



INDEPENDENTS

AUCTIONEER COMMISSION

The Auctioneer and Auction Licensing Act, Business and Professions Code section 5700 *et seq.*, was enacted in 1982 and establishes the California Auctioneer Commission to regulate auctioneers and auction businesses in California.

The Act is designed to protect the public from various forms of deceptive and fraudulent sales practices by establishing minimal requirements for the licensure of auctioneers and auction businesses and prohibiting certain types of conduct.

Section 5715 of the Act provides for the appointment of a seven-member Board of Governors, which is authorized to adopt and enforce regulations to carry out the provisions of the Act. The Board's regulations are codified in Division 35, Title 16 of the California Code of Regulations (CCR).

During the summer of 1992, the California legislature defunded the Auctioneer Commission and its Board of Governors in retaliation for the Commission's June 15 filing of *California Auctioneer Commission v. Hayes*, No. 370773 (Sacramento County Superior Court). The petition for writ of mandate sought a court order prohibiting state budget officers from carrying out a June 30 transfer to the general fund of all but three months' worth of operating expenses from the Commission's reserve fund, in compliance with a legislative directive in the Budget Act of 1991. The Commission was attempting to prevent a loss of \$127,000 in auctioneers' licensing fees to the general fund. [12:4 CRLR 1, 214-15; 12:2&3 CRLR 248; