respondent’s activities shall be monitored by one of the Board’s podiatric medical consultants. The monitor shall provide podiatric reports to the Board.”

On April 30, Weber filed a class action suit against the Board in the U.S. District Court for the Southern District of California. In Weber v. Rathlesberger, et al., No. 99-CV-0900JM - RBB, Weber purports to represent all licensed podiatrists in the state, and alleges that BPM’s disciplinary proceeding and order violate the civil rights of all California podiatrists by mandating that they “literally and blindly follow the Preferred Practice Guidelines published by the American College of Foot and Ankle Surgeons.” Weber alleges that the defendants— including all Board members and Executive Officer Jim Rathlesberger— “spent several years and several thousand dollars” prosecuting him. He further contends that defendants “bear personal animosity” toward him, and that the Board’s decision to nonadopt the ALJ’s proposed decision is unlawful (“in contumacious disregard for the law”) and was made in “secret meetings” in violation of the Bagley-Keene Open Meeting Act. In addition to his civil rights act claim, Weber alleges causes of action based upon negligence, defamation, illegal restraint of trade, abuse of legal process, and tortious interference with prospective economic advantage. Weber seeks $15 million in lost business revenue and loss of reputation, an order requiring the Board to withdraw its disciplinary decision, punitive damages, and attorneys’ fees and costs. At this writing, the Attorney General’s Office has not yet filed a responsive pleading on behalf of the Board.

RECENT MEETINGS

At its February 5 meeting, BPM elected Kenneth K. Phillips Jr., DPM, as its Vice-President. Dr. Phillips replaces former Vice-President Michael A. DiGiacomo, DPM, whose term expired. Public member Iva P. Greene continues to serve as Board President.

FUTURE MEETINGS

- November 5, 1999 in Los Angeles.

Board of Psychology

Executive Officer: Thomas O’Connor • (916) 263-2699 • Toll-Free Consumer Complaint Line: (800) 633-2322 • Internet: www.dca.ca.gov/psych/

The Board of Psychology (BOP) regulates licensed psychologists, registered psychologists, and psychological assistants under 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, and no member may serve for more than two consecutive terms.

On January 1, psychologist Pamela Harmell, Ph.D., and public member Lisa Kalustian were appointed to the Board.

MAJOR PROJECTS

Board Develops Proposed Revisions to Supervision Regulations

On March 5, BOP held a second informational hearing on its proposed overhaul of sections 1387–1387.5, Title 16 of the CCR, its supervised professional experience (SPE) regulations. [16:1 CRLR 82–83] Business and Professions Code section 2914(c) requires any applicant for a psychologist license to complete two years (3,000 hours) of SPE “under the direction of a licensed psychologist, the specific requirements of which shall be defined by the board in its regulations.” Sections 1387–1387.5 are detailed regulations which flesh out the precise parameters of the SPE requirement. For the past several months, BOP has been engaged in a project to substantially reorganize these regulations, and to amend several of their substantive provisions. The Board held an initial informational hearing on some of its proposed changes in November 1998. [16:1 CRLR 82–83]

In preparation for the March 5 hearing, Board staff prepared a revised draft of its proposed changes to the SPE regulations which incorporates suggestions made at the first informational hearing last November. The revised draft deletes two existing requirements that have caused some concern: (1) a requirement that primary supervisors of trainees have at least three years of post-licensure experience, and (2) a requirement that primary supervisors be onsite and available to trainees for at least 50% of the supervisee’s work schedule (“a minimum of one-half time in the same work setting at the same time as the person supervised”).

In place of the requirement that primary supervisors have three years of experience, the revised draft would require primary supervisors to have a current license in good standing; the supervisor would be required to notify the supervisee of
any disciplinary action that affects the primary supervisor's ability or right to supervise. Further, primary supervisors would have to certify under penalty of perjury, when verifying SPE, that they are qualified to supervise psychology trainees by virtue of education, training, and experience in psychology supervision (including "knowledge of the process, procedures, and theories of supervision needed to prepare trainees" for the safe, independent practice of psychology). BOP believes that knowledge of the process and theories of supervision is more important in the development of effective supervisors than three years of post-licensure experience. The revised draft also specifies that the primary supervisor (or a qualified delegated supervisor) must be "employed in the same setting at least half time and be available to the supervisee 100% of the time the supervisee is accruing SPE." This availability may be in-person, by telephone, by beeper, or by other appropriate technology. BOP believes that this change will provide more flexibility for the supervisor and, at the same time, increase access for the supervisee.

