

Board of Podiatric Medicine

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The Board of Podiatric Medicine (BPM) regulates the practice of podiatry in California pursuant to Business and Professions Code section 2460 *et seq.* and Article 12 of the Medical Practice Act, Business and Professions Code section 2220 *et seq.* BPM's regulations appear in Division 13.9, Title 16 of the California Code of Regulations (CCR).

BPM is a consumer protection agency within the Department of Consumer Affairs (DCA) and the Medical Board of California (MBC). BPM's mission is to ensure the protection of consumers through proper use of the licensing and enforcement authorities delegated to it by the legislature. The Board consists of four licensed podiatrists and three public members. All four professional members and one public member are gubernatorial appointees; one public member is appointed by the Speaker of the Assembly, and the other is appointed by the Senate Rules Committee.

BPM licenses doctors of podiatric medicine (DPMs), administers two licensing tests per year, approves colleges of podiatric medicine, and enforces professional standards by initiating investigations and taking disciplinary action where appropriate. BPM is funded solely by fees paid by its licensees and applicants for licensure; over 70% of BPM's \$900,000 operating budget is spent on enforcement. In this regard, BPM—through its use of MBC enforcement staff—receives and evaluates complaints and reports of misconduct and negligence against DPMs; investigates them where there is reason to suspect a violation of the Medical Practice Act, BPM's enabling act, or BPM's regulations; files charges against alleged violators; and prosecutes the charges at evidentiary hearings before administrative law judges (ALJs) from the Medical Quality Hearing Panel within the Office of Administrative Hearings. In enforcement actions, BPM is represented by legal counsel from the Health Quality Enforcement Section (HQES) of the Office of the Attorney General. Following the hearing, BPM reviews the ALJ's proposed decision and takes final disciplinary action to revoke, suspend, or restrict the license or take other appropriate administrative action.

BPM maintains five standing committees. The Consumer Advocacy Committee encourages outreach to consumers; the Examination Committee oversees the oral clinical exam and approves examiners; the Legislative Committee is the Board's liaison to the legislature; the Medical Education Committee administers the Board's approval system for podiatry schools and residencies; and the Professional Practice Committee regulates standards and approval of podiatric consultants and experts and also develops policy on practice matters.

On November 8, 1999, then-Assembly Speaker Antonio Villaraigosa reappointed Iva P. Greene to BPM; she has served on the Board since 1994.

MAJOR PROJECTS

Board Amends Strategic Plan to Address Significant Issues

At its May 2000 meeting, BPM amended the three-year strategic plan that guides its regulatory programs and legislative initiatives. The May 2000 amendments address several significant issues that will likely be addressed at BPM's December 2001 sunset review:

♦ **Board Viability in Light of Declining Resources.** BPM has long been concerned about its ability to maintain a high-quality consumer protection regulatory program in the face of decreasing revenues due to the declining number of podiatrists in California. The number of licensees under BPM's jurisdiction peaked in 1993 at 2,134. Since then, that number has declined, dipping to 1,760 as of January

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2001. Because BPM's operations are supported solely through the fees it assesses, with the greatest amount coming from biennial license renewals, this decrease has been a source of considerable concern for the Board. Additionally, BPM has recently been besieged with lawsuits by a particularly litigious licensee (see LITIGATION), requiring it to spend its limited resources on unanticipated attorneys' fees to defend itself.

Because of its dwindling licensee base, BPM has explored numerous ways to ensure the continuation of its regulatory programs. Effective January 1, 2000, its licensing fees were temporarily raised from \$800 to \$900 biennially—the highest licensing fees in California. Absent successful legislation in 2001, that temporary fee hike will revert to \$800 biennially effective January 1, 2002. [17:1 CRLR 67, 69] Additionally, BPM instituted a series of cost-cutting measures, including fewer Board meetings, leaving some staff positions vacant, and the expanded use of citations and fines instead of more costly formal disciplinary proceedings. Finally, BPM has on occasion advocated a merger of its regulatory program into the Medical Board in order to maintain high-quality regulation without a disproportionate financial burden on its licensees. [16:2 CRLR 57; 15:2&3 CRLR 76-77]

After BPM's initial sunset review in 1997-98, the Joint Legislative Sunset Review Committee directed BPM to fur-

ther study the proposed merger with MBC. As such, BPM then amended its strategic plan to note that "BPM has been working to hasten the day when BPM can be fully merged back to the MBC without the concern about professional discrimination." However, the May 2000 amendments to the strategic plan acknowledge that "political and structural realities...make a merger of the boards unrealistic at this time" and state BPM's goal to remain a semi-autonomous board provided sufficient funding is available to maintain a high-quality regulatory program. BPM's strategic plan amendments also express hope that the agency can achieve sufficient success in controlling costs so that the temporary fee increase will not need to be extended beyond 2001.

◆ **Endorsement of FPMB's Model Law.** The May 2000 strategic plan amendments also reflect BPM's February 2000 endorsement of the "model law" of the Federation of Podiatric Medical Boards (FPMB), and BPM's intent to seek legislation enacting relevant provisions of the model law in conjunction with its 2001-02 sunset review.

