



The Fifth District concluded by reiterating its "very narrow" holding: The court is not prohibited, by any explicit or implicit legislative command contained in those specific statutes cited by the Association, from choosing to maintain a record of general civil proceedings by means of electronic recording devices where neither the court nor any party requests that a verbatim record be taken by an official shorthand reporter pursuant to the provisions of section 269. Accordingly, the Fifth District reversed the judgment and directed the trial court to enter an order denying the Association's petition for writ of mandate and to enter judgment for the court.

The Fifth District's holding did not address the broader issue still pending in *California Court Reporters Association v. Judicial Council of California*, No. A066471 (First District Court of Appeal). In that matter, CCRA has challenged the legality of California Rule of Court 980.3, which allows jurisdictions to replace court reporters with tape recorders or video cameras when "funds available for reporting services are insufficient to employ a qualified person...at the prevailing wage." Following vigorous litigation in Alameda County Superior Court just prior to the rule's effective date of January 1, 1994, retired Fourth District Court of Appeal Justice Robert Staniforth (who presided because the entire Alameda County court system recused itself from hearing the case) ruled that the Council acted within its constitutionally-mandated authority in adopting the rule. Justice Staniforth found that applicable statutes do not specifically require that court reporters be the "sole means" for making verbatim records of superior court proceedings. [14:2&3 CRLR 106-07; 14:1 CRLR 83] CCRA appealed, and the case is still pending in the First District.

RECENT MEETINGS

At its October 14 meeting, CRB discussed the disclosure of citations and fines; staff is currently seeking direction on when to make public the fact that the Board has issued a citation or fine against a licensee. Some boards make this information immediately available to the public, while others wait until the appeal process has been concluded. The Board instructed its legal counsel to research the matter and report back at a future meeting. At its November 10 meeting, CRB was advised that it should disclose citations and fines once they are issued and time for appeal has elapsed; the Board asked staff to draft a policy for consideration at its next meeting.

Also at its October 14 meeting, CRB discussed the issue of informal conferences regarding citations and fines. Three main questions exist: whether legal counsel should be present with the Executive Officer at the informal conference; whether the conference should be recorded; and whether the licensee should be informed that anything said may be used against him/her in the future. The Board generally agreed that since the conference is informal, it should not be recorded, nothing should be used against the licensee, and the Executive Officer should have legal counsel present only if the licensee does.

Also on October 14, Executive Officer Richard Black urged CRB to specify the criteria to be used in determining whether a state exam is comparable to the California exam; Black suggested that CRB require that the other state have a written knowledge test and that the speed and level of proficiency required to pass the machine exam meet or exceed California requirements. CRB also heard from a member of the Idaho CSR board, who stressed recent improvements to the Idaho exam and requested acceptance of the Idaho license as qualification for taking the California exam. [14:4 CRLR 99] The Board decided to review all material available on other state exams and licenses for future consideration of examination reciprocity.

At CRB's November 10 meeting, staff presented the Board with possible criteria for granting exam reciprocity. For example, CRB could require that there be a written examination of at least 50 items; for the machine portion of the test, the national RPR speeds and accuracy rate must be used; and there must be at least one ten-minute, two-voice dictation at 200 words per minute with a score of 97.5% accuracy required, or three five-minute sessions at speeds slower than 160 words per minute, and which must contain one five-minute, two-voice test of at least 200 words per minute with 97.5% accuracy required on all segments. Based on these criteria, staff recommended that CRB grant reciprocity to Georgia (A certificate only), Hawaii, Idaho, Michigan, Missouri, Nevada, Mexico, Texas, and Utah; CRB directed staff to draft regulatory changes to implement this policy.

Successful completion of the State Hearing Reporter Exam administered for stenographers/reporters who work in non-legal settings is currently accepted as qualification for the CSR exam. At its October 14 meeting, the Board responded to a public request to eliminate this means of qualification due to the lack of a written portion and the extremely high pass rate

(95%). Executive Officer Richard Black urged the Board not to take action on the request due to a probable lack of legislative support; no action was taken by the Board.

CRB also addressed the issue of suspected exam subversion, noting that the most likely way to cheat on a CSR exam would be to tape record it; enforcement of any policy would probably involve complex Fourth Amendment issues related to search and seizure. CRB directed its legal counsel to research the matter for future discussion.

FUTURE MEETINGS

January 27 in Burlingame.

February 25 in Newport Beach.

March 11 in Los Angeles.

May 11 in San Francisco.

