

**Board of Chiropractic Examiners
MEETING MINUTES
Enforcement Committee
January 27, 2015
3:00 p.m.
State of California
901 P Street, Suite 142-A
Sacramento, CA 95814**

Committee Members Present

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

Staff Present

Robert Puleo, Executive Officer
Sandra Walker, Compliance Manager
Dixie Van Allen, Associate Governmental Program Analyst
Kristy Schieldge, Attorney III
Marlene Valencia, Associate Governmental Program Analyst
Christina Bell, Associate Governmental Program Analyst

Public Present

Penny Cunha, California Chiropractic Association (CCA)
Cris Forsyth, California Chiropractic Association (CCA)

Call to Order

Dr. Azzolino called the meeting to order at 3:01 p.m.

Roll Call

Dr. Dehn called the roll. Dr. Azzolino and Dr. Dehn were present. Mr. Ruffino was not able to participate in the meeting due to an Agenda error regarding his meeting location.

Approval of October 28, 2014 Minutes

**MOTION: DR. DEHN MOVED TO APPROVE THE MINUTES
SECOND: DR. AZZOLINO SECONDED THE MOTION
DR. AZZOLINO ADDRESSED THE VOTE FOR FAVOR OF ADOPTION
DR. AZZOLINO STATED "YES"
DR. DEHN STATED "YES"
VOTE: 2-0
MOTION CARRIED**

Discussion and Possible Action on Advertising a Chiropractic Specialty

At the Committee's request, Staff Counsel Ms. Schieldge provided a memorandum summary, the Medical Board's Regulation (California Code of Regulations Title 16 Section 1363.5) and copies of the legal cases involving the Dental Board: Bingham v. Hamilton, Potts v. Hamilton and Potts v. Zettel.

Dr. Azzolino, Dr. Dehn, and Ms. Schieldge had lengthy discussion about the case litigation involving the Dental Board's attempt to regulate advertising specialties. Dr. Azzolino expressed concern that we are seeing increased advertising of neuropathy, diabetes, or variety of conditions that licensees claim to be specialists for when they really don't have the training. He feels that this is harmful to the patient and also harmful to the profession. Dr. Azzolino inquired why the Medical Board is exempt (unlike Dental Board) from such practices and is able to engage in the practice of regulating specialties.

Ms. Schieldge discussed important litigation involving the Medical Board and Dental Board related to specialty advertising. In the American Academy of Pain Management v. Joseph case, the court upheld the Medical Board's authority to regulate specialty advertising pursuant Business and Professions Code Section 651(h)(5)(B). Section 651(h)(5)(B) forbids California-licensed physicians from advertising that they are certified by a medical specialty board unless that board is either recognized by the American Board of Medical Specialties (ABMS) or the Medical Board as having certification requirements that are equivalent to those of ABMS recognized specialty boards. This case determined there is a long established understanding within the medical profession about the precise meaning of "board certified". Within the case context, "board certified" means only a doctor who has been certified by a board that is a member of the ABMS in one of the 23 areas of medical specialization recognized by the ABMS. The court held that advertisement using the term board certified to denote a credential from a non-ABMS recognized specialty board is inherently misleading.

The Potts v. Hamilton case ruled as to whether dentists are permitted to advertise their credentials earned from specialty organizations or boards such as the American Academy of Implant Dentistry (AAID) and American Board of Oral Implantology / Implant Dentistry (ABOI/ID). These boards award specialty credentials to their members who fulfill certain practice, education, and testing requirements. The Dental Board specifically prohibited AAID members from calling themselves specialists in their advertising. The AAID members sued, alleging this violated their right to free speech. Section 651(h)(5)(A) governed false and misleading advertising and outlined the conditions under which a dentist advertises 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. The Court eventually ruled in favor of the dentists.

Ms. Schieldge noted that while advertising is a First Amendment right, if an advertisement is inherently misleading to the public, it is not protected by the First Amendment.

Dr. Azzolino asked whether the Board can list information about the specialties on its website. Ms. Schieldge stated the Board can explore disclaimers and disclosures as opposed to banning advertisement of specialties. For instance, she stated disclaimers may be worded as.... "if consumers are interested in finding out if chiropractors have specialized training or experience in a specific area, they may wish to confirm this with the specialty boards..." The chiropractor would be required to disclose the educational requirements met for their credentials. Ms. Schieldge agrees with the concern and interest in protecting consumers by using appropriate disclaimers and disclosures relevant to education and training so that the consumer can make an informed decision about a licensee.

Discussion and Possible Action on Proposed Language Regarding Maintenance of Patient Records/Amendment to Title 16, California Code of Regulation (CCR) Sections 312.2 and 318

Proposed draft language for Patient Records and Retention Requirements was discussed at length. **(Please Note: The prior committee draft was erroneously numbered as CCR Section 318.1. However the draft content was relevant and correct for the review that occurred on this topic).** The committee requested revisions to the draft content and determined those revisions can be incorporated into the current CCR Section 318 by renumbering it. Proposed language for CCR Section 318 will be brought back to the next committee meeting for further review and discussion.

The topics of Proof of Service, Custodian of Records and the Affordable Care Act (ACA) were additionally discussed as they relate to records or retention requirements.

Related to Proof of Service, Ms. Schieldge mentioned that it is an option to send First Class Mail with Proof of Service. Dr. Azzolino stated that Proof of Service is too cumbersome, due to the volume of patients and suggested a recommendation for a modified voice mail recording or website announcement about records location.

There was lengthy discussion regarding Custodian of Records. Dr. Azzolino stated that the Custodian of Records should be the chiropractic practice where treatment was provided, unless the patient starts treating elsewhere. Dr. Dehn stated that it depends on the agreement of the group of doctors as to who is the Custodian of Records. The committee members also agree that there are many scenarios that could arise regarding this subject. Ms. Schieldge stated that the Board's regulations do say "each licensed chiropractor shall maintain records..." so there has to be an identifiable licensee who is responsible.

Ms. Schieldge recommended that the Board decide who is responsible for notifying patients about the records location, and when the notification should occur.

Dr. Azzolino stated that we should spend some time reviewing the ACA. Ms. Schieldge stated that she had not yet researched if the ACA had included new record retention requirements for minors or even adults. She also stated that the statute of limitations for civil actions was listed in the Code of Civil Procedure Section 340.5. Ms. Schieldge also stated she would be happy to hear if the CCA has other information on this issue. Ms. Cunha from CCA offered the Board staff a copy of the CCA Medical Records Kit document for members.

Dr. Azzolino recommended that Ms. Walker do a check with Malpractice Carrier(s), specifically about the medical records retention period for minors.

Ms. Schieldge recommended that the words "personal representative" and/or "conservator" be added to CCR Section 312.2 because they are being added to CCR Section 318.

Dr. Dehn asked for clarity with reference to patient signature and electronic capabilities. Ms. Schieldge stated she will check the Electronic Signature Act from Secretary of State for this information.

The Committee reviewed and discussed the handout containing Helpful Hints about practice closure. About three to four changes were recommended. A revised handout will be brought back to the next committee meeting.

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. [2014-2017 Strategic Plan]

Dr. Azzolino asked for the upcoming Expert training to be scheduled.

Mr. Puleo explained that a training session for Expert Consultants has not yet been scheduled due to the pending revisions on the Expert application. After review and discussion, one additional revision was requested in Section 3, to finalize the Expert application.

Public Comment

None

Future Agenda Items

None

Adjournment

Dr. Azzolino adjourned the meeting at 4:34 p.m.