Among other things, enactment of the model law would rewrite the definition of podiatric medicine. Currently, Business and Professions Code section 2472(b) defines "podiatric medicine" as "the diagnosis, medical, surgical, mechanical, manipulative, and electrical treatment of the human foot, including the ankle and tendons that insert into the foot and the nonsurgical treatment of the muscles and tendons of the leg governing the functions of the foot." Under FPMB's model law, "podiatric medicine" is "the practice of medicine on the lower extremity, and includes the diagnosis and treatment of conditions affecting the human foot and ankle and related structures, including those anatomical structures of the leg inserting into or affecting the functions of the foot, and local manifestations of systemic conditions as they appear on the lower extremity, and superficial conditions of the leg, by all appropriate means and systems, including the prescribing and administering of drugs and medicines. A doctor of podiatric medicine may assist a licensed physician and surgeon who holds a medical doctor or osteopathic medical doctor degree in non-podiatric procedures."

Enactment of FPMB's model law would also change the examination and experience requirements for podiatrist licensure. Currently, California DPM applicants must pass Parts I and II of the written examination administered by the National Board of Podiatric Medical Examiners (NBPME), plus BPM's own oral clinical examination. In the May 2000 amendments to its strategic plan, BPM decided to work with NBPME to improve Part III of its exam so that BPM might substitute Part III for its own oral clinical exam; passage of Parts I, II, and III of the NBPME exam are required under FPMB's model law. As for experience, Business and Professions Code section 2484 requires completion of at least one year of approved postgraduate podiatric medical and surgical

training (PGT) in order to qualify for licensure; enactment of the model law would require completion of two years of PGT. The Medical Board has tried on several occasions to increase its similar one-year PGT requirement to two years, but California Medical Association (CMA) opposition has thwarted that objective. [16:1 CRLR 52-53] BPM believes that standardization of licensing requirements would enhance license reciprocity across state lines—which does not currently exist.

Additionally, FPMB's model law requires podiatric medical residents to be issued a "training license" under which they may practice medicine during their residencies. To conform to this requirement, BPM is attempting to reinstate its "limited license" program for podiatric residents that was sunsetted on July 1, 2000 (see 2000 LEGISLATION).

FPMB's model law also contains a "continuing competence" provision that requires DPMs to complete at least 50 hours of approved continuing education every two years and to further demonstrate continuing competence through fulfillment of other requirements at least once every ten years. At BPM's request, the legislature has already enacted Business and Professions Code section 2496, the first continuing competence requirement for any doctor licensing board in the nation. [16:1 CRLR 77, 80]

BPM plans to make its case for enactment of FPMB's model law during its 2001-02 sunset review. At this writing, BPM's sunset report to the JLSRC is due on September 1, 2001, and its sunset review hearing is scheduled for December 4, 2001.

Board Addresses Conflict of Interest Issue

During BPM's February 16, 2000 meeting, public member Joe Girard proposed that the Board adopt a "policy statement" precluding Board members from concurrently serving as officers in podiatric professional associations. Professional member Paul Califano acknowledged that, as the chair of the political action committee (PAC) of the California Podiatric Medical Association (CPMA), he was in that very situation. Several

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Board members expressed faith in Califano's own personal integrity, but were concerned about possible harm to the image of the Board if the public were to perceive that there was a potential for conflict of interest or bias. The members were particularly troubled about how DPMs who know Dr. Califano as a Board member with a certain amount of quasi-judicial authority would react to him acting in his CPMA role, especially while fundraising for CPMA from BPM licensees.

DCA legal counsel Robert Miller presented a memorandum from DCA's legal affairs office stating that "there is at present no legal prohibition against the concurrent holding of office in a professional association by one who is a member of the board." The memo went on to point out that the issue of possible conflict of interest was one to be resolved by the

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appointing authority, rather than the Board. "A question of the initial qualifications and of the continuing fitness for office of a board member is a matter to be determined by the member's appointing power, namely, by the Governor, the Senate Rules Committee, or the Speaker of the Assembly.... Absent an express statutory prohibition, the appointing power may determine that a person who has risen to a position of professional prominence, as reflected by the holding of office in a professional association, is the best qualified person to serve the public interest." Califano noted that he had been the PAC chair for eight years at the time of his December 1998 appointment by then-Governor Wilson.

DCA's memo further explained that "a member of a board is indeed expected, in his or her capacity as a public officer, to serve and to represent faithfully the interests of the public....It must be presumed that such a member will act conscientiously and fairly, consistent with the overall public interest....Moreover, assuming that there is an appearance of a conflict of interest for such a member due to ostensibly competing loyalties between the public interest and the association's interest, the mere appearance of a conflict of interest or bias, without more, is insufficient to compel a board member to be disqualified from participation even in such essential matters as quasi-judicial decisions to suspend or revoke professional licenses."

Lynn Morris, DCA Deputy Director for Board Relations, stated that Governor Davis wishes to retain the authority to appoint whoever he feels is most qualified for Board service, even if those individuals are active in their professional associations. However, she reiterated that "you have to take your CPMA hat off at the door." She noted that recent law requires ethics training for DCA board members.

Mr. Girard amended his motion to state that Board policy should "discourage" Board members from also being officers of podiatric professional associations, thereby softening the prohibitory language of the original motion. However, Board member Anne Kronenberg stated that she could not support a policy statement with no binding effect. Seeing that there would be insufficient votes to pass the motion and noting that he had achieved his goal of airing the issue, Mr. Girard withdrew his motion.

Specialty Board Approval Regulations

At its April 1999 meeting, BPM adopted proposed sections 1399.663 and 1399.681, Title 16 of the CCR, to implement SB 1981 (Greene) (Chapter 736, Statutes of 1998). Among other things, SB 1981 permits BPM to approve private specialty boards and associations whose certificants may advertise the term "board certified" in California, and allows BPM to establish and collect a reasonable fee from each specialty board or association applying for such recognition. In its proposed regulations, BPM established a processing time of 918 days and an application fee of \$4,030—both identical to the Medical Board's similar regulations. [17:1 CRLR 68-69; 16:2 CRLR 58; 16:1 CRLR 80]

On January 27, 2000, the Office of Administrative Law (OAL) disapproved this regulatory action. OAL found that BPM's establishment of the processing time and application fee in amounts identical to those utilized by MBC for its similar approval process was "not supported by facts, studies, expert opinion, or other information."

