



REGULATORY AGENCY ACTION

Also at its March 21 meeting, the Board considered the issue of AIT Program evaluation. Presently, BENHA has no mechanism to judge the effectiveness of this training program, apart from the licensure examination. The possibility of entering into a formal contract with the American College of Health Care Administrators was discussed and rejected, due to the cost factor. The Education Committee recommended that AITs themselves evaluate the program. The Board agreed, and decided to establish an evaluation mechanism whereby the AITs will routinely evaluate the training programs.

Also at the March 21 meeting, the Board again considered the subject of maximum allowable AIT hours per week. [14:1 CRLR 70] Executive Officer Ramsey noted that AITs frequently request an increase in the number of permitted hours in order to meet established examination deadlines. Existing section 3162, Title 16 of the CCR, specifies that AITs must work a minimum of 20 hours per week, but no maximum is stated. Ramsey reminded the Board that, at its October 1993 meeting, it had decided to allow a maximum of 60 hours per week, but that each request was to be reviewed individually and that approval would be at the discretion of the Executive Officer; allowance will depend upon whether the AIT is training full-time or combining the training with a full- or part-time job. The Board decided that Ms. Ramsey should evaluate requests for additional AIT hours based on those guidelines, and that a regulation change reflecting those guidelines should be pursued.

■ FUTURE MEETINGS

July 21 in San Francisco.
September 22 in Sacramento
(tentative).

BOARD OF OPTOMETRY

*Executive Officer: Karen Ollinger
(916) 323-8720*

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 mem-

bers—six licensed optometrists and three public members.

At its March 11–12 meeting, the Board welcomed new member Robert Dager, OD, to replace Kenneth Woodard, OD, on the Board. Two additional positions on the Board will become vacant when the terms of Thomas Nagy, OD, and Stephen Chun, OD, expire at the end of June.

■ MAJOR PROJECTS

OAL Approves Regulatory Changes on Disclosure of Prescription Release Policy and Delegation of Functions. On March 15, the Office of Administrative Law (OAL) approved the Board's amendment to section 1502 and addition of new section 1566, Title 16 of the CCR. The amendment to section 1502 delegates and confers solely upon the Board's Executive Officer—instead of upon the Board Secretary—enforcement-related functions involving the filing of accusations, issuing notices of hearings, statements to respondents, statements of issues, and other powers and duties conferred by law on the Board. New section 1566 requires each optometry office to post in a conspicuous place a notice which clearly states the legal requirements and office policy regarding the release of spectacle and contact lens prescriptions. Section 1566 was opposed by the California Optometric Association (COA), which argued the notice requirement will be "overly burdensome." [14:1 CRLR 72; 13:4 CRLR 77] The Board plans to include an example of an acceptable notice posting which satisfies the requirements of section 1566 in its July newsletter. The notice must, at a minimum, contain the following information: "Federal law requires that a written copy of the spectacle prescription be given out to the patient. However, the law does not require the release of a contact lens prescription; this is left to the discretion of the optometrists. You may want to inquire about your doctor's policy regarding contact lens prescriptions prior to the examination."

Letter Regarding Scope of Co-Managed Care Between Optometrist and Ophthalmologist Causes Controversy. At its March 11 meeting, the Board heard from COA counsel William Gould and Norma Dillon, Director of COA's Governmental Affairs Division, who expressed concern about a February 22 letter from Marsha Roggero, Staff Services Analyst with the Medical Board of California (MBC), to the Eye Surgery Center of Northern California. In her letter, Roggero admonished an ophthalmologist at the Eye Surgery Center for his distribution to optometrists of a letter soliciting referrals of

patients to him for surgery in return for referral of the patients back to the optometrist for "co-managed post-operative cataract care"; according to Roggero's letter, MBC has determined that such an arrangement "is improper because it violates the patient referral kickback prohibition of Section 650 of the California Business and Professions Code." Roggero also stated that post-operative cataract care "exceeds the scope of optometric practice and thereby violates Business and Professions Code Section 2052." Roggero's letter included an excerpt from a "legal opinion adopted by the [Medical] Board," which provides that section 650 is violated when an understanding exists between an ophthalmologist and an optometrist that the optometrist will make referrals to an ophthalmologist who will return the patient to him/her for the provision of services the ophthalmologist would otherwise provide. According to Roggero, the legal opinion also states that in California, "optometrists may not provide post-operative care to surgical patients" because "[p]ost-operative care is examination for the purpose of diagnosis," and "California does not permit optometrists to diagnose." In sum, Roggero asserted that "[d]elegation of post-operative care to an optometrist is inappropriate and unlawful because the optometrist is neither qualified by training or experience to diagnose post-surgical complications, nor licensed to provide the necessary treatment."

