The Respiratory Care Board (RCB) is a consumer protection agency within the state Department of Consumer Affairs (DCA). Pursuant to the Respiratory Care Practice Act, Business and Professions Code section 3700 et seq., and its regulations in Division 13.6, Title 16 of the California Code of Regulations (CCR), RCB licenses and regulates respiratory care practitioners (RCPs). These health care professionals regularly perform critical lifesaving and life support procedures prescribed by physicians that directly affect major organs of the body. RCPs provide direct patient care in the hospital or home care setting; their patients may be suffering from lung cancer, emphysema, asthma, or cystic fibrosis, or may be premature infants whose lungs have not fully developed.

RCB is charged with examining and licensing qualified RCPs, setting standards for the practice of respiratory care in California, inspecting hospitals and other facilities in which respiratory care is delivered, investigating alleged wrongdoing by licensees, and taking appropriate disciplinary action, including license suspension or revocation, in order to ensure public health and safety.

The nine-member Board consists of four RCPs, four public members, and one physician. Three members are appointed by the Governor, three are appointed by the Senate Rules Committee, and three by the Assembly Speaker. RCB is staffed by 14 people. RCB is financed by licensing fees and receives no allocation from the state general fund.

In January, the Board welcomed Randal Clark, RCP, and Eugene Mitchell as new Board members. At its April meeting, Richard L. Sheldon, MD, joined the Board as its new physician member; Dr. Sheldon was appointed to replace Peter Margand, MD, whose term expired.

MAJOR PROJECTS

RCB Evaluates Enforcement Program and Priorities

At its January 21 meeting, RCB held an enforcement seminar to enable its members to evaluate its disciplinary priorities and procedures in the wake of the 1998 report of the Joint Legislative Sunset Review Committee (JLSRC) following its review of the Board in 1997. In that report, the JLSRC noted RCB's recent budget problems and instructed it to "consider restructuring and curtailing its enforcement program and reducing discretionary activities. The high costs associated with conducting rigorous background checks, and disciplining applicants and licensees for prior criminal violations, raise the question of whether they should be continued....To balance its budget, the Board needs to strike a balance between proactive enforcement efforts and cost containment." [16:1 CRLR 85-86]

The Board heard from speakers who participate in the various steps of the disciplinary process. Dolly Portman of RCB's staff explained the Board's complaint receipt and processing procedures; Steve Robards, Deputy Chief of DCA's Division of Investigation (DoI) described the investigative process; Deputy Attorney General Mara Faust explained the steps her office takes in preparing and filing the formal accusation and in prosecuting the case in an evidentiary hearing; Administrative Law Judge René Román from the Office of Administrative Hearings described the hearing process; and DCA legal counsel Dan Buntjer explained the role of the Board in making the final disciplinary decision. RCB also heard a presentation from Julie D'Angelo Fellmeth of the Center for Public Interest Law (C PIL) on the importance of its disciplinary system to consumer protection.

RCB Executive Officer Cate McCoy and Steve Scott of the Department of Justice's Bureau of Forensic Services also explained the history of the Board's policy toward substance abuse, which proved somewhat controversial with the JLSRC. When the Board was created in 1982, it was required to "grandparent" into licensure about 10,000 individuals without waiting for receipt of fingerprint clearances. "Grandparented" applicants needed only to demonstrate 800 hours of relevant experience in order to be licensed.

Under the "grandparenting" process, 300 individuals with serious criminal histories were licensed, and RCB spent a considerable amount of time between 1985 and 1989 revoking some of these licenses. Thereafter, RCB instituted a fingerprint requirement: Applicants must submit fingerprints with their licensure application and disclose prior arrests and convictions under penalty of perjury on their application forms. RCB checked applicants' fingerprints with the state Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI), which compile "rap sheets" on individuals who are arrested or convicted of crimes.