OAL also concluded that BPM had not adequately responded to comments submitted by the American Council of Certified Podiatric Physicians and Surgeons (ACCPPS). ACCPPS had raised several issues in a letter submitted to BPM. ACCPPS claimed that "there is simply no evidence that the review process is the same for the Board of Podiatric Medicine in approving a podiatry specialty board...as it is for the Medical Board in approving any number of different medical specialty boards." Thus ACCPPS argued that it is not reasonable for BPM to utilize the same fee and schedule as MBC without further evidence that the two review processes were sufficiently similar.

ACCPPS also contended that the regulatory proposal lacked objective criteria for the recognition of specialty boards. BPM responded that the statute already set the standard for review as equivalency with the criteria used by the Council on Podiatric Medical Education (CPME) for such approval. In its disapproval opinion, OAL pointed out that if BPM intends to use CPME's criteria, then BPM should compare those criteria with MBC's to determine whether the two are indeed equivalent.

Finally, OAL held that BPM's use of MBC's minimum, median, and maximum processing times was inconsistent with the Permit Reform Act of 1981, Government Code section 15376(c). The Permit Reform Act requires these time estimates to be based on the agency's actual performance during the two years immediately preceding the regulatory proposal. Because BPM lacked such past experience, the Board utilized MBC's processing times instead. However, the Act does not allow such a substitution.

BPM had 120 days to remedy OAL's concerns and resubmit the rulemaking file. On May 31, 2000, BPM resubmitted a modified proposal. In the file, BPM included a detailed comparison between MBC's approval process and the process the Board proposed to undertake. BPM also composed a clarified and expanded response to ACCPPS' original comment. Finally, BPM eliminated from the proposal subsection (c) of section 1399.663, which had contained the minimum, median, and maximum approval processing times.

On June 27, 2000, OAL approved the modified regulatory action, which became effective on July 27, 2000. As codified, section 1399.663 gives the Board 918 calendar days from submission of a completed application to notify the applicant whether it has been approved as a specialty board. Section 1399.681 sets the fee for this process at \$4,030.

Board Amends Citation and Fine Procedures

During the coverage period of this issue of the *California Regulatory Law Reporter*, the Board has amended sec-

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tion 1399.696, Title 16 of the CCR, dealing with the citation and fine procedure three times.

The first amendment added Business and Professions Code section 2234 (unprofessional conduct) to the list of offenses whose violation justifies the issuance of a citation and fine by BPM. The Board published notice of this proposal in December 1998, held a public hearing in February 1999, and adopted the change in April 1999. [17:1 CRLR 69; 16:2 CRLR 59; 16:1 CRLR 79] OAL approved the change on January 19, 2000, and it became effective on February 18, 2000.

Next the Board made nonsubstantive amendments to the regulation to correct the listing of two code sections to reflect their renumbering in the Business and Professions Code. OAL approved these amendments on November 19, 1999.

Finally, addressing what became a controversial issue, the Board proposed in March 2000 to amend section 1399.696 to require its Executive Officer (EO) to consult with a Board-approved medical expert before issuing a citation and fine in cases involving quality of care issues or necessitating medical judgment. This proposal followed lively public hearings at BPM's November 1999 and February 2000 meetings, during which BPM public member Joe Girard and Matthew Rifat, attorney for several DPMs who have been disciplined through the citation and fine process, argued that Board members should participate in citation and fine decisionmaking. [17:1 CRLR 67-68]

Prior to the February 2000 meeting, BPM widely circulated an "options paper" describing the following alternatives to the decisionmaking issue: (1) adhere to the existing regulation, under which the EO was permitted to unilaterally issue citations and fines, subject to several levels of appeal by the licensee; (2) clarify the existing regulation to conform to current practice and require the EO to base his decision on the opinion of a Board-approved medical consultant or expert when issuing citations and fines in quality of care cases; (3) follow MBC's procedure and delegate citation and fine authority to the enforcement coordinator; (4) amend the regulation to require the EO to base his decision on expert opinion and obtain the approval of at least one licensee Board member in quality of care cases; (5) adopt a "non-rulemaking policy" requiring the EO to seek expert opinion and obtain the approval of at least one licensee Board member in quality of care cases; (6) amend the regulation to require the EO to base his decision on expert opinion and the advice of at least one licensee Board member; or (7) amend the regulation to require full Board approval of staff recommendations requiring citations and fines.

At BPM's February 2000 meeting, Center for Public Interest Law (CPIL) Administrative Director Julie D'Angelo Fellmeth urged the Board to adopt option (1) or (2), and to reject the notion that Board members should become involved in citation and fine decisionmaking. She noted that BPM's citation and fine process provides at least three levels of appeal: (1) an informal conference with the executive officer, at the request of the licensee; (2) an evidentiary hearing by an ALJ, followed by Board review of the ALJ's proposed deci-

sion; and (3) judicial review of the Board's decision. Thus, the statute and the Board's regulations combine to provide ample procedural due process for a licensee who is unhappy with a citation. She also contended that any proposal to require Board member review of the EO's citation and fine decisions "substantially—and fairly radically—departs from (1) the intent of the citation and fine statute, which was to provide an alternative to long, drawn-out disciplinary proceedings which must be reviewed by board members; and (2) the existing Administrative Procedure Act, which requires board members to review proposed ALJ decisions based upon the evidence presented in that proceeding, and in that proceeding alone." She noted that in disciplinary actions for which the Board is required by the APA to act as a quasi-judicial body, any Board members who have other knowledge of the respondent, such as could be gained from participating in a prior citation and fine decision, might be required to recuse themselves because of the possibility that their judgment would be tainted by that outside-the-record information.