At the March meeting, Gould noted that he requested MBC to provide him with a copy of the legal opinion Roggero referred to in her letter. Tony Arjil, Program Manager of MBC's Division of Allied Health Professions (DAHP), commented that Roggero had obtained the legal opinion from the California Medical Association (CMA), not from MBC. According to Arjil, MBC had not previously adopted any policy or opinion concerning optometrist participation in the management of post-operative cataract care; however, Arjil noted that MBC had recently asked its legal counsel for a formal opinion, which had not yet been issued. Following discussion, Board president John Anthony requested that staff send a letter to MBC to clarify the Board's position on co-management of post-operative cataract care.

By letter of March 15, Board President John Anthony informed MBC that Roggero's letter "grossly misstates the scope of lawful optometric practice,....contains a negatively framed discussion of patient referrals involving ophthalmologists and optometrists, [and] tends to discourage lawful professional relationships between



ophthalmologists and optometrists" (emphasis original). Anthony also stated that "[i]t is our understanding that this letter is soon to be withdrawn if it has not already been withdrawn as of this date. It is our further understanding that this matter is presently under review by the executive staff of the Medical Board and its legal counsel."

By letter of March 30, MBC responded to the Board's correspondence by forwarding a copy of a March 16 legal opinion from Department of Consumer Affairs (DCA) legal counsel Anita Scuri; that opinion addresses whether one specific referral solicitation circulated by Richard Meister, MD, to optometrists violates section 650. According to Scuri, Meister's letter solicits the referral of patients for surgery to him in return for referral of the patients back to the optometrist for "co-managed post-operative cataract care" valued at approximately \$240. Scuri noted that section 650 provides that "the offer, delivery, receipt, or acceptance by any person licensed under this division of any...consideration, whether in the form of money or otherwise, as compensation or inducement for referring patients, clients, or customers to any person...is unlawful"; Scuri concluded that "[i]n the case presented, the referring optometrist derives income directly from the referral he or she makes to the physician. The fees are an inducement to make the referral to the physician. We believe these facts present a clear violation of Section 650." Scuri noted that the purpose of section 650 is "to ensure that health care provider referrals are made on the basis of the patient's needs and not on the basis of whether they generate income for the referring provider." Scuri's opinion does not address whether post-operative cataract care is within the scope of optometric practice.

On May 9, the Board responded to MBC, noting that in Dr. Meister's case, MBC had apparently interpreted the reference to the collection of the \$240 fee by the optometrist as an offer intended to induce a patient referral, and acknowledged MBC's authority to make such a determination in that particular case. However, the Board stated its opinion that "co-management by ophthalmologists and optometrists does not necessarily involve a relationship prohibited by Section 650 any more than a co-management relationship between an ophthalmologist and a physician who is a family practitioner." The Board also expressed its longstanding position that "[o]ptometrists may participate in the co-management of the immediate post-surgical patient," and "[t]he parameters of this co-management process should be determined by the practitioners

involved based upon the nature of the surgical procedure performed and the risk factors anticipated during the recovery period."

At this writing, MBC had not formally responded to the Board's May 9 letter; the Board is expected to continue its discussion of this matter at its May 19-20 meeting.

Examination Review Based on Occupational Analysis Data Begins. In March, DCA's Office of Examination Resources (formerly the Central Testing Unit) began overseeing the Board's implementation of the validation of its licensure examination. The Office, in consultation with a group of California-licensed optometrists selected by the Board, is undertaking an independent review of the Board's examination questions to ensure the exam is reliable for testing entry-level competency. In December 1993, HRStrategies completed an occupational analysis which identified the tasks performed by licensed optometrists currently practicing in California, and the knowledge, skills, and abilities needed to perform them. [14:1 CRLR 71; 13:4 CRLR 79; 13:1 CRLR 59] The results of the occupational analysis are being used to measure the validity of each examination question. Review of the examination questions is scheduled to be completed by early 1995 and the results implemented on the licensure exam given in July 1995.