However, in 1991, the Board received a report from a hospital which had admitted an RCP after a traffic accident; the RCP had been transported to a hospital because he was under the influence of alcohol and drugs. A police officer discovered medications, which the licensee had diverted from his patients, on the floor of his car. The RCP (whose license...
was later revoked) had five previous driving under the influence (DUI) charges that had never been reported to RCB through fingerprint background checks or other sources. Subsequently, the Board discovered that California DUI convictions are not routinely reported on DOJ’s “rap sheet” because they are Vehicle Code (rather than Penal Code) violations; DUI convictions appear on DOJ’s rap sheet only if they cause injury or death. Thus, RCB began to check Department of Motor Vehicles (DMV) records for information on its applicants, and found that a substantial number had DUI convictions. The Board later voted to incorporate routine DMV background checks into its precurrence application process. Further investigation by RCB of its applicant pool revealed that 30% of the applicants investigated had either criminal conviction or substance abuse histories. The most common criminal convictions include substance abuse (possession/sale), driving under the influence of alcohol or drugs, battery, and sexual misconduct. Exacerbating this problem for the Board is the fact that 27% of RCP applicants lie on their application forms about their criminal histories.

McCoy explained that, because of this high percentage of applicants with criminal histories and the unreliability of the background check system, RCB took several steps to make it easier to deny or—in case information concerning criminal convictions does not surface until a license is issued—revoke a license for past criminal activity, including drug- and alcohol-related offenses. In 1987, the Board sponsored legislation adding section 3750.5 to the Business and Professions Code, which authorizes RCB to deny, suspend, or revoke a license for conviction of any criminal offense involving the consumption or self-administration of alcohol or certain controlled substances. Subsequent 1992 legislation authorizes RCB to deny a license “whenever it appears that the applicant may be unable to practice his or her profession due to mental illness or chemical dependency.”

Throughout the early 1990s, the Board remained concerned about the prospect of issuing an unrestricted license to individuals with DUI-related convictions, and considered whether to issue probationary licenses to applicants with such convictions. During debate on the issue, RCB members advanced several justifications for their concern. First, a DUI conviction is just that—a criminal conviction, either based on a plea or entered after a trial in which the licensee has had an opportunity to be represented by counsel. A DUI conviction is not merely an arrest or a charge; it is a conviction of a crime which indicates (at the very least) a serious lapse in judgment, and it has not been pled down to reckless driving or some other charge. Second, statistics indicate that a single DUI conviction is probably representative of numerous other incidents of undetected, unapprehended driving under the influence. McCoy described these RCPs as “loaded guns” who pose too great a risk to patients. Third, the practice of respiratory therapy is stressful, calls for extraordinary skill and judgment, and exposes licensees to readily available narcotics. According to the Board’s description of this debate in its 1997 sunset report, in a “worst-case scenario wherein an applicant with a DUI was issued an unrestricted license and later diverted drugs which resulted in injury to a patient,...the Board would have failed in its consumer protection responsibilities. It was considered far better to give a probationary license which would allow the applicant—who has never worked unsupervised in the field—the opportunity to establish a support system within the community to prevent relapses.”

After lengthy consideration of these issues and consultation with a psychiatrist who specializes in addiction medicine, the Board in 1994 formally voted to require the issuance of a probationary license to applicants with DUI convictions within specified timeframes. RCB added this requirement to its Disciplinary Guidelines, to which it adheres in making disciplinary decisions pursuant to section 1399.374, Title 16 of the CCR. Under these guidelines, if an applicant has suffered one DUI conviction within three years, or two or more DUI convictions within a five-year period, the applicant will be required to submit (at his/her own expense) to a complete diagnostic evaluation by a Board-approved evaluation program which focuses on chemical dependency. After completion of the evaluation, the applicant may be issued a probationary license on terms and conditions dictated by the results of the evaluation. At the very least, the applicant is required to abstain from all alcohol and/or drug use for one year and submit to random bodily fluid testing for that period.