Following considerable discussion in which CPMA urged the Board to involve its members in citation and fine decisionmaking, BPM settled on middle ground by approving option (2). Thus, BPM avoided Board-member personal participation in citation and fine decisions, yet will conform its regulation to existing practice by requiring the EO to rely on the findings of a medical expert in quality of care cases.

On March 17, 2000, BPM published notice of its intent to amend section 1399.696 as described above; in addition, BPM's proposal would add Business and Professions Code section 17537.11 to the list of statutes which, if violated, would subject DPMs to citation and fine. Section 17537.11, added by AB 1231 (Machado) (Chapter 907, Statutes of 1999), prohibits the unfair or deceptive use of "free gift" or "reduced price" coupons. At its May 5, 2000 meeting, BPM adopted the proposed regulatory changes; at this writing, the rulemaking file is awaiting OAL approval.

At its November 3, 2000 meeting, BPM decided to seek amendments to section 1399.698, Title 16 of the CCR, which concerns public disclosure and retention of records of citations and fines issued against licensees. Section 1399.698 currently states that resolved citations will be purged from BPM records five years from the date of issuance of the citation; BPM's proposal would extend that timeframe to five years from the date of resolution. Citations are considered "resolved" when the cited licensee has paid the fine or has complied with an order of abatement. Section 1399.698 also states that a citation that has been withdrawn or dismissed must be purged from the Board's file one year after the date of the withdrawal or dismissal; the amendment would provide for immediate purge of the record upon withdrawal or dismissal of the citation. BPM published notice of its intent to amend section 1399.698 on December 8, 2000, and adopted the amendments after a public hearing on January 25, 2001. At this writing, BPM staff is preparing the rulemaking file for submission to MBC, DCA, and OAL for approval.

Update on Other Board Rulemaking Proceedings

The following is an update on BPM rulemaking proceedings described in more detail in Volume 17, No. 1 (Winter 2000) of the *California Regulatory Law Reporter*:

◆ **Podiatric Residency Programs.** At its November 1999 meeting, BPM voted to amend section 1399.667, Title 16 of the CCR, which sets forth specific criteria for the Board's approval of podiatric residency programs at hospitals. One of the criteria for a residency program is reasonable conformance with the Accreditation Council on Graduate Medical Education's "Essentials of Accredited Residencies in Graduate Medical Education: Institutional and Program Requirements." The amendment permits BPM to consider the September 1998 revised version of that document instead of the July 1992 version that was incorporated by reference into the prior version of the regulatory section. [17:1 CRLR 68] OAL approved this amendment on November 7, 2000.

◆ **Disciplinary Guidelines.** On January 27, 2000, OAL approved BPM's amendment to section 1399.710, Title 16 of the CCR, which incorporates by reference the Board's "Manual of Disciplinary Guidelines and Model Disciplinary Orders." The prior version of that section required the Board to consider the November 1, 1996 revision of the manual in reaching decisions on disciplinary matters. The amendment allows the Board to consider instead the November 6, 1998 revision, which incorporated as a probation option for certain violations completion of the Physician Assessment and Clinical Education (PACE) Program at the University of California at San Diego. [17:1 CRLR 69; 16:2 CRLR 59; 16:1 CRLR 79-80]

On March 17, 2000, BPM published notice of its intent to further amend section 1399.710 to incorporate the November 1999 revision of the Board's disciplinary guidelines. The 1999 revision further clarifies the PACE Program probation option and updates other manual language to conform to that of MBC. BPM approved the amendment after a public hearing on May 5, 2000; at this writing, the rulemaking file awaits OAL approval.

2000 LEGISLATION

SB 2031 (Figueroa), as amended August 18, 2000, was a DCA omnibus bill containing minor changes to the enabling acts of a number of different DCA agencies and changing the composition of the Osteopathic Medical Board of California. As to BPM, the bill would have reinstated the "limited license" requirement for DPMs participating in postgraduate training (residency) programs (see MAJOR PROJECTS). SB 1981 (Greene) (Chapter 736, Statutes of 1998) repealed the limited license requirement effective July 1, 2000, due in part to the fact that MBC has no equivalent licensing requirement for medical residents. [16:1 CRLR 80] At the time, BPM did not oppose the proposed repeal of the program. However, the Board subsequently decided that it is in the public interest to license and track podiatric medical residents, and thus sought reinstatement of the license before it sunsetted on July 1, 2000.

However, Governor Davis vetoed SB 2031 on September 29, 2000 because "this bill expands the Osteopathic Medical Board of California from five members to seven members without a showing that the current number of board members is inadequate." At this writing, BPM is attempting to reinstate the limited license requirement through 2001 urgency bill SB 26 (Figueroa) (see 2001 LEGISLATION below).