The revised draft also describes the qualifications and expectations of a "delegated supervisor" to whom a primary supervisor may delegate his/her supervision responsibility. The draft provides that primary supervisors may delegate supervision to other qualified licensed psychologists or to other qualified mental health professionals, including marriage and family therapists, licensed educational psychologists, licensed clinical social workers, and board-certified psychiatrists. "Delegated supervisors" must have the same qualifications and assume the same responsibilities as primary supervisors (except that the primary supervisor remains responsible for providing one hour per week of direct, individual, face-to-face supervision and for ensuring the overall quality of the supervised experience). The revised draft specifies that neither primary nor delegated supervisors may exploit or engage in sexual relationships with supervisees.

At the informational hearing on March 5, the Board heard comments from interested parties. Board member Emil Rodolfa, Ph.D., who is heading up the effort to restructure BOP's SPE regulations, stressed that the current three-year post-licensure experience requirement is not a particularly effective way to ensure competent supervisors. He stated that the data indicate that training in supervision techniques is the one variable that correlates with effective supervision. Board President Judith Janaro Fabian, Ph.D., expressed concern that elimination of the three-year experience requirement would be problematic in crisis situations where the availability of an experienced practitioner would be most helpful. Dr. Fabian recommended that the three-year experience requirement be retained, but suggested that a supervisor be allowed to substitute supervisory training for part of the experience requirement.

Dr. Rodolfa indicated that the Board plans to finish drafting the proposed changes to its SPE regulations within the year, and to schedule a regulatory hearing when the drafting is complete.

**Implementation of SB 983 (Polanco and Rainey)**

At its January 15 and March 6 meetings, the Board discussed implementation of SB 983 (Polanco and Rainey) (Chapter 822, Statutes of 1998). [16:1 CRLR 84] The bill requires BOP to encourage licensees to take continuing education courses in psychopharmacology and the biological bases of behavior, and to encourage institutions offering doctorate degree programs in psychology to include education and training in psychopharmacology and related topics. Further, SB 983 requires BOP to "develop guidelines for the basic education and training of psychologists whose practices include patients with medical conditions and patients with mental and emotional disorders, who may require psychopharmacological treatment and whose management may require collaboration with physicians and other licensed prescribers."

SB 983 requires BOP to "develop guidelines for the basic education and training of psychologists whose practices include patients with medical conditions and patients with mental and emotional disorders, who may require psychopharmacological treatment and whose management may require collaboration with physicians and other licensed prescribers." In developing these guidelines for training, the Board is required to consider a number of specific factors and subjects for inclusion in the training; these factors and subjects are specified in Business and Professions Code section 2914.3(b).

SB 983 was a step back from SB 2050 (Polanco and Rainey), a bill which would have authorized qualified psychologists to prescribe medication, and required the Board to administer a certification program in prescribing. SB 983 does not authorize psychologists to prescribe drugs or in any way expand the scope of practice of psychologists, but it is intended to "improve the ability of clinical psychologists to collaborate with physicians."

At the March meeting, BOP President Dr. Fabian reminded the Board that no financial resources were made available for the implementation of SB 983. She therefore suggested that the Board consider the education guidelines already established by the American Psychological Association (APA). Executive Officer Tom O'Connor confirmed that BOP will work with the APA and the California Psychological Association (CPA) to develop the training guidelines mandated by SB 983.

**Update on Recent BOP Rulemaking Proceedings**

The following is an update on recent BOP rulemaking proceedings described in detail in Volume 16, No. 1 (Winter 1999) of the California Regulatory Law Reporter.
Passing Grades for BOP Licensing Exams. On January 8, the Office of Administrative Law (OAL) approved BOP’s emergency amendments (effective for 120 days) to sections 1388(b) and 1388.5, Title 16 of the CCR. The amendments implement a provision of SB 1983 (Greene) (Chapter 589, Statutes of 1998) which requires the Board to establish, by regulation, passing grades for its licensing examinations. [16:1 CRLR 81–82] The amendment to section 1388(b) specifies that BOP will apply the national passing grade of 140 to the written Examination for Professional Practice in Psychology (EPPP), as recommended by the Association of State and Provincial Psychology Boards (ASPPB).

