



for participating in a Board-sponsored state licensing examination item writing session. Following the hearing, BNHA adopted these changes without modification.

- Section 3152 provides for the approval of CE providers and courses. BNHA's proposal would provide that BNHA may, in lieu of conducting its own investigation, accept the findings of National Association of Boards for Nursing Home Administrators regarding CE courses and providers, and adopt those findings as its own. Following the hearing, BNHA adopted this change without modification.

- Section 3160 sets forth for the qualifications of a preceptor for AITs. As originally proposed, BNHA's changes would have provided that any licensed NHA may be approved to serve as a preceptor if the individual, among other things, has an active NHA license, has no disciplinary actions pending against his/her license, and is not on probation by the Board. CAHF and SAHF objected to the requirement that the preceptor candidate have no disciplinary actions pending against his/her license, commenting that a preceptor should not have his/her preceptor certificate revoked because of pending (*i.e.*, incomplete) disciplinary actions filed against his/her facilities as this abridges the preceptor's right to due process. The Board agreed to delete the disputed requirement and released the modified text on January 6 for an additional 15-day public comment period; if BNHA receives no adverse comments, the Executive Officer will adopt the language and forward the file to OAL.

- Section 3162 specifies the requirements for obtaining Board approval of an AIT program; the section provides that an approved AIT program shall include a minimum of twenty hours per week of supervised training and work experience in a nursing home. The Board's proposal would establish sixty hours as the maximum number of hours an AIT may work and train each week. Following the hearing, BNHA adopted this amendment without modification.

At this writing, all of the revisions adopted by BNHA await review and approval by DCA and OAL.

■ RECENT MEETINGS

At BNHA's December 7 meeting, Executive Officer Pamela Ramsey reported that DHS has agreed to the development of a memorandum of understanding (MOU) between DHS and BNHA regarding the timeframe within which DHS must provide citations and other disciplinary actions to BNHA; this MOU will be in lieu of BNHA pursuing legislation to effect-

ate these deadlines. [14:4 CRLR 86] Ramsey stated that the MOU is still in the draft stage and BNHA staff will continue to meet with DHS staff to further develop the document.

Also at its December meeting, BNHA noted that Dr. Norman Hertz of DCA's Office of Examination Resources will be conducting an occupational analysis (OA) of the AIT program. The Board agreed that the completion date for the OA should be January 8, 1996.

Also on December 7, the Board expressed concern that DHS does not always contact BNHA to verify the status of administrators' licenses. Over 350 NHAs with active licenses are delinquent in renewing them, and 80 of them have been delinquent for six months or longer. Executive Officer Ramsey reported that BNHA staff has prepared a statement to be used when delinquent licensees request that an "inactive" license be placed on "active" status. The statement declares under penalty of perjury that the licensee has not worked as a NHA in California since his/her license was put on inactive status. The Board voted to send a memo to DHS Assistant Deputy Director of Licensing and Certification Brenda Klutz to provide her with information on the Board's verification process.

■ FUTURE MEETINGS

February 16 in Los Angeles.
May 11 in Sacramento.
August 17 in San Francisco.
November 9 in San Diego.

BOARD OF OPTOMETRY

Executive Officer: Karen Ollinger
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Pursuant to Business and Professions Code section 3000 *et seq.*, the Board of Optometry is responsible for licensing qualified optometrists and disciplining malfeasant practitioners. The Board establishes and enforces regulations pertaining to the practice of optometry, which are codified in Division 15, Title 16 of the California Code of Regulations (CCR). The Board's goal is to protect the consumer patient who might be subjected to injury resulting from unsatisfactory eye care by inept or untrustworthy practitioners. The Board consists of nine members—six licensed optometrists and three public members.

■ MAJOR PROJECTS

Board Conducts Retreat. On October 14, the Board held a retreat in order to

build a common understanding of its roles and responsibilities, orient new members to Board functions and activities, and begin to generate ideas about the future direction of the Board. Among other things, the Board discussed whether it should attempt to expand the practice of optometry in California as it has been in other states; whether it should give optometry schools more direction in terms of curriculum oversight; and whether it wants California to be a leader in the profession of optometry. The Board also identified issues that it should address in the areas of consumer education, continuing education, enforcement, legislation, and regulations. For example, the Board discussed the possibilities of producing a media education campaign on what consumers should expect from optometric services; adding an ethics course as part of its continuing education requirements; and clarifying its position on optometric assistants. The Board is expected to consider many of the topics discussed at the retreat at future meetings.