SB 1554 (Committee on Business and Professions), as amended August 22, 2000, is also a DCA omnibus bill that makes several minor changes to statutes governing BPM. SB 1554 conforms BPM's public disclosure policy with MBC's public disclosure policy by adding BPM to Business and Professions Code subsection 803.1(b), thus expressly requiring BPM to disclose to the public information regarding the status of a license, any malpractice judgments, any arbitration awards, and any summaries of hospital disciplinary actions that result in the termination or revocation of a licensee's staff privileges for a medical disciplinary cause or reason. Further, BPM must disclose any enforcement actions taken against a licensee either by BPM or by another jurisdiction, including temporary restraining orders issued, interim suspension orders issued, limitations on practice ordered by BPM, public letters of reprimand issued, and infractions, citations, or fines imposed. [16:2 CRLR 58-59]

SB 1554 also clarifies that the Board president may call meetings of the Board and of any BPM committee. The bill excises provisions in the law specifying that subcommittee meetings are not required to be advertised. This bill also deletes an obsolete provision pertaining to certificates to practice podiatric medicine by reciprocity. SB 1554 was signed by the Governor on September 28, 2000 (Chapter 836, Statutes of 2000).

AB 2888 (Committee on Consumer Protection, Governmental Efficiency and Economic Development), as amended August 22, 2000, amends Business and Professions Code section 2415 concerning fictitious name permits. The amendment adds the terms "foot," "foot and ankle," "foot care," "foot health," and "foot specialist" to the list of permissible descriptive designations under which DPMs may practice after validly obtaining a fictitious name permit from BPM.

Prior law specified certain criteria for the issuance of a certificate to practice podiatric medicine, including a requirement that the applicant had passed, after June 30, 1958, the examination administered by the National Board of Podiatric Medicine Examiners of the United States (NBPME), or an equivalent examination, and had passed an oral and practical examination administered by BPM. AB 2888 changes these criteria by specifying that, within the past ten years, applicants must have passed all parts of the NBPME examination, or an equivalent examination, and must pass any oral and practical examination that BPM may require. This flexibility will permit BPM to substitute Part III of NBPME's examination for its oral clinical examination without future legislative changes (see MAJOR PROJECTS). This bill was signed

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by the Governor on September 8, 2000 (Chapter 568, Statutes of 2000).

2001 LEGISLATION

SB 26 (Figueroa), as amended March 8, 2001, is urgency legislation that would reinstate the "limited license" for DPMs in postgraduate training (residency) programs (see SB 2031 (Figueroa) in 2000 LEGISLATION above). The limited license would be issued annually, and renewable for up to four years. [A. B&P and A. Health]

SB 349 (Committee on Business and Professions), as amended March 26, 2001, would add a sunset clause to Business and Professions Code section 2471, which limits the terms of service of podiatric medical consultants hired by BPM to assist in the enforcement program. The legislation would make section 2471 inoperative on July 1, 2003 and would repeal it as of January 1, 2004. SB 349 would also amend section 2470, concerning BPM's rulemaking authority. The amendments would delete existing provisions requiring the Board to submit its regulatory proposals to MBC's Division of Licensing for review and approval. [S. Appr]

AB 269 (Correa), as amended April 5, 2001, would create the Division of Enforcement Oversight within DCA. Under the direction of the DCA Director, the Division would monitor and evaluate the consumer complaint and discipline system of each DCA board (including BPM). Further, the bill would require the executive officer of each DCA board to be appointed by a three-member panel comprised of a representative of the board, the DCA Director, and the Governor's appointments secretary. [A. B&P]

LITIGATION

BPM's April 26, 1999 discipline of the license of Garey Lee Weber has prompted a fairly unprecedented torrent of lawsuits against the Board. In its 1999 decision, BPM placed Weber's license on probation for five years for inappropriate post-surgical care following bunionectomies involving osteotomies (the cutting of bone). Purportedly adhering to the preferred practice guidelines of the Academy of Ambulatory Foot Surgery (AAFS), Weber's post-surgical treatment included strapping, taping, splinting, and placement of the foot in a firm-soled post-surgery shoe, but failed to include rigid internal fixation (e.g., the use of screws, wires, or other devices to fix the opposite ends of cut bone together) or immobilization (casting). Further, Weber advised patients to bear weight on the surgical sites immediately after surgery. In its decision, BPM determined that AAFS' guidelines "are so broad as to be almost meaningless for purposes of determining the community standard of care" for the treatment in question and that they "breach the basic tenets of bone healing and place patients at significant risk of severe, long-term disability." Instead, BPM

found that the preferred practice guidelines of the American College of Foot and Ankle Surgeons (ACFAS)—which require internal fixation, preclude early weight-bearing, and "contain numerous citations to the professional literature"—better reflect the standard of care in California for such post-surgical treatment, and placed Weber's license on probation subject to numerous terms and conditions.

In July 1999, Weber filed *Weber v. State of California Board of Podiatric Medicine*, No. BS058388, in Los Angeles County Superior Court, a petition for writ of mandate challenging the Board's decision; however, Weber failed to persuade the court to stay the disciplinary order. When Weber later failed to comply with the terms of his probationary order, BPM filed—on October 27, 1999—a petition to revoke Weber's probation and an accusation to revoke his license. [17:1 CRLR 70–71; 16:2 CRLR 60–61]

At a hearing on April 10, 2000, Weber argued that the Board's decision against him was not supported by the evidence presented at the administrative hearing, and that BPM's finding that ACFAS practice guidelines constitute the standard of care for podiatrists amounts to "underground rulemaking" violative of the rulemaking requirements of the Administrative Procedure Act. Weber also alleged that the Board's disciplinary proceedings against him were conducted in violation of the Bagley-Keene Open Meeting Act, and thus any resulting decision should be void. The court found no evidence supporting Weber's contentions that BPM had violated Bagley-Keene or that the Board's decision was arbitrary or capricious. Accordingly, the judge denied Weber's petition and dismissed the case.

