Circuit Court of Appeals, sitting by designation.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

1 The First Amendment affords no protection to speech that is actually misleading. *In re R.M.J.*, 455 U.S. 191, 203, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982). We assume for the purposes of this appeal that CDB's evidence creates a material issue of fact only as to whether the advertisements have the potential to mislead.

2 CDB and Potts cross-moved for summary judgment. Contrary to CDB's assertion on appeal that it presented "undisputed" evidence of actual consumer confusion, Potts presented evidence challenging the reliability and scientific validity of CDB's data.

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Specialty Board Advertising

Business and Professions Code section 651(h)(5)(A)&(B) prohibits physicians from advertising that they are board certified unless they are certified by:

1. an ABMS member specialty board;
2. a specialty board with an ACGME accredited postgraduate training program; or
3. a specialty board with "equivalent" requirements approved by the Medical Board of California's Licensing Program.

The Medical Board has approved the following four specialty boards:

American Board of Facial Plastic and Reconstructive Surgery (Approved: February 3, 1995)

American Board of Pain Medicine (Approved: February 2, 1996)

American Board of Sleep Medicine (Approved: February 6, 1998)

American Board of Spine Surgery (Approved: May 10, 2002)

Therefore, unless physicians are certified by a specialty board, as defined by law, physicians are prohibited from using the term "board certified" in their advertisements. The law does not, however, prohibit the advertising of specialization, regardless of board certification status, nor does it prohibit the use of *diplomate, member, approved by,* or any other term that is subject to interpretation by prospective patients.

Business and Professions Code section 651 (h)

California Code of Regulations section 1363.5

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Frequently Asked Questions - Physician Credentials/Practice Specialties

How do I find out if my doctor has a practice specialty?

My physician told me that she was board certified and handed me a card with her board specialty. Is it mandatory for my physician to be "board certified" in her specialty?

My physician informed me that he is board certified by "XYZ" specialty board and is advertising in the local newspaper. Is this legal?

How do I know if my physician is board certified or if he or she is certified by an approved specialty board?

How do I find out if my doctor is licensed or a "real" medical doctor?

Has my doctor ever been in any kind of "trouble" or had any complaints filed against him?

How do I find out if my doctor has been, or is, licensed in another state?

How do I find out if my doctor has a practice specialty?

Physicians can identify their practice specialty on their Medical Board profile and that information is available through the Breeze Online License Lookup. You can also obtain this information by either contacting the physician's office directly, reviewing the physician's and/or medical group's website, or by contacting the local medical society if the physician is a member. Most physicians have a practice specialty, which is the area of medicine they have received additional training in, but not all physicians have medical specialty certification. Medical specialty certification is a voluntary process granted by a member board of the American Board of Medical Specialties (ABMS), a private organization, or other equivalent board. Board certification is not required by the Medical Board for a physician to practice. (See question below on board certification)

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My physician told me that she was board certified and handed me a card with her board specialty. Is it mandatory for my physician to be "board certified" in her specialty?

There is no current law that requires that a physician be "board certified." However, unless physicians are certified by a specialty board as defined by law, physicians are prohibited from using the term "board certified" in their advertisements. The law does not, however, prohibit the advertising of specialization regardless of board certification status, nor does it prohibit the use of "diplomate, member, approved by," or any other term that is subject to interpretation by prospective patients.

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My physician informed me that he is board certified by "XYZ" specialty board and is advertising in the local newspaper. Is this legal?

Business and Professions Code §651(h)(5)(A) & (B) prohibits physicians from advertising that they are board certified unless they are certified by one of the following: a member board of the American Board of Medical Specialties, a specialty board with the Accreditation Council for Graduate Medical Education accredited postgraduate training program, or a specialty board approved by the Medical Board of California's Licensing Program as equivalent.

Specialty Board Advertising

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How do I know if my physician is board certified or if he or she is certified by an approved specialty board?

Medical specialty certification is a voluntary process granted by a member board of the American Board of Medical Specialties (ABMS), a private organization, or other equivalent board. Board certification is not required by the Medical Board for a physician to practice; however, pursuant to Business and Professions Code section 651, in California physicians may not advertise that they are board certified unless they have been certified by an ABMS Member Board or an equivalent board recognized by the Medical Board of California. The Medical Board has approved the following specialty boards: American Board of Facial and Plastic Reconstructive Surgery; American Board of Pain Medicine; American Board of Sleep Medicine; and the American Board of Spine Surgery.