BOARD OF DENTAL EXAMINERS

Executive Officer:
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The Board of Dental Examiners (BDE) is charged with enforcing the Dental Practice Act, Business and Professions Code section 1600 *et seq.* This includes establishing guidelines for the dental schools' curricula, approving dental training facilities, licensing dental applicants who successfully pass the examination administered by the Board, and establishing guidelines for continuing education requirements of dentists and dental auxiliaries. The Board is also responsible for ensuring that dentists and dental auxiliaries maintain a level of competency adequate to protect the consumer from negligent, unethical, and incompetent practice. The Board's regulations are located in Division 10, Title 16 of the California Code of Regulations (CCR).

The Committee on Dental Auxiliaries (COMDA) is required by law to be a part of the Board. The Committee assists in efforts to regulate dental auxiliaries. A "dental auxiliary" is a person who may perform dental supportive procedures, such as a dental hygienist or a dental assistant. One of the Committee's primary tasks is to create a career ladder, permitting continual advancement of dental auxiliaries to higher levels of licensure.

The Board is composed of fourteen members: eight practicing dentists (DDS/DMD), one registered dental hygienist (RDH), one registered dental assistant (RDA), and four public members. On Sep-



tember 29, Assembly Speaker Willie Brown appointed Linda Lucks as a new public member on BDE; Lucks, who served two terms as a public member of the Board of Psychology, is the principal of a Los Angeles area community relations consulting firm. In November, the term of dentist Gloria Valde expired, leaving BDE with one DDS/DMD vacancy.

MAJOR PROJECTS

CDA Fails in Bid to Modify Infection Control Guidelines. In June, the Office of Administrative Law (OAL) approved BDE's adoption of new section 1005, Title 16 of the CCR, which establishes infection control standards for licensees to follow in order to minimize the transmission of blood-borne pathogens in health care settings. [14:4 CRLR 53; 14:2&3 CRLR 53; 14:1 CRLR 42] Following OAL's approval, the dental community expressed general opposition to the mandatory protocols, which many practitioners view as excessive and extremely costly. The California Dental Association (CDA) filed with BDE a petition to repeal section 1005 and adopt a modified version in its place. The petition, which was signed by almost 200 dentists, asserted that section 1005's protocols are not minimum standards but high standards with prohibitive costs for dental practitioners which are not being exacted from other health care providers. The petition further alleged that the regulation as adopted fails to meet OAL's standards for the promulgation of regulations.

BDE held a special informational hearing on the matter on October 15, and on October 25 denied the petition. According to BDE, it solicited and considered comments from all interested parties prior to adopting the language contained in section 1005; BDE also stated that OAL's approval of section 1005 negates CDA's claim that certain standards were not met.

Onsite Inspection of Conscious Sedation/Anesthesia Permittees. Following a public hearing on September 23, BDE adopted section 1043.5, Title 16 of the CCR, which provides for the assessment of a penalty to a conscious sedation licensee for cancelling a scheduled onsite inspection and evaluation. [14:4 CRLR 53; 14:2&3 CRLR 53] Existing law authorizes BDE to require such onsite inspections of a conscious sedation/anesthesia permittee as well as the facility, equipment, personnel, and procedures employed by the licensee as a condition to permit renewal. As adopted, the new regulation focuses on fee forfeiture after the second and third cancellations of a scheduled inspection and allows for automatic denial or revocation of a conscious seda-

tion/anesthesia permit upon a third cancellation. At this writing, BDE is awaiting OAL approval of section 1043.5.

Remedial Education Regulations. Following a November 4 public hearing, BDE adopted new section 1039, Title 16 of the CCR, which defines the exact nature of the remedial education required by AB 194 (Tucker) (Chapter 1299, Statutes of 1992) for licensure candidates who fail the skills examination three times. As adopted, the new regulation not only defines the course of study required to make an applicant eligible for re-examination, but also outlines the method by which an applicant for licensure can demonstrate to BDE successful completion of such coursework. [14:4 CRLR 54; 14:2&3 CRLR 53] At this writing, BDE is awaiting OAL approval of section 1039.

New Rules for Dental Examinations. At its September meeting, BDE discussed the contradictory and unclear language of various regulations relating to the administration of the dental licensure examination. On December 9, the Board published notice of its intent to adopt changes to sections 1007, 1008, 1035, 1035.2, 1036, and 1037, Title 16 of the CCR; these changes include amendments to and renumbering of these sections for the purposes of clarity.