At its November 3, 2000 meeting, pursuant to Government Code section 11425.60 and at the suggestion of the Attorney General's Office, BPM classified its April 26, 1999 decision in the *Weber* matter as "precedential." Section 11425.60 provides a way for regulatory agencies to establish binding policy through adjudications "that contain a significant legal or policy determination of general application that is likely to recur."

Meanwhile, BPM pushed ahead with its petition to revoke Weber's probation and his license. After an administrative hearing in October 2000, ALJ Vincent Nafarrete recommended that—rather than revoke Weber's license—BPM should extend Weber's probationary term and suspend his license for 60 days. On January 25, 2001, BPM nonadopted that decision (prompting yet another lawsuit—see below). At this writing, BPM is scheduled to determine the fate of Weber's license at its May 4, 2001 meeting.

In the meantime, Weber's counsel filed a number of other matters:

◆ *Smith v. Rathlesberger*, No. SACV00-1205, was filed on December 8, 2000 in the Southern Division of the U.S. District Court for the Central District of California. This civil rights class action challenges the constitutionality of Busi-

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ness and Professions Code section 2054, which makes it a misdemeanor to use certain designations or titles that imply that a person is a licensed physician and surgeon. Plaintiff alleges that the section violates podiatrists' first amendment free speech and fourteenth amendment equal protection rights in that it prohibits podiatrists from using the designations "doctor," "physician," or "physician and surgeon." At a February 26, 2001 hearing, both plaintiff's motion for preliminary injunction and BPM's motion to dismiss were denied. On behalf of BPM, the Attorney General's Office filed an answer to plaintiff's first amended complaint on March 14, 2001.

◆ **Smith v. Medical Board of California, et al.**, No. 00CS01624, was filed on December 15, 2000 in Sacramento County Superior Court. This petition seeks declaratory relief and to void prior disciplinary actions against the plaintiff, a podiatrist who alleges that BPM engaged in "underground rulemaking" by making the ACFAS preferred practice guidelines (see above) the standard of care for podiatrists. Plaintiff claims that as a result, he is afraid to conduct any surgical procedures that are not within the ACFAS guidelines. On January 18, 2001, the Attorney General's Office filed a demurrer to this action, making several arguments: (1) plaintiff had failed to exhaust administrative remedies (through its regulatory determination process, OAL has jurisdiction to declare underground regulations invalid); (2) plaintiff's vague and uncertain pleading failed to state facts sufficient for relief; (3) the applicable statute of limitations had passed; (4) there is no justiciable case or controversy; and (5) EO Rathlesberger should be removed as a defendant. The AG's demurrer was denied after a hearing on April 6, 2001.

◆ **Murphy v. Rathlesberger, et al.**, No. SACV00-1242, was filed on December 18, 2000 in the Southern Division of the U.S. District Court for the Central District of California. This is a complaint by a podiatrist's patient alleging a violation of her fourteenth amendment right to choose the health care treatment she prefers. The plaintiff claims that BPM's adoption of the ACFAS preferred practice guidelines as the standard of care makes her podiatrist afraid to perform the procedure she desires because it is not found in those particular guidelines. On January 16, 2001, the Attorney General's Office filed a motion to dismiss on a variety of grounds, including eleventh amendment immunity, lack of federal jurisdiction, and failure to state a claim upon which relief can be granted. At this writing, a hearing on that motion is scheduled for May 14, 2001.

◆ **Ambulatory Surgical Center, et al. v. Williams**, No. 00CC15297, was filed on December 20, 2000 in Orange County Superior Court. This is a civil complaint for damages against a Medical Board investigator for (1) malicious prosecution and conspiracy, (2) defamation, (3) negligence, (4) intentional and negligent infliction of emotional distress, (5) intentional and negligent misrepresentation, (6) civil rights violation under 42 U.S.C. section 1983, (7) breach of fiduciary duty, and (8) extortion. Plaintiff alleges that the defendant encouraged one of plaintiff's patients to file a medical

malpractice case against plaintiff and that the case was resolved in plaintiff's favor on a motion for summary judgment. In February 2001, plaintiff stipulated to a transfer of this case to the Los Angeles County Superior Court.

◆ **Weber v. Shepherd, et al.**, No. 01AS03868, was filed on December 20, 2000 in Orange County Superior Court. Under legal theories of malicious prosecution, conspiracy, defamation, and negligence, plaintiff Weber alleged that defendant Rathlesberger encouraged one of Weber's patients to file a medical malpractice case against Weber. The malpractice case was ultimately adjudicated in Weber's favor. On April 24, 2001, the Orange County court granted the Attorney General's motion to transfer venue of this case to Sacramento.

◆ **Smith v. California Board of Podiatric Medicine**, No. 00CS01666, was filed on December 22, 2000 in Sacramento County Superior Court. The complaint sought declaratory relief and to void prior BPM disciplinary actions against the plaintiff DPM. Plaintiff claims that BPM has been inconsistent in its interpretation of Business and Professions Code section 2472, which prohibits podiatrists from performing amputations. According to the allegations, BPM has sometimes—but not always—approved of removals of portions less than the entire foot. On January 25, 2001, the Attorney General's Office filed a demurrer claiming (1) failure to state a cause of action; (2) failure to allege improper acts or omissions on the part of defendant Rathlesberger; and (3) inapplicability of Government Code section 800 (which allows attorney fees where there has been arbitrary and capricious government conduct) in a proceeding where there has been no prior administrative hearing. At an April 6, 2001 hearing, the demurrer was granted, but plaintiff was granted leave to amend the complaint to correct the deficiencies.