The Board also amended section 1388.5 to address the pass point for its oral examination. The process to determine the pass point on the oral exam will be overseen by DCA’s Office of Examination Resources. Subsection 1388.5(d) provides that the pass point on the oral exam shall be at a level of minimally acceptable competence, which shall be established by developing performance standards expected of candidates ready for independent practice. Candidates’ responses will be given a numerical value by examiners and arrayed along a rating scale continuum; to achieve a passing score, candidates must earn a score equivalent to minimal acceptable competence on the rating scale. The oral exam scoring format is designed such that a candidate must earn 24 points out of the 40 possible.

On March 12, BOP published notice of its intent to permanently adopt these regulatory amendments. The Board did not hold a public hearing on the proposal, but accepted written comments until April 26. The Board submitted the rulemaking file on the proposed changes to DCA on April 27; after the DCA Director reviews the regulatory changes, they will be forwarded to OAL for review and approval.

CE Regulations. At its November 1998 meeting, BOP adopted several amendments to sections 1397.60–65 and 1397.68, Title 16 of the CCR, which implement the Board’s continuing education (CE) requirements under Business and Professions Code section 2915. Current law requires licensees to complete 36 hours of approved CE during each two-year renewal cycle. BOP’s amendments are intended to define certain terms in the regulations, adjust CE fees, address emerging technology issues, and clarify the Board’s intent regarding the content of acceptable CE courses and the methods used to evaluate a licensee’s participation in a CE course.

Among other things, the Board’s amendments (1) define the terms “conferences,” “grand rounds,” and “in-service training programs” for purposes of CE credit; (2) authorize licensees who qualify for a reasonable accommodation under the Americans with Disabilities Act to complete all or part of their CE requirement through a “distance learning program” (including courses delivered via the Internet, CD-ROM, satellite downlink, correspondence courses, and home study) approved by an accrediting agency, and permit other licensees to take advantage of distance learning programs to satisfy up to 20% of the CE required in each renewal cycle; (3) specify that acceptable CE courses must be “pertinent to the practice of psychology” at a post-licensure level, and clarify that courses focused on business, marketing, or that are predominantly designed to explore opportunities for personal growth are not eligible for credit; (4) state that the required evaluation mechanism used to assess the achievement of CE course participants “shall be appropriate to the length of the course and complexity of the material being presented and in accordance with generally accepted adult education evaluation models”; (5) increase the course attendee fee which CE providers must pay to the course accrediting agency from $5 to $7 per licensee; and (6) establish a CE conference fee of $100 to be paid by the CE provider to the accrediting agency. [16:1 CRLR 82]

BOP submitted the rulemaking file on these regulatory changes to DCA on April 22. After the DCA Director reviews the regulatory changes, they will be forwarded to OAL for review and approval.

Declaratory Decision Regulation. At its August 1998 meeting, BOP adopted section 1380.7, Title 16 of the CCR, entitled “Declaratory Decisions.” Government Code section 11465.10 et seq., part of the state’s Administrative Procedure Act, permits BOP to issue a declaratory decision, in effect an advisory opinion concerning assumed facts submitted by an interested party. Proposed section 1380.7 states that no decision or opinion issued by BOP is a declaratory decision unless the decision or opinion specifically states that it is a “declaratory decision.” [16:1 CRLR 83] The Board submitted the rulemaking file on this proposed change to DCA on March 2; thereafter, it will be reviewed by OAL.

Citation and Fine Regulation. Also at its August 1998 meeting, the Board voted to amend section 1397.51, Title 16 of the CCR, which identifies all statutes and regulations the violation of which is grounds for a citation and fine under Business and Professions Code section 125.3. The amendment to section 1397.51 would allow the Board to issue a citation and fine to supervisors who fail to supervise as required by the Board’s statute and regulations, and to licensees for failure to complete CE requirements. [16:1 CRLR 83] The Board submitted the rulemaking file on this proposed change to DCA on March 2; thereafter, it will be reviewed by OAL.