Please use the links below to access the ABMS website and other boards recognized by the Medical Board of California and learn more about board certification and whether your doctor is board certified.

American Board of Medical Specialties

American Board of Facial Plastic and Reconstructive Surgery

American Board of Pain Medicine

American Board of Sleep Medicine

American Board of Spine Surgery

Back to Top

How do I find out if my doctor is licensed or a "real" medical doctor?

You may obtain information about a physician from the Medical Board of California by calling (916) 263-2382, or by viewing a physician's profile through the Breeze Online License Lookup. You also may want to check the Osteopathic Medical Board's website if you are unable to locate your physician on our website.

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Has my doctor ever been in any kind of "trouble" or had any complaints filed against him?

You may check your doctor's profile through the Breeze Online License Lookup. Complaints are confidential in California. However, disciplinary action against a licensee is public.

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How do I find out if my doctor has been, or is, licensed in another state?

You may contact the Federation of State Medical Boards located in Euless, TX, at the toll-free number 866-275-2267 for further information about other state medical boards.

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BUSINESS AND PROFESSIONS CODE - BPC

DIVISION 2. HEALING ARTS [500 - 4999.129] *(Division 2 enacted by Stats. 1937, Ch. 399.)*

CHAPTER 1. General Provisions [500 - 865.2] *(Chapter 1 enacted by Stats. 1937, Ch. 399.)*

ARTICLE 6. Unearned Rebates, Refunds and Discounts [650 - 657] *(Article 6 added by Stats. 1949, Ch. 899.)*

651. (a) It is unlawful for any person licensed under this division or under any initiative act referred to in this division to disseminate or cause to be disseminated any form of public communication containing a false, fraudulent, misleading, or deceptive statement, claim, or image for the purpose of or likely to induce, directly or indirectly, the rendering of professional services or furnishing of products in connection with the professional practice or business for which he or she is licensed. A "public communication" as used in this section includes, but is not limited to, communication by means of mail, television, radio, motion picture, newspaper, book, list or directory of healing arts practitioners, Internet, or other electronic communication.

(b) A false, fraudulent, misleading, or deceptive statement, claim, or image includes a statement or claim that does any of the following:

(1) Contains a misrepresentation of fact.

(2) Is likely to mislead or deceive because of a failure to disclose material facts.

(3) (A) Is intended or is likely to create false or unjustified expectations of favorable results, including the use of any photograph or other image that does not accurately depict the results of the procedure being advertised or that has been altered in any manner from the image of the actual subject depicted in the photograph or image.

(B) Use of any photograph or other image of a model without clearly stating in a prominent location in easily readable type the fact that the photograph or image is of a model is a violation of subdivision (a). For purposes of this paragraph, a model is anyone other than an actual patient, who has undergone the procedure being advertised, of the licensee who is advertising for his or her services.

(C) Use of any photograph or other image of an actual patient that depicts or purports to depict the results of any procedure, or presents "before" and "after" views of a patient, without specifying in a prominent location in easily readable type size what procedures were performed on that patient is a violation of subdivision (a). Any "before" and "after" views (i) shall be comparable in presentation so that the results are not distorted by favorable poses, lighting, or other features of presentation, and (ii) shall contain a statement that the same "before" and "after" results may not occur for all patients.

(4) Relates to fees, other than a standard consultation fee or a range of fees for specific types of services, without fully and specifically disclosing all variables and other material factors.

(5) Contains other representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived.

(6) Makes a claim either of professional superiority or of performing services in a superior manner, unless that claim is relevant to the service being performed and can be substantiated with objective scientific evidence.

(7) Makes a scientific claim that cannot be substantiated by reliable, peer reviewed, published scientific studies.

(8) Includes any statement, endorsement, or testimonial that is likely to mislead or deceive because of a failure to disclose material facts.

(c) Any price advertisement shall be exact, without the use of phrases, including, but not limited to, "as low as," "and up," "lowest prices," or words or phrases of similar import. Any advertisement that refers to services, or costs for services, and that uses words of comparison shall be based on verifiable data substantiating the comparison. Any person so advertising shall be prepared to provide information sufficient to establish the accuracy of that comparison. Price advertising shall not be fraudulent, deceitful, or misleading, including statements or advertisements of bait, discount, premiums, gifts, or any statements of a similar nature. In connection with price advertising, the price for each product or service shall be clearly identifiable. The price advertised for products shall include charges for any related professional services, including dispensing and fitting services, unless the advertisement specifically and clearly indicates otherwise.