◆ **Roth v. Rathlesberger**, No. 01AS01722, was filed on December 29, 2000 in Los Angeles County Superior Court. Plaintiff alleges (1) malicious prosecution, (2) defamation, (3) negligence, (4) intentional and negligent infliction of emotional distress, (5) intentional and negligent misrepresentation, (6) civil rights violation under 42 U.S.C. section 1983, (7) breach of fiduciary duty, and (8) extortion. The plaintiff claims that he was wrongfully disciplined for mistakenly being identified as an "M.D." in a publication listing forensic consultants. On March 27, 2001, the case was transferred to Sacramento County Superior Court.

◆ **Bauer v. Rathlesberger, et al.**, No. 01CS0068, was filed on January 16, 2001 in Sacramento County Superior Court. In this case under the Public Records Act, petitioner seeks to acquire the report from her psychological evaluation undertaken as part of the PACE Program in which she was participating as a condition of her probation. The Attorney General's Office filed an answer to the complaint on February 19, 2001.

◆ **Vacio v. Rathlesberger, et al.**, No. 01CS0067, filed on January 16, 2001 in Sacramento County Superior Court, is identical to the *Bauer* case (see above). At this writing, a hearing on the Attorney General's special demurrer has been scheduled for May 29, 2001.

HEALTH CARE REGULATORY AGENCIES

◆ **Roth v. Rathlesberger**, No. BC243698, was filed on January 18, 2001 in Los Angeles County Superior Court. Like *Smith v. Rathlesberger*, No. SACV00-1205 (see above), this is a class action challenge to the constitutionality of Business and Professions Code section 2054. At this writing, a hearing on the Attorney General's demurrer is scheduled for May 25, 2001.

◆ **Carver v. Rathlesberger**, No. 01AS00445, was filed on January 24, 2001 in Sacramento County Superior Court. The plaintiff alleges (1) malicious prosecution, (2) defamation, (3) negligence, (4) intentional and negligent infliction of emotional distress, (5) intentional and negligent misrepresentation, (6) civil rights violation under 42 U.S.C. section 1983, (7) breach of fiduciary duty, and (8) extortion. The plaintiff claims that he was wrongfully issued a citation and fine for providing an excessive dose of medication to a patient and that the citation and fine remained public for one year before it was withdrawn. At this writing, a hearing on the Attorney General's special demurrer (based on the vagueness of the complaint) is scheduled for June 29, 2001.

◆ **Dintcho v. Califano, et al.**, No. 01AS00446, was filed on January 24, 2001 in Sacramento County Superior Court. The complaint alleges violations of the Fair Political Practices Act, deprivation of rights under 42 U.S.C. section 1983, and violations of the Bagley-Keene Open Meeting Act. The plaintiff claims that Board member Paul Califano, DPM, is tainted by a conflict of interest (see MAJOR PROJECTS) and that five Board members, who are also named as defendants, conducted secret meetings without providing public notice.

Defendant Board members Davis, Kronenberg, Califano, and Phillips were deposed in March of 2001. At this writing, defendant Board member Greene is scheduled for deposition on May 2, 2001. Board members Girard and Williams are not defendants in this suit, but their depositions have been taken. A protective order precluding the deposition of BPM EO Rathlesberger was issued on March 23, 2001.

◆ **Dintcho v. Rathlesberger, et al.**, No. 01AS00448, was filed on January 24, 2001 in Sacramento County Superior Court. This is a complaint for damages alleging (1) defamation, (2) tortious interference with prospective economic advantage, (3) invasion of privacy, and (4) negligent and intentional infliction of emotional distress. The plaintiff claims that EO Rathlesberger and two Board members made false and defamatory statements about him. At this writing, the Attorney General's Office is drafting a special demurrer based on vagueness.

◆ **Smith v. Rathlesberger**, No. BS067731, was filed on February 13, 2001 in Los Angeles County Superior Court. This claim under the Public Records Act alleges that BPM's copying fee is excessive and not within the spirit of the Act. In correspondence dated March 7, 2001, Smith's counsel indicated to the Attorney General's Office that he would dismiss this case; thus, the deputy attorney general representing defendant Rathlesberger did not appear at an April 13, 2001 hearing. However, Smith's counsel did not dismiss the case. The judge continued the April 13 hearing to May 1, 2001 and

issued an order to respondent to show cause why there was no opposition to the petition and no appearance, and requested the petitioner to file supplemental briefs on the merits.

◆ **Smith v. Rathlesberger**, No. 01CS00236, filed on February 23, 2001 in Sacramento County Superior Court, is a Public Records Act case identical to *Smith v. Rathlesberger*, No. BS067731, pending in Los Angeles County Superior Court (see above). After an April 6, 2001 hearing, plaintiff's petition was denied and the case was dismissed.

◆ **Hickey v. Sweet, et al.**, No. 01CS00237, was filed on February 26, 2001 in Sacramento County Superior Court. This is a petition for a writ of mandate to have a named investigator removed from the disciplinary case against Stephen Smith, DPM. A hearing scheduled for April 6, 2001 was continued to June 1, 2001.

◆ **Weber v. California Board of Podiatric Medicine**, No. 01AS01941, was filed on March 29, 2001 in Sacramento County Superior Court. The complaint seeks declaratory and injunctive relief to void BPM's April 1999 disciplinary action placing Garey Lee Weber on probation (see above) and BPM's subsequent January 2001 decision to nonadopt ALJ Nafarrete's proposed decision recommending an extension of Weber's probationary term and the suspension of his license to practice for 60 days. At this writing, a hearing is scheduled for August 31, 2001.