LEGISLATION

SB 2036 (McCorquodale), as amended May 18, would create a "sunset" review process for occupational licensing agencies within the Department of Consumer Affairs (DCA), requiring each to be comprehensively reviewed every four years. SB 2036 would impose an initial "sunset" date of July 1, 1999 for the Board; create a Joint Legislative Sunset Review Committee within the legislature, which would review the Board's performance approximately one year prior to its sunset date; and specify 11 categories of criteria under which the Board's performance will be evaluated. Following review of the agency and a public hearing, the Committee would make recommendations 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. (See agency report on DCA for related discussion of the "sunset" concept.) [S. Appr]

AB 2943 (Hauser). Under existing law, the Board is required to adopt regulations requiring that licensees submit proof of continuing education as a condition of renewal of licensure. As amended May 4, this bill would require the Board, commencing July 1, 1995, to require licensees to maintain current certification in cardiopulmonary resuscitation. At one time, the Board had a regulation requiring CPR certification as a condition of license renewal; in 1992, an appellate court struck down the requirement because the Board lacked the express statutory authority to impose it. [12:2&3 CRLR 133] [A. W&M] **SB 1399 (Lewis)**, as amended April 13, would authorize the Board, notwithstanding any other provision of law relating to optometry, to issue a certificate of registration to persons licensed in another state who meet certain other qualifications. [A. Health]

The following is a status update on bills reported in detail in CRLR Vol. 14, No. 1 (Winter 1994) at page 72:

AB 1807 (Bronshvag). Existing law provides that a person who has obtained an optometry degree from a university located outside the United States, if he/she meets other specified requirements, may take the Board's examination for a certificate of registration as an optometrist. Until January 1, 1994, the Board may refuse to permit a person to take the examination if it finds that the curriculum of the institution granting the degree is not reasonably equivalent to that required of applicants who have graduated from an institution within the United States; on January 1, 1994, that authority expired. As amended March 23, this bill extends that authority until January 1, 1996. [13:4 CRLR 77-78]

Existing law provides that, until January 1, 1994, a person who graduated from a foreign optometry school prior to 1980 and who was previously sponsored or qualified to be sponsored by the Board for the NBEO examination, shall be sponsored for the national exam. Upon passing the national exam, under existing law, the person is required to be permitted to take the examination for licensure as an optometrist. This bill extends the repeal date until January 1, 1996.

Existing law provides that in most circumstances, a certificate issued by the Board may be renewed up to five years after the date of expiration if the applicant passes the regular examination of the Board and pays outstanding fees. This bill reduces the period for renewal to three years after the expiration of the certificate, if the person passes the clinical portion of the regular examination of applicants, or other clinical examination approved by



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the Board, and pays all outstanding fees. This bill was signed by the Governor on March 30 (Chapter 26, Statutes of 1994).

AB 2020 (Isenberg), as amended April 28, is a COA-sponsored bill which would provide that the practice of optometry includes, among other things, the examination of the human eye, or its appendages and adnexa, and the analysis and diagnosis of conditions of the human vision system, either subjectively or objectively; and authorize optometrists to use specified diagnostic pharmaceutical agents. It would also authorize optometrists who meet specified requirements to use, prescribe, and dispense specified therapeutic pharmaceutical agents to a patient for the purposes of treating the human eye, or its appendages or adnexa, for any disease or pathological condition. The bill would establish a seven-member pharmaceutical advisory committee with a prescribed membership to provide advice to the Board as to the use of diagnostic and therapeutic agents by optometrists. Under this bill, only optometrists who meet several examination and training requirements and agree to accept Medi-Cal patients are permitted to use, dispense, or prescribe therapeutic pharmaceutical agents. AB 2020 would also make it a misdemeanor for any person licensed as an optometrist to refer a patient to a pharmacy that is owned by the licensee or in which the licensee has a proprietary interest; and require Board licensees to complete, at a minimum, 25 hours of continuing education per year, one-third of which must relate to the diagnosis, treatment, and management of ocular disease. [S. B&P]