Board Amends Disciplinary Guidelines

At its March 6 meeting, BOP amended its disciplinary guidelines, which it has formulated to provide guidance to its licensees, the deputy attorneys general who prosecute its disciplinary cases, the administrative law judges who preside over its disciplinary hearings, and the Board itself in making final disciplinary decisions on the type and range of penalties considered appropriate for given violations of BOP’s practice act or regulations. The disciplinary guidelines also
include standard terms and conditions of probation. Section 1397.12, Title 16 of the CCR, currently requires the Board to consider the July 1, 1996 version of its disciplinary guidelines in making enforcement decisions.

The March 6 changes, which became effective on April 1, delete actual suspension as a minimum penalty for violation of several BOP statutes and require the use of a billing monitor for violations which involve fiscal improprieties.

Pursuant to Government Code section 11425.50(e), BOP may not base disciplinary decisions on the April 1 version of its disciplinary guidelines until it amends section 1397.12; at this writing, the Board has not yet published notice of its intent to revise that provision.

**LEGISLATION**

SB 809 (O’Connell), as introduced February 25, would impose a statute of limitations on the filing of Board disciplinary actions. SB 809 would require the Board to file an accusation against a licensee within three years from the date the Board discovers the alleged act or omission that is the basis for the accusation, or within seven years from the date the alleged act or omission occurred, whichever is first. This requirement would not apply, however, if the accusation alleges the procurement of a license by fraud or misrepresentation. The bill would apply to all accusations pending and unresolved on January 1, 2000, and all accusations filed thereafter. The bill is based on a similar requirement imposed on the Medical Board by AB 2719 (Gallegos) (Chapter 301, Statutes of 1998). [16:1 CRLR 57] [S. Floor]

SB 1308 (Committee on Business and Professions), as amended April 14, would amend section 27 of the Business and Professions Code and specifically require BOP to provide information concerning the status of its licensees on the Internet, including information on license suspensions, revocations, and other related enforcement action taken by the Board. The disclosed information would not include personal information (such as home address and home telephone number of the practitioner).

SB 1308 would also include BOP within Business and Professions Code section 800, and require BOP to maintain a “central file” with information on its licensees. The “central file” would contain an individual historical record for each licensee with respect to criminal convictions, malpractice judgments or settlements requiring the licensee or his/her insurer to pay any amount of damages in excess of $3,000, any consumer complaints (except those which are found to be without merit), and any disciplinary information reported to BOP by psychologist peer review bodies. The contents of a licensee’s central file which are not public records under any other provision of law would be kept confidential, except that a licensee (or his/her counsel or representative) would have the right to inspect and copy his/her complete file except for records that may disclose the identity of an information source.

Finally, this bill provides that attorneys from the Health Quality Enforcement Section of the Attorney General’s Office would continue to represent the Board in disciplinary actions. [S. Appr]

**AB 400 (Lempert),** as introduced February 12, would amend Business and Professions Code section 2914 and require, after January 1, 2006, each applicant for licensure in psychology to have completed the required doctoral degree at the University of California, the California State University, or at an institution accredited by an accrediting agency recognized by the U.S. Department of Education (collectively, “accredited” institutions). Under current law, applicants who have completed their doctorates at an accredited institution or one which is not accredited but has been “approved” by the Board or the state Bureau for Private Postsecondary and Vocational Education (BPPVE) are eligible for licensure. After January 1, 2006, applicants who graduated from “approved” (but not “accredited”) institutions would no longer be eligible for psychologist licensure in California. The bill would also—effective January 1, 2006—eliminate BOP’s ability to deem a doctoral program in a field other than psychology, education psychology, or education with a specialization in psychology as equivalent to those degrees for purposes of licensure eligibility.