Board Reviews More Draft Regulatory Proposals. At its December 1-2 meeting, the Board reviewed several draft rulemaking proposals which would clarify the Board's examination process and continuing optometric education requirements. Specifically, the Board considered the following proposals:

- Amendments to section 1532, Title 16 of the CCR, would clarify that an applicant who has failed to pass either the Clinical and Demonstration or Laws and Regulations examination sections after a period of five consecutive calendar years from the date of the first examination must retake both examination sections.

- Amendments to section 1533, Title 16 of the CCR, would provide that an inspection by an examinee of the papers he/she wrote while taking the Board examination must be made by that person before the expiration of 90 days after the examination results are mailed.

- Amendments to section 1535, Title 16 of the CCR, would specify that the Board requires successful completion of the National Board of Examiners in Optometry's (NBEO) Basic and Clinical Science examination sections as a condition of eligibility to take the Clinical Demonstration and Laws and Regulations examination sections, and delete language authorizing an applicant to otherwise furnish satisfactory evidence of his/her eligibility pursuant to the provisions of Chapter 7 of Division 2 of the Business and Professions Code.

- Amendments to section 1536, Title 16 of the CCR, would provide that no more than four hours of continuing education (CE) coursework shall be in the area



of practice management; CE offerings approved by the International Association of Boards of Examiners in Optometry, known as the Council on Optometric Practitioner Education, would be approved as meeting the required standards of the Board; a licensee would be exempt from CE requirements if he/she was first licensed by examination within the twelve months immediately preceding the annual license renewal date; and, as a condition of license renewal, all licensees would be required to maintain current certification in cardiopulmonary resuscitation (CPR), and the training required for the CPR certificate would not be credited toward the required CE hours. The Board was authorized to require the CPR certification by AB 2943 (Hauser) (Chapter 578, Statutes of 1994). [14:4 CRLR 89]

At its December meeting, the Board generally agreed to pursue these rulemaking proposals and several others considered at its August 1994 meeting [14:4 CRLR 88]; at this writing, however, the Board has not published notice of its intent to do so in the *California Regulatory Notice Register*.

Recent Conflicts With the Medical Board. The Board of Optometry recently stood in opposition to the Medical Board of California (MBC) on two major issues: the scope of optometric practice and the co-management of post-surgical patients by optometrists and ophthalmologists. [14:4 CRLR 88; 14:2&3 CRLR 92-93]

After many months of discussion on both issues, the Board officially announced its position on both issues in the Fall 1994 edition of its *Optometry News* newsletter. Regarding the scope of optometric practice, the Board unanimously declared that optometrists may and do diagnose in the course of their professional practice; the Board made this decision after consultation with Department of Consumer Affairs (DCA) legal counsel Robert Miller. The Board also unanimously agreed that the co-management of post-surgical patients by optometrists and ophthalmologists is appropriate. However, the Board cautioned that such arrangements must be carefully structured to avoid violation of Business and Professions Code section 650, which prohibits "kickbacks" for referrals.

MBC Reintroduces Rulemaking to Permit Medical Assistants to Perform Optometric Tasks. In *Engineers and Scientists of California (ESC), et al. v. Division of Allied Health Professions*, No. 532588 (Apr. 25, 1994), the Sacramento County Superior Court invalidated parts of section 1366, Title 16 of the CCR, MBC's regulation which sets forth the technical supportive services which may

be performed by unlicensed medical assistants (MAs). Due to procedural irregularities in the rulemaking process, the court struck down section 1366(b)(4), which permitted MAs to perform "automated visual field testing, tonometry, or other simple or automated ophthalmic testing" under certain conditions. The regulations were challenged by ESC and the California Optometric Association (COA) on both procedural and substantive grounds, but the court did not reach ESC/COA's argument that the regulation impermissibly allows MAs to perform tasks reserved for licensed optometrists. [14:4 CRLR 89; 14:2&3 CRLR 94; 14:1 CRLR 72]

On December 16, MBC's Division of Licensing (DOL) reinstated the rulemaking process to reinstate the controversial provision. This time, the regulatory language would permit MAs to "perform ophthalmic testing not requiring interpretation in order to obtain test results, including (for example) but not limited to, the operation of automated objective ophthalmic testing equipment, color vision and depth perception." As published, the language precludes MAs from performing "subjective refractions or any other procedure requiring the exercise of any judgment or interpretation of the data obtained on the part of the operator." At this writing, DOL is scheduled to hold a public hearing on this proposed regulatory change on February 3 in San Francisco. (See agency report on MBC for related discussion.)