RECENT MEETINGS

During the November 1999 meeting, BPM's Consumer Advocacy Committee announced an effort to establish a Joint Outreach Committee with CPMA. The purpose of the committee is to educate the public, and particularly those who lack access to electronic resources (Internet), about the practice of podiatry and the safeguards that are available to consumers. Board member Anne Kronenberg will serve as BPM's liaison with CPMA on this project.

Also in November 1999, BPM elected DPM Kenneth Phillips as president and public member Joseph Girard as vice-president for 2000.

At its February 2000 meeting, BPM discussed CPMA's September 1999 memorandum suggesting that BPM change its name to the "Board of Podiatric Medicine and Surgery." According to CPMA, such a change would "represent a more descriptive name for the services actually provided by podiatric physicians." The Board declined to take action on CPMA's proposal.

At its May 2000 meeting, BPM undertook a review of its internal policies and voted to rescind several of them. The "Board Member Conflict of Interest Policy," originally adopted on December 7, 1990, was rescinded because the Board concluded that the subject matter is already adequately covered by the Administrative Procedure Act. BPM rescinded a policy called "Licensing Examination" (various parts of which were adopted between 1982 and 1986) because that topic is dealt with in both statute and BPM regulation. The "Surgical Assisting" policy (adopted November 20, 1982),

which encourages DPMs to provide surgical assistance to MDs, was rescinded because BPM believes its *Information for Health Facilities* fact sheet is a more appropriate medium for the information. Because "Medical Staff Privileges" are regulated by the Department of Health Services (DHS), BPM rescinded that policy (adopted February 25, 1983) as well. The policy on "Admission of Patients/Histories and Physicals," adopted August 26, 1983, was rescinded because the matters it addresses are the focus of both state and federal administrative rules. The "Infection Control Guidelines," which, as adopted January 25, 1994, simply state that BPM licensees are to follow DHS rules to prevent transmission of bloodborne pathogens, have been superseded by Business and Professions Code section 2221.1 and thus were rescinded. The Board also rescinded the "Guidelines for Pain Management" (adopted November 4, 1994), which states that DPMs must follow MBC guidelines for prescribing controlled substances for intractable pain, because Business and Professions

Code sections 2025 and 2241.5 now address the issue. Finally, June 5, 1987's "Residency Programs with 'Candidate Status'" policy was rescinded because it is more appropriately dealt with in BPM licensing forms and information packet. The Board also combined "Minimum Requirements for Consultants and Expert Reviewers" and "Minimum Requirements for Examination Commissioners" into one policy: "Minimum Requirements for Consultants, Experts and Examiners."

At its November 2000 meeting, BPM elected Paul J. Califano, DPM, as president and public member Anne M. Kronenberg as vice-president for 2001.

FUTURE MEETINGS

2001: May 4 in Millbrae; August 15 in San Francisco; November 2 in Los Angeles.

2002: February 13 in Sacramento; May 3 in Millbrae; November 8 in Los Angeles.

Board of Psychology

Executive Officer: Thomas O'Connor ♦ (916) 263-2699 ♦ Toll-Free Consumer Complaint Line: (800) 633-2322 ♦ Internet: www.psychboard.ca.gov

The Board of Psychology (BOP) regulates licensed psychologists, registered psychologists, and psychological assistants under the Psychology Licensing Law, Business and Professions Code section 2900 *et seq.* BOP sets standards for education and experience required for licensure, administers licensing examinations, issues licenses, promulgates rules of professional conduct, regulates the use of psychological assistants, investigates consumer complaints, and takes disciplinary action against licensees. BOP's regulations are located in Division 13.1, Title 16 of the California Code of Regulations (CCR).

BOP is a consumer protection agency located within the Department of Consumer Affairs (DCA). The Board is composed of nine members: five psychologists and four public members. Each member of the Board is appointed to a term of four years; no member is permitted to serve for more than two consecutive terms. The five licensed members and two of the public members are appointed by the Governor. One public member is appointed by the Senate Rules Committee, and the fourth public member is appointed by the Speaker of the Assembly. Public members may not be licensed by BOP or by any other DCA healing arts board. At this writing, two psychologist seats are vacant; both must be filled by the Governor.

BOP maintains seven standing committees: Consumer Education, Continuing Education, Credentials, Enforcement, Examination, Legislation, and Personnel.

BOP is funded through license, application, and examination fees. The Board receives no tax money from the state general fund.

MAJOR PROJECTS

Continued Use of Oral Exam Questioned

On March 6, 2001, DCA's Office of Examination Resources (OER) submitted a report to BOP evaluating the oral examination administered by the Board to licensure applicants. The report summarized the outcome of OER's convening of two focus groups consisting of psychologists, the examiners who administer the oral exam, recent Board licensees, and members of academic and training institutions. The purpose of OER's review was to assess: (1) whether BOP needs an oral exam to determine minimal competency for licensure; (2) if so, whether the current format of the oral exam meets this need; and (3) if not, what (if any) additional requirements are indicated to determine minimal competency.

OER identified the three components (other than the oral exam) which are currently utilized to assess minimal competency: (1) the requirement of a doctoral degree in psychology; (2) successful completion of 3,000 hours of supervised professional experience (SPE); and (3) passage of the national written Examination for the Professional Practice of Psychology (EPPP).