CPA is sponsoring AB 400. According to CPA, California is the only state in the United States that allows graduates of unaccredited institutions to be licensed as psychologists. CPA believes the bill is necessary to bring California into conformance with the rest of the nation and to prevent discrimination against California-licensed psychologists who are graduates of approved schools. Passage of AB 400 would eventually allow California to become a member of the ASPPB’s Agreement of Reciprocity. Membership in the agreement would allow California licensees to more freely practice in other states. At its March 6 meeting, BOP declined to take a position on this bill. [A. Health]

**AB 1144 (Aanestad),** as introduced February 25, would require BOP to encourage institutions offering doctorate programs in psychology to include education and training in geriatric pharmacology. The bill would also require the Board to encourage licensed psychologists to take continuing education courses in geriatric pharmacology. The bill is intended to clean up confusion created by SB 983 (Polanco and Rainey) (Chapter 822, Statutes of 1998) (see MAJOR PROJECTS). [A. Floor]

**SB 125 (Haynes),** as amended March 17, would prohibit the Board of Behavioral Sciences from utilizing any type
of oral examination as a condition of licensure as a clinical social worker or marriage and family therapist, except as specified, and delete the prescribed fees for the oral examination. Although this bill does not directly affect BOP or its licensees and applicants, the Board is closely monitoring the progress of the bill. BOP is opposed to the elimination of its oral examination as a requirement for licensure of psychologists in California. [S. B&P]

SB 433 (Johnson), as amended April 20, would require court-connected and private child custody evaluators to complete a described domestic violence training program and comply with other requirements. It would also require the Judicial Council to formulate a statewide rule of court by January 1, 2002, that establishes education, training, and licensure requirements for court-connected and private child custody evaluators and requires child custody evaluators to declare under penalty of perjury that they are currently licensed and meet all other requirements of the rule. Finally, the bill would require, on and after January 1, 2005, that each child custody evaluator be a licensed physician who devotes a substantial portion of his/her time to the practice of psychiatry, a psychologist, a marriage and family therapist, or a licensed clinical social worker, or to be proposed by or stipulated to by the parties and consented to by the court.

According to the author of SB 433, many child custody evaluators are not licensed professionals. This anomaly, the author and proponents of the bill state, has wreaked havoc in the lives of many families who have used private child custody evaluators who have never trained in the field, who are not held accountable for incompetent handling of a case, or who are not disciplined for unprofessional conduct. This bill, it is hoped, would rein in all the unlicensed and inexperienced private child custody evaluators by prescribing and mandating their training and, in time, requiring them to have a professional license related to the issues prevalent in child custody cases. BOP supports this bill as “a good first step,” noting that child custody matters are currently the most common subject of BOP consumer complaints. [S. Appr]

AB 794 (Corbett), as amended April 27, would clarify the requirements for Board licensees whose clients’ records are subpoenaed in civil litigation. Among other things, the bill would prohibit a licensee from restricting the hours for copying records during normal business hours or requiring that specific appointments be made to copy records; exempt organizations with ten or fewer employees, permitting them to limit the hours for inspection or copying to any continuous four-hour period on each business day; provide that a client waives the right to object to the release of personal or employment records if his/her attorney signs a written authorization, on the client’s behalf, providing for the release of the records; and provide that deposition officers are not liable for the release of a consumer’s personal or employment records if such officers do not receive proper notice of the consumer’s motion to quash a subpoena duces tecum, as required by law. [A. Floor]

LITIGATION

On January 7 in National Association for the Advancement of Psychoanalysis v. California Board of Psychology, No. C-97-3913, the U.S. District Court for the Northern District of California granted BOP’s motion to dismiss the third amended complaint filed by the National Association for the Advancement of Psychoanalysis (NAAP) and some of its individual members. NAAP is a group of professional psychoanalysts which contends that California’s psychology licensing laws violate the first and fourteenth amendment rights to freedom of speech, travel, religion, and association of its members.

Business and Professions Code section 2902(c) requires anyone holding him/herself out as a “psychoanalyst” or offering “psychoanalysis” to be licensed as a psychologist by the Board. The individual plaintiffs are psychoanalysts who either live in California and wish to practice psychoanalysis here, or live in other states but intend to move to California and practice psychoanalysis; none of the individual plaintiffs are licensed by the Board as psychologists, nor has any plaintiff applied for licensure.

Plaintiffs claimed that because psychoanalysis consists primarily of expressive conduct protected by the first amendment’s free speech guarantee, any state licensing scheme which restricts that guarantee should be subject to “strict scrutiny.” The court rejected this argument, holding that psychoanalysis is no different from other professions that rely heavily on communication as a tool of the trade. The court stated that regulation of these professions is within the police power of the state, and analyzed the licensing requirement under the “rational basis” test: A licensing statute will be struck down only if there is no rational connection between the challenged statute and a legitimate government objective.