Board to Consider Removal of Branch Office Restrictions. The Board recently consulted DCA legal counsel Robert Miller about two applications for registration of optometric corporations. While the applications specified only one address, they were apparently intended to be vehicles for the establishment of "independent practice associations," and optometric services would actually be rendered through numerous optometrists practicing at different locations. Because Miller interpreted these offices to be "branch offices" subject to the restrictions and registration requirement of Business and Professions Code section 3077, and because both applicants expressly disclaimed having any branch offices, Miller recommended that the applications be denied. However, the Board at its December meeting decided to revisit the section 3077 branch office restrictions, and scheduled a discussion of this issue for its March meeting.

■ LITIGATION

In *United States v. Vision Service Plan*, No. 94CV02693, filed by the U.S. Department of Justice (DOJ) in U.S. Dis-

trict Court for the District of Columbia on December 15, the federal government alleged that California-based Vision Service Plan (VSP), the country's largest vision care insurance plan, violated section 1 of the Sherman Act by illegally requiring so-called "most favored nation" (MFN) clauses in its contracts with optometrists. According to DOJ, the MFN clause prohibits each VSP optometrist from charging VSP patients higher fees than those charged non-VSP patients; requires VSP optometrists to notify VSP if a published VSP fee schedule exceeds their usual and customary fee, and requires them to accept the lower fee; and requires participating optometrists to accept reduced fees if VSP determines the optometrist has charged it higher fees than those charged non-VSP patients. According to Anne Bingaman, assistant attorney general in charge of DOJ's Antitrust Division, the MFN clause discourages optometrists from offering discounts to non-VSP patients from competing plans, and vision care insurance plans that had previously contracted with optometrists at discounts between 20-40% were no longer able to obtain those discounts.

On the same day it filed the lawsuit, however, DOJ also filed a proposed consent decree which—if approved by the court—would settle the matter. Under the proposed consent decree, VSP will discontinue its practice of using the challenged MFN clause and will adopt a new fee system based on a range of fees accepted by optometrists. Also pursuant to the proposed consent decree, VSP would be prohibited from maintaining, adopting, or enforcing any policy or practice of linking payments made by VSP to any VSP panel optometrist to fees charged by the optometrist to any non-VSP patient or any non-VSP plan; differentiating its payments to, or other treatment of, any VSP panel optometrist because the optometrist charges any fee lower than that charged by the optometrist to the VSP; to any non-VSP patient, or to any non-VSP plan; taking any action to discourage any VSP panel optometrist from participating in any non-VSP plan or from offering or charging any fee lower than that paid to the optometrist by VSP to any non-VSP patient or to any non-VSP plan; monitoring or auditing the fees that any VSP panel optometrist charges any non-VSP patient or non-VSP plan; and communicating in any fashion with any VSP panel optometrist regarding the his/her participation in any non-VSP plan or regarding the his/her fees charged to any non-VSP patient or to any non-VSP plan. According to VSP president and chief executive officer



Roger Valine, the insurer agreed to discontinue its policy "to avoid long and expensive litigation with the Justice Department that could easily have cost thousands and maybe millions in legal fees."

RECENT MEETINGS

At its October 14 meeting, the Board unanimously accepted DCA's recommendation to abolish its existing Examination Committee made up of non-Board members, and to reestablish the Examination Committee as an integral part of the Board with a member of the Board serving as chair of the Committee.

At the Board's December 1-2 meeting, President John Anthony, OD, announced that he will be appointing a Sunset Review Committee to prepare the Board for its upcoming "sunset" review before the legislature; SB 2036 (McCorquodale) (Chapter 908, Statutes of 1994) created a sunset review process for occupational licensing boards within DCA, requiring each to be comprehensively reviewed every four years. SB 2036 imposes an initial sunset date of July 1, 1999 for the Board; approximately one year prior to the Board's sunset date, a Joint Legislative Sunset Review Committee will review the Board's performance in several areas and make a recommendation to the legislature on whether the Board should be abolished, restructured, or redirected in terms of its statutory authority and priorities. The legislature may then either allow the sunset date to pass (in which case the Board would cease to exist and its powers and duties would transfer to DCA) or pass legislation extending the sunset date for another four years. [14:4 CRLR 89]

Also in December, the Board reviewed the request of Akorn, Inc., for approval of its product, AK-T-caine, as a topical pharmaceutical agent (TPA) which may be used by optometrists in their examination of patients in California. Following discussion, the Board agreed to approve the product and to (1) seek the Medical Board's approval as required by Business and Professions Code section 3041(e), and (2) schedule rulemaking hearings to amend section 1560, Title 16 of the CCR, to add AK-T-caine to the list of approved TPAs in California.