AB 1894 (Polanco), as amended January 14, would authorize ancillary personnel who work under the supervision of an optometrist to assist in the preparation of the patient and the preliminary collection of data that does not require the exercise of professional judgment or the skill of an optometrist and is limited to specified activities; the bill would provide that ancillary personnel are not authorized to perform any data analysis or diagnosis, or to prescribe and determine any treatment plan. [S. B&P]

SB 908 (Calderon), as introduced March 4, 1993, would provide that the terms "license" and "certificate of registration" are deemed to be synonymous for the purposes of the provisions of law regarding the licensure and regulation of optometry. [A. Inactive File]

SB 921 (Maddy), which would have provided that it is unprofessional conduct for an optometrist to fail to advise a patient in writing of any pathology that requires the attention of a physician when an ex-

amination of the eyes indicates a substantial likelihood of any pathology, died in committee.

■ LITIGATION

In *Engineers and Scientists of California (ESC), et al. v. Division of Allied Health Professions (DAHP)*, Medical Board of California, No. 532588, following a one-day trial conducted on April 25, Sacramento County Superior Court Judge Rudolph Loncke ruled in favor of plaintiffs ESC and COA by invalidating two subsections of DAHP's medical assistant regulations which—according to ESC and COA—permit unlicensed medical assistants to perform optometric tasks and functions. [14:1 CRLR 72; 13:2&3 CRLR 100] The court found fault with DAHP's procedure in adopting the regulations, and did not reach the merits of ESC/COA's claim.

Specifically, the court ruled that the following two portions of section 1366, Title 16 of the CCR, are invalid and ineffective: (1) section 1366(b)(4), which provided that medical assistants may perform automated visual field testing, tonometry, or other simple or automated ophthalmic testing not requiring interpretation in order to obtain test results, using machines or instruments, but are precluded from the exercise of any judgment or interpretation of the data obtained on the part of the operator; and (2) that part of section 1366(d) which referred to section 1366(b)(4). After removing the objectionable portion of section 1366(d), that section now provides that "[n]othing in these regulations shall be construed to authorize a medical assistant to practice optometry." The offensive sections were added at the final public hearing on the proposed rules and released as a "non-substantive change" for a 15-day public comment period; the court found that the changes were substantive and should have been republished for a full 45-day public comment period.

The court restrained and enjoined DAHP from enforcing the invalid provisions; ordered DAHP to immediately inform, in writing, the Secretary of State of the invalidity of those provisions; directed the Secretary of State to publish the same notice in the *California Regulatory Notice Register*; and ordered DAHP to forthwith notify, in writing, all medical licentiates, podiatry licentiates, and all known medical assistants of the invalidity of those provisions. At this writing, it is unknown whether DAHP will appeal the court's ruling.

■ RECENT MEETINGS

At its March meeting, the Board elected John Anthony, OD, to serve as Board pres-

ident, Jennifer H.W. Hao, OD, as vice-president, and R. Mona Tawatao to serve as secretary.

■ FUTURE MEETINGS

May 19–20 in San Francisco.
August 18–19 in Sacramento.

BOARD OF PHARMACY

Executive Officer: Patricia Harris (916) 445-5014

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, public member Herb Strickline resigned from the Board; at this writing, he has not yet been replaced.

■ MAJOR PROJECTS

Oral Consultation Regulations. At the Board's January 26–27 meeting, Executive Officer Patricia Harris reported on the Board's enforcement of its oral consultation regulations which have been in effect since November 1, 1992. Under sections 1707.1 and 1707.2, Title 16 of the CCR, pharmacists must maintain patient medication profiles on all ongoing patient-consumers and provide an oral consultation to each patient or patient's agent whenever a new prescription is dispensed, with specified exceptions. [12:4 CRLR 115–16; 12:2&3 CRLR 135]

Although she acknowledged a common perception that the Board has not been enforcing the regulations, Harris stated that the Board has been enforcing