Following McCoy’s explanation of the genesis of RCB’s policy, DCA legal counsel Dan Buntjer noted that the Board’s rules do not impose an automatic suspension of the license for one DUI conviction. Under the Administrative Procedure Act, the licensee is entitled to a hearing and an opportunity to explain the circumstances of the DUI and any rehabilitative steps in which the licensee is already involved. Some Board members expressed concern that RCB’s policy toward substance abuse is apparently the most stringent among the health care provider licensing agencies in California, and wondered whether it is fair to subject RCPs to such a strong policy when physicians and other health care providers are treated more leniently. CPIL’s Julie D’Angelo Fellmeth urged the Board to reaffirm its strong stance in favor of consumer protection. According to Fellmeth, “you should not lower your standards to match those of other boards; those other boards should raise their standards to match yours.”

At the full Board meeting on January 22, RCB members stated that the enforcement seminar had been extremely helpful. RCP member Randal Clark noted that the Board’s enforcement statistics for the first half of fiscal year 1999–2000 indicate a lower level of enforcement activity in many
categories than in previous years (see RECENT MEETINGS). Board President Kim Kruser, RCP, explained that RCB has been publicizing its strong enforcement program for several years, and that this publicity is now having a deterrent effect. Since the Board has implemented its disciplinary guidelines and begun to issue probationary licenses, the number of repeat offenders has dropped. Additionally, the Board’s use of its citation and fine authority has resulted in a decline in the number of cases forwarded to the Attorney General’s Office for formal prosecution. Kruser commented that RCB’s enforcement role has served the public well.

RCB Updates Strategic Plan

At its January 21 and April 9 meetings, RCB updated its 1999 Strategic Plan which annually sets forth the objectives, goals, and direction of the Board in order to aid in ensuring its effectiveness and responsiveness to consumers.

In the Strategic Plan, RCB reiterated its mission statement: “to protect and serve the consumer by administering and enforcing the Respiratory Care Practice Act and its regulations in the interest of the safe practice of respiratory care.” RCB identified several agencies and groups that have a continued stake and vital interest in the ongoing functions and responsibilities of the Board, including consumers, respiratory care patients and their families, RCPs, respiratory care students and applicants, employers, Board members, staff, state and federal agencies, contracted agencies, and the legislature. The Board also identified its 1999 goals and objectives in the areas of enforcement, licensing, administration, and public relations. In its action plan for 1999, the Board pledged to: (1) reestablish the regular publication of a newsletter; (2) conduct an up-to-date occupational analysis of the respiratory care profession; (3) implement and optimize associated technology to conduct Board business and communicate with the public; (4) implement an automated tracking and billing system for probation monitoring and cost recovery; and (5) revise its disaster recovery system to archive and store historical licensee information as soon as possible.

Enhanced Educational Requirements Required in July 2000

At its January 22 meeting, RCB explained and clarified, for the benefit of new Board members and licensure applicants, the enhanced educational requirements for RCP licensure that take effect on July 1, 2000. Under existing law, an RCP applicant must be at least 18 years of age, must have completed a Board-approved respiratory care training program and passed an examination, and must not have committed acts or crimes constituting grounds for denial of a license.

Following two years of research, debate, and public hearings, RCB adopted new sections 1399.330 and 1399.331, Title 16 of the CCR, in late 1997. These sections require, effective July 1, 2000, that applicants for initial RCP licensure have attained an associate of arts (AA) degree. Although the AA degree may be issued in any discipline, it must contain at least 42 semester units in basic sciences, clinical sciences, and respiratory care curricula; further, 800 hours of student clinical practice are required. Applicants must have attained a grade point average of “C” or better in all work attempted in the curriculum upon which the degree is based, and must have attained a “C” or better in each course in the respiratory care curriculum and its prerequisites.

The Board increased its educational requirement for a number of reasons, including advances in the profession and in the procedures performed by RCPs; an increase in the number of disciplinary actions against RCPs who have not attained an AA degree; challenges from other professions questioning the ability of RCPs to perform complex tasks; revisions to the Code of Federal Regulations relating to respiratory care; and amendments to the Clinical Laboratory Improvement Act which require individuals who perform complex testing (including blood gas analysis, a mainstay procedure for RCPs) to have AA degrees.

RCB has published a flier entitled Education Requirements—July 1, 2000, which is available from the Board’s office.