Relying on Cornwell v. California Board of Barbering and Cosmetology, 962 F.Supp. 1260 (S.D. Cal. 1997), plaintiffs further alleged that the California psychology licensing statute bears no rational relationship to the practice of psychoanalysis. In Cornwell, plaintiffs challenged the validity of a California statute requiring those who practice African hair braiding to be licensed as cosmetologists, which in turn requires completion of a 1,600-hour course which is “largely irrelevant” to African hair braiding. The NAAP court rejected that argument, stating that “this is not a case where plaintiffs are being squeezed into a licensing category that may not fit. The California legislature has expressly considered regulation of psychoanalysis and set forth the qualifications for practicing psychoanalysis in the state.”
Because "plaintiffs have failed to allege any reason why California's licensing laws are not rationally related to the legitimate state interest of protecting the health and safety of California citizens," the court dismissed plaintiffs' complaint with prejudice for failure to state a claim upon which relief can be granted. At BOP's March 5 meeting, DCA legal counsel Dan Buntjer advised the Board that he expects NAAP to appeal the district court's ruling.

In Trear v. Sills, 69 Cal. App. 4th 1341 (Feb. 16, 1999), a case of first impression, the Fourth District Court of Appeal held that the professional duty of a therapist does not extend beyond an adult patient to the patient's parent.

James Trear brought an action for professional negligence against his stepdaughter's therapist, Judith Sills. Trear claimed that Sills implanted the false idea in his stepdaughter's head that Trear had sexually abused her. Trear's stepdaughter, Kathleen Searles, was adopted in 1957 when she was twelve years old. Searles sued Trear in 1992, claiming he had sexually abused her during her childhood years, but that she had no memory of it until 1991. Sills diagnosed Searles as suffering from "body and cell memories" of childhood sexual abuse from age six months, and encouraged Searles to file suit against her stepfather. In April 1994, Trear sued Sills for professional negligence, alleging that had she exercised reasonable care she would have foreseen the harm to him resulting from the diagnosis, and she should be liable for that harm.

Documenting the controversy which swirls around the so-called "recovered memory syndrome," and distinguishing this matter from cases in which a patient sues his/her own therapist or in which the therapist voluntarily assumes some duty toward the parent of a patient, the Fourth District held that "absent agreement, a psychotherapist has no duty to the parent of an adult patient regarding allegedly false recovered memories of childhood sexual abuse." The court also noted that imposing a duty toward a patient's parent would require the therapist to "serve two masters"—"it would subject the therapist to inherently conflicting incentives, to the detriment of the patient.... A duty to a potential abuser affords the therapist no 'leeway' in deciding whether the patient really was abused: It would put the therapist in the position of a jury called upon to make a determination according to well-established and predetermined rules of evidence, rather than as a 'helping' professional—except that, unlike judges and juries, the therapist would face personal liability if the determination were wrong. Either way."

The court also determined that Sills was not liable under several other theories advanced by Trear, including intentional infliction of emotional distress, barratry, abuse of process or conspiracy to commit abuse of process, and malicious prosecution.

Treas has filed a petition for review in the California Supreme Court.

RECENT MEETINGS

At its January 15 meeting, the Board elected Judith Janaro Fabian, Ph.D., as Board President by a unanimous 8-0 vote. BOP also selected Martin Greenberg, Ph.D., as Vice-President, and reelected public member Mary McMillan as Secretary.

At BOP's March 6 meeting, Dr. Fabian reported on the statistics for the October 1998 written examination (the EPPP) and the January 1999 oral examination. The EPPP had a pass rate of 54%, and the oral examination had a pass rate of 51.5%. These pass rates are consistent with previous results.

FUTURE MEETINGS

• May 14-15, 1999 in Los Angeles.
• August 13-14, 1999 in San Jose.
• November 5-6, 1999 in San Diego.
• March 3-4, 2000 in Sacramento.
• May 12-13, 2000 in Los Angeles.
• August 18-19, 2000 in San Francisco.
• November 3-4, 2000 in San Diego.