Also at the December meeting, the Board re-elected John Anthony, OD, to serve as president, and selected Robert Dager, OD, as vice-president and Mona Tawatao as secretary for 1995.

FUTURE MEETINGS

March 9-10 in Sacramento.
May 22-23 in San Francisco.
August 24-25 in Sacramento.
December 1-2 in Orange County.

BOARD OF PHARMACY

*Executive Officer: Patricia Harris
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Pursuant to Business and Professions Code section 4000 *et seq.*, the Board of Pharmacy grants licenses and permits to pharmacists, pharmacies, drug manufacturers, wholesalers, and sellers of hypodermic needles. It regulates all sales of dangerous drugs, controlled substances, and poisons. The Board is authorized to adopt regulations, which are codified in Division 17, Title 16 of the California Code of Regulations (CCR). To enforce its regulations, the Board employs full-time inspectors who investigate complaints received by the Board. Investigations may be conducted openly or covertly as the situation demands.

The Board conducts fact-finding and disciplinary hearings and is authorized by law to suspend or revoke licenses or permits for a variety of reasons, including professional misconduct and any acts substantially related to the practice of pharmacy.

The Board consists of ten members, three of whom are nonlicensees. The remaining members are pharmacists, five of whom must be active practitioners. All are appointed for four-year terms.

In January 1994, public member Herb Stoecklein resigned from the Board; at this writing, he has not yet been replaced.

MAJOR PROJECTS

Board Publishes Scaled-Back Version of Citation and Fine Regulations.

On November 4, the Board republished notice of its intent to adopt new Article 9.5, commencing with section 1775, to Title 16 of the CCR. For years, the Business and Professions Code has authorized the Board to adopt regulations to implement a system of issuing citations and fines to its licensees and to others who unlawfully provide services for which a license is required; however, the Board has never implemented this authority. Currently, when a licensee fails to comply with a statute or regulation, the Board is limited to seeking suspension, revocation, license probation, or judicial relief through actions by the Attorney General or a district attorney to enforce compliance. These processes are time-consuming, expensive, and allow illegal activities to continue throughout the process. In addition, many violations of laws regulating the practice of pharmacy do not warrant such severe discipline. These regulations, if adopted, would establish a citation and fine program to deal with some of these violations.

The proposed regulations represent an extremely scaled-back version of the citation and fine regulations proposed by the Board in 1993. [14:4 CRLR 91-92; 14:2&3 CRLR 95; 14:1 CRLR 73]

Proposed new section 1775 would provide that a Board inspector or committee may issue citations containing orders of abatement and/or fines for violations of the statutes referred to in section 1775.1. Each citation must be in writing and must describe the nature and facts of the violation, including a reference to the statute or regulation alleged to have been violated, and the citation must be served upon the individual personally or by certified mail. Section 1775 would also require that a citation inform the person or entity that if a hearing to contest the finding of a violation is desired, the hearing must be requested by written notice to the Board within thirty days of the issuance of the citation.

Proposed new section 1775.1 would list the Business and Professions Code violations for which the Board inspector or committee may issue a citation and fine or order of abatement. At this time, the listed sections which justify the issuance of a citation and/or fine pertain only to the unlicensed practice of pharmacy or related activities and violation of the pharmacist's duty to provide oral consultations before dispensing medication.

Section 1775.2 would set forth the criteria which must be considered when determining the amount of an administrative fine (when a fine is assessed with a citation). As proposed, this regulation provides that in no event shall the fine exceed \$2,500 for violations of the Code sections set forth in section 1775.1; a Board inspector or committee, in his/her/its discretion, may issue an order to cease the violation without charging a fine. In assessing the amount of an administrative fine, section 1775.2 would require the Board inspector or committee to consider, among other things, the gravity of the violation, the good or bad faith of the cited person or entity, the history of previous violations, evidence that the violation was or was not willful, and the extent to which the cited person or entity has mitigated or attempted to mitigate any damage or injury caused by the violation.

New section 1775.3, as proposed, would provide that an order of abatement shall either be personally served or mailed by certified mail; the time allowed for the correction of a violation begins when the order of abatement is final and has been served or received. If a cited person or entity who has been issued an order of abatement is unable to complete the cor-