(d) Any person so licensed shall not compensate or give anything of value to a representative of the press, radio, television, or other communication medium in anticipation of, or in return for, professional publicity unless the fact of compensation is made known in that publicity.

(e) Any person so licensed may not use any professional card, professional announcement card, office sign, letterhead, telephone directory listing, medical list, medical directory listing, or a similar professional notice or device if it includes a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of subdivision (b).

(f) Any person so licensed who violates this section is guilty of a misdemeanor. A bona fide mistake of fact shall be a defense to this subdivision, but only to this subdivision.

(g) Any violation of this section by a person so licensed shall constitute good cause for revocation or suspension of his or her license or other disciplinary action.

(h) Advertising by any person so licensed may include the following:

(1) A statement of the name of the practitioner.

(2) A statement of addresses and telephone numbers of the offices maintained by the practitioner.

(3) A statement of office hours regularly maintained by the practitioner.

(4) A statement of languages, other than English, fluently spoken by the practitioner or a person in the practitioner's office.

(5) (A) A statement that the practitioner is certified by a private or public board or agency or a statement that the practitioner limits his or her practice to specific fields.

(B) A statement of certification by a practitioner licensed under Chapter 7 (commencing with Section 3000) shall only include a statement that he or she is certified or eligible for certification by a private or public board or parent association recognized by that practitioner's licensing board.

(C) A physician and surgeon licensed under Chapter 5 (commencing with Section 2000) by the Medical Board of California may include a statement that he or she limits his or her practice to specific fields, but shall not include a statement that he or she is certified or eligible for certification by a private or public board or parent association, including, but not limited to, a multidisciplinary

board or association, unless that board or association is (i) an American Board of Medical Specialties member board, (ii) a board or association with equivalent requirements approved by that physician and surgeon's licensing board, or (iii) a board or association with an Accreditation Council for Graduate Medical Education approved postgraduate training program that provides complete training in that specialty or subspecialty. A physician and surgeon licensed under Chapter 5 (commencing with Section 2000) by the Medical Board of California who is certified by an organization other than a board or association referred to in clause (i), (ii), or (iii) shall not use the term "board certified" in reference to that certification, unless the physician and surgeon is also licensed under Chapter 4 (commencing with Section 1600) and the use of the term "board certified" in reference to that certification is in accordance with subparagraph (A). A physician and surgeon licensed under Chapter 5 (commencing with Section 2000) by the Medical Board of California who is certified by a board or association referred to in clause (i), (ii), or (iii) shall not use the term "board certified" unless the full name of the certifying board is also used and given comparable prominence with the term "board certified" in the statement.

For purposes of this subparagraph, a "multidisciplinary board or association" means 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 applicant's education, training, and experience.

For purposes of the term "board certified," as used in this subparagraph, the terms "board" and "association" mean an organization that is an American Board of Medical Specialties member board, an organization with equivalent requirements approved by a physician and surgeon's licensing board, or an organization with an Accreditation Council for Graduate Medical Education approved postgraduate training program that provides complete training in a specialty or subspecialty.

The Medical Board of California shall adopt regulations to establish and collect a reasonable fee from each board or association applying for recognition pursuant to this subparagraph. The fee shall not exceed the cost of administering this subparagraph. Notwithstanding Section 2 of Chapter 1660 of the Statutes of 1990, this subparagraph shall become operative July 1, 1993. However, an administrative agency or accrediting organization may take any action contemplated by this subparagraph relating to the establishment or approval of specialist requirements on and after January 1, 1991.

(D) A doctor of podiatric medicine licensed under Chapter 5 (commencing with Section 2000) by the Medical Board of California may include a statement that he or she is certified or eligible or qualified for certification by a private or public board or parent association, including, but not limited to, a multidisciplinary board or association, if that board or association meets one of the following requirements: (i) is approved by the Council on Podiatric Medical Education, (ii) is a board or association with equivalent requirements approved by the California Board of Podiatric Medicine, or (iii) is a board or association with the Council on Podiatric Medical Education approved postgraduate training programs that provide training in podiatric medicine and podiatric surgery. A doctor of podiatric medicine licensed under Chapter 5 (commencing with Section 2000) by the Medical Board of California who is certified by a board or association referred to in clause (i), (ii), or (iii) shall not use the term "board certified" unless the full name of the certifying board is also used and given comparable prominence with the term "board certified" in the statement. A doctor of podiatric medicine licensed under Chapter 5 (commencing with Section 2000) by the Medical Board of California who is certified by an organization other than a board or association referred to in clause (i), (ii), or (iii) shall not use the term "board certified" in reference to that certification.