LEGISLATION

A B 1234 (Shelley), as amended April 27, would require any regulatory board subject to the Bagley-Keene Open Meeting Act, including RCB, to publish notice of its regular meetings on the Internet, and would require the agency’s written notice of the meeting to include the address of the Internet site where required notices are made available. [A. Appr]

LITIGATION

RCB continues to handle the fallout from the so-called “Angel of Death” case, in which California RCP Efren Saldivar first admitted—and then retracted—that he had hastened the deaths of dozens of patients at Glendale Adventist Medical Center between 1989 and 1998. Saldivar initially confessed to killing 40–50 patients by lethal injection, depriving ventilator patients of oxygen, and failing to provide medical care when needed. Although Saldivar has not yet been charged with any crime, RCB revoked his license in May 1998. [16:1 CRLR 87]

On April 2, Executive Officer Cate McCoy filed an accusation against Robert Baker, licensed as an RCP in California since 1985, alleging negligence, corrupt acts, and unprofessional conduct. The accusation asserts that Baker improperly failed to report to the appropriate authorities his observation of controlled substances (including morphine) and dangerous devices (including a powerful magnet which is used to alter...
and fine authority), RCPs would commonly work for several years with expired licenses, and the Board spent thousands of dollars to discipline those licensees; the $1,000 fine is intended to deter violations and save the Board's precious resources. McCoy also stated that the Board gives licensees who renew an expired license 150 days in which to pay the $1,000 fine, rather than demanding immediate payment. By consensus, the Board agreed not to seek amendment of the mandatory $1,000 fine language.

Also on April 9, RCB announced that it plans to expand its website within DCA's Information Services Menu and that an Interdepartmental Agency Contract has been signed to start the process in motion. Additionally, and consistent with its Strategic Plan (see above), the Board's Professional and Community Relations Committee released a draft of RCB's newsletter for comments; at this writing, the Board hopes the final version will be available for mailing by June.

At its April 9 meeting, RCB discussed some concerns over the transition to computerized testing due to begin on January 1, 2000. [16:1 CRLR 88–89] As a result of these concerns, the Board plans to meet with representatives of the National Board for Respiratory Care (NBRC) in June to seek information regarding the new testing system. In addition to this meeting, RCB is working Dr. Norman Hertz, the manager of DCA's Office of Examination Resources, to discuss the possibilities of enhancing the Board's current competency exam to augment the licensing exam. At this writing, further discussion of this issue is scheduled for the Board's July meeting.

Also, at its April meeting, the Board examined its enforcement statistics for fiscal year 1997–98 and for the first eight months of fiscal year 1998–1999. During 1997–98, the Board received 135 complaints (including reports and rap sheets), opened 135 investigations and forwarded 17 to DCA's Division of Investigation, filed 77 accusations, and took a total of 102 disciplinary actions (83 of which were settled by stipulated agreement). RCB requested and was awarded $293,687 in cost recovery; the Board has collected $184,553 from disciplined licensees. The statistics for first eight months of 1998–99 indicate a lower level of enforcement activity (see MAJOR PROJECTS). As of February 28, RCB had received 63 complaints, opened 63 investigations and forwarded 11 to DofI, filed 42 accusations, and taken a total of 55 disciplinary actions (27 of which were stipulated). RCB has been awarded $135,567 in cost recovery and has collected $109,237.

Also in April, staff briefed the Board on its latest examination statistics. A total of 149 applicants took the March 1999 exam. Of those, 97 passed (a 65% pass rate) with 46 test takers failing the exam (a fail rate of 31%). At the November 1998 exam, 119 of 217 applicants passed (a 55% pass rate), and 88 failed (a 40% fail rate).

Finally, the Board announced at its April meeting that Executive Officer Cate McCoy is the first recipient of the Public Protection Award by the Federation of Associations of Regulatory Boards. In its award letter, the Federation noted that it selected McCoy for "her many contributions and initiatives to protect the public," both as RCB's Executive Officer for the past nine years and, prior to that, as the executive director of the New Jersey boards of professional engineers and land surveyors and of professional planners.

**FUTURE MEETINGS**

- July 16, 1999 in Sacramento.
- November 12, 1999 in San Diego.