The sections at issue deal primarily with the general administration of the exam and the manner in which the Board handles candidates who demonstrate either incompetence or unethical and inappropriate behavior during exam administration. Additionally, the proposed changes would renumber section 1007 as section 1030 and provide that an examinee may be dismissed from the exam for failing to comply with BDE's infection control regulations (see above). [14:4 CRLR 53] At this writing, BDE is scheduled to hold a public hearing on these proposed regulatory changes on January 26 in Los Angeles.

Proposed Changes in Dental Assistant Duties. In accordance with legislative mandate, BDE has reviewed the list of permissible functions for dental assistants (DAs). [14:4 CRLR 55] As part of its review, BDE determined that existing regulations do not allow DAs to cure restorative or orthodontic materials in an operative site with a light-curing device under direct supervision of a licensed dentist, or to examine orthodontic appliances under the general supervision of a licensed dentist.

On December 9, BDE published notice of its intent to amend sections 1085(b)(3) and 1085(c)(15), Title 16 of the CCR, which would expand the duties of DAs, as well as the settings in which those duties may be performed. The proposed amend-

ments would specifically authorize DAs to examine orthodontic devices under general supervision and cure restorative or orthodontic devices in an operative site with light-curing devices under direct supervision. At this writing, BDE is scheduled to hold a public hearing on the proposed amendment on January 26 in Los Angeles.

Future Rulemaking. At its November 3-4 meeting, BDE agreed to pursue regulatory language to clarify AB 2821 (Knight) (Chapter 400, Statutes of 1994), which authorized BDE to mandate continuing education (CE) coursework in specific areas of study as a condition to license renewal. [14:4 CRLR 54] BDE will also seek to delete dental administration as a course of study acceptable for CE purposes. Finally, BDE plans to adopt regulations allowing it to designate a representative to observe a third conscious sedation/anesthesia inspection and to set application processing timeframes for conscious sedation permits. At this writing, BDE has not published notice of these proposed actions in the *California Regulatory Notice Register*.

LEGISLATION

Future Legislation. At this writing, BDE is still seeking authors for its proposed changes to the Business and Professions Code. [14:4 CRLR 54] BDE plans to pursue the addition of new section 168 to the Business and Professions Code, which would help ensure that prescriptions for dangerous drugs are issued properly by requiring a dentist to perform an examination before prescribing such drugs. BDE also hopes to add new section 1700(e) to the Business and Professions Code, which would make it a misdemeanor for a licensee to practice dentistry while impaired by alcohol or drugs. Finally, BDE will seek the addition of new section 1680(g) to the Business and Professions Code, to require licensees to furnish records to the Board within 14 days of a written request from BDE. The Board has discussed language for these proposed bills, but has not yet found an author to introduce any of them.

LITIGATION

In *Ellenberger v. Espinosa, et al.*, 30 Cal. App. 4th 943 (Nov. 18, 1994), dentist James Ellenberger sued Jennie Espinosa, BDE, the state of California, and others for conspiracy to violate his federal civil rights and slander per se. The action was based on Espinosa's accusation and BDE's finding that Ellenberger was guilty of gross negligence and immorality in the practice of dentistry, despite a police investigation



which concluded that Ellenberger was innocent of similar criminal charges. The trial court dismissed the action. The Fourth District Court of Appeal affirmed, holding that the dentist is not entitled to pursue federal civil rights claims in this circumstance because the publication of defamatory statements does not violate the federal constitution, even if it may violate state defamation law; the Fourth District also found no evidence, nor any allegation, of any wrongdoing or impropriety with BDE's hearing. Accordingly, the court found that, as a matter of law, the defendants' conduct as pleaded is not the basis of a federal civil rights action, and cannot be the basis of a conspiracy to violate civil rights action.

Regarding the slander per se claim, the Fourth District found that the statements of Espinosa at BDE's administrative hearing were privileged under Civil Code sections 47 and 43.8, noting that to find otherwise would deter patients from expressing legitimate complaints regarding the services of health care professionals for fear that the accused practitioners would initiate defamation actions against them. Further, the Fourth District noted that truth is a complete defense to civil liability for slander; the court found that BDE's determination that Ellenberger had been grossly negligent and in violation of several sections of the Business and Professions Code indicated that there was truth in Espinosa's accusations. Accordingly, the court found that the facts failed to support any claim of slander per se.