For purposes of this subparagraph, a "multidisciplinary board or association" means an educational certifying body that has a psychometrically valid testing process, as determined by the California Board of Podiatric Medicine, for certifying doctors of podiatric medicine that is based on the

applicant's education, training, and experience. For purposes of the term "board certified," as used in this subparagraph, the terms "board" and "association" mean an organization that is a Council on Podiatric Medical Education approved board, an organization with equivalent requirements approved by the California Board of Podiatric Medicine, or an organization with a Council on Podiatric Medical Education approved postgraduate training program that provides training in podiatric medicine and podiatric surgery.

The California Board of Podiatric Medicine shall adopt regulations to establish and collect a reasonable fee from each board or association applying for recognition pursuant to this subparagraph, to be deposited in the State Treasury in the Podiatry Fund, pursuant to Section 2499. The fee shall not exceed the cost of administering this subparagraph.

(6) A statement that the practitioner provides services under a specified private or public insurance plan or health care plan.

(7) A statement of names of schools and postgraduate clinical training programs from which the practitioner has graduated, together with the degrees received.

(8) A statement of publications authored by the practitioner.

(9) A statement of teaching positions currently or formerly held by the practitioner, together with pertinent dates.

(10) A statement of his or her affiliations with hospitals or clinics.

(11) A statement of the charges or fees for services or commodities offered by the practitioner.

(12) A statement that the practitioner regularly accepts installment payments of fees.

(13) Otherwise lawful images of a practitioner, his or her physical facilities, or of a commodity to be advertised.

(14) A statement of the manufacturer, designer, style, make, trade name, brand name, color, size, or type of commodities advertised.

(15) An advertisement of a registered dispensing optician may include statements in addition to those specified in paragraphs (1) to (14), inclusive, provided that any statement shall not violate subdivision (a), (b), (c), or (e) or any other section of this code.

(16) A statement, or statements, providing public health information encouraging preventative or corrective care.

(17) Any other item of factual information that is not false, fraudulent, misleading, or likely to deceive.

(i) Each of the healing arts boards and examining committees within Division 2 shall adopt appropriate regulations to enforce this section in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

Each of the healing arts boards and committees and examining committees within Division 2 shall, by regulation, define those efficacious services to be advertised by businesses or professions under their jurisdiction for the purpose of determining whether advertisements are false or misleading. Until a definition for that service has been issued, no advertisement for that service shall be disseminated. However, if a definition of a service has not been issued by a board or committee within 120 days of receipt of a request from a licensee, all those holding the license may advertise the service. Those boards and committees shall adopt or modify regulations defining what services may be advertised, the manner in which defined services may be advertised, and restricting advertising that would promote the inappropriate or excessive use of health services or commodities. A board or committee

shall not, by regulation, unreasonably prevent truthful, nondeceptive price or otherwise lawful forms of advertising of services or commodities, by either outright prohibition or imposition of onerous disclosure requirements. However, any member of a board or committee acting in good faith in the adoption or enforcement of any regulation shall be deemed to be acting as an agent of the state.

(j) The Attorney General shall commence legal proceedings in the appropriate forum to enjoin advertisements disseminated or about to be disseminated in violation of this section and seek other appropriate relief to enforce this section. Notwithstanding any other provision of law, the costs of enforcing this section to the respective licensing boards or committees may be awarded against any licensee found to be in violation of any provision of this section. This shall not diminish the power of district attorneys, county counsels, or city attorneys pursuant to existing law to seek appropriate relief.

(k) A physician and surgeon or doctor of podiatric medicine licensed pursuant to Chapter 5 (commencing with Section 2000) by the Medical Board of California who knowingly and intentionally violates this section may be cited and assessed an administrative fine not to exceed ten thousand dollars ($10,000) per event. Section 125.9 shall govern the issuance of this citation and fine except that the fine limitations prescribed in paragraph (3) of subdivision (b) of Section 125.9 shall not apply to a fine under this subdivision.

(Amended by Stats. 2011, Ch. 385, Sec. 1. Effective January 1, 2012.)

13- Updates on Proposed Regulations

Date: February 12, 2015

14-Public Comment - **Notes**