RECENT MEETINGS

At its September 22-23 meeting, BDE reported that its citation and fine program is proving to be a cost-effective way to deal with minor violations. Also at its September meeting, BDE addressed the growing problem of delinquent licenses in California. Dr. David Gaynor of CDA suggested that the Board send a list of delinquent licensees to the major dental insurance providers in California to ensure that those practitioners with expired licenses will not receive payments for work performed without a license. Although the Board noted that the names of these dentists are a matter of public record and may be sent to insurance companies or otherwise published, some members were concerned with the feasibility and cost of such a practice. BDE established an ad hoc committee to consider the issue and report back at a future meeting.

At its November 3-4 meeting, BDE voted to change its traditional meeting schedule; the Board will now meet five times per year instead of six. BDE will still

meet every other month beginning in January except that there will be no meeting in July as that is when the state licensing examinations are given by the Board members on the Examination Committee. The Board noted that this abbreviated meeting schedule will reduce both the quantity and quality of time it can devote to public comment at each meeting.

Additionally, BDE voted to change the manner in which petitioner hearings are conducted (e.g., hearings on petitions for reinstatement or for modification or termination of license probation). In the past, petitioner hearings have been scheduled in conjunction with Board meetings at the request of a licensee. The Board must pay an administrative law judge (ALJ) and a deputy attorney general (DAG) to appear; BDE is not reimbursed by the petitioner if the petitioner fails to appear. Under the new plan, two extra days of meetings will be scheduled each year, one in northern California and one in southern California. These meetings will be for the sole purpose of hearing petitions and will be scheduled the day before a regular Board meeting. Under this plan, the ALJ and DAG can be scheduled and paid for a full day and will be available to conduct up to eight hearings per day. In this manner, the Board expects to save approximately \$2,000 annually in enforcement costs.

Also at the November meeting, BDE noted a 13% increase in the passage rate on the California dental exam; BDE attributed this improvement to the remedial education required by AB 194 (Tucker) (Chapter 1299, Statutes of 1992) for license applicants who fail the skills examination three times (see MAJOR PROJECTS).

FUTURE MEETINGS

January 26-27 in Los Angeles.
 March 10-11 in San Francisco.
 May 18-19 in Los Angeles.
 August 24-25 in San Francisco.
 November 2-3 in Los Angeles.

BOARD OF FUNERAL DIRECTORS AND EMBALMERS

Executive Officer:
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The Board of Funeral Directors and Embalmers (BFDE) licenses funeral establishments and embalmers. It registers apprentice embalmers and approves funeral establishments for apprenticeship

training. The Board annually accredits embalming schools and administers licensing examinations. BFDE inspects the physical and sanitary conditions in funeral establishments, enforces price disclosure laws, and approves changes in business name or location. The Board also audits preneed funeral trust accounts maintained by its licensees, which is statutorily mandated prior to transfer or cancellation of a license. Finally, the Board investigates, mediates, and resolves consumer complaints.

BFDE is authorized under Business and Professions Code section 7600 *et seq.* The Board consists of five members: two Board licensees and three public members. In carrying out its primary responsibilities, the Board is empowered to adopt and enforce reasonably necessary rules and regulations; these regulations are codified in Division 12, Title 16 of the California Code of Regulations (CCR).

MAJOR PROJECTS

Board Struggles for Survival. 1994 ended on a bizarre note for BFDE and the Cemetery Board: One board shut its doors, the other remained open by spending little money, and both looked to the Wilson administration or the legislature for a bailout from a move which cut off funding to both boards.

In the 1994-95 Budget Act signed by Governor Wilson on July 8, the state appropriated only six months' worth of funding to both BFDE and the Cemetery Board. The action was an attempt to force the restructuring of the boards and the state's regulation of the death services industry through SB 2037 (McCorquodale), which would have merged the boards effective January 1 and provided the rest of the needed 1994-95 funding to the merged board. However, the Assembly reversed the budget agreement in August by deleting the merger provision from SB 2037, and the Senate subsequently refused to concur in the Assembly's amendments—which killed SB 2037 and continuation funding for both boards. [14:4 CRLR 4, 55]

At BFDE's November 17 meeting, Executive Officer Richard Yanes reported that, in October, both BFDE and the Cemetery Board had requested a deficiency appropriation pursuant to section 27 of the 1994-95 Budget Act. Department of Finance Director Russell Gould informed Joint Legislative Budget Committee Chair Senator Mike Thompson of his intent to grant the requests. However, Senate Business and Professions Committee Chair Senator Dan Boatwright and others urged Senator Thompson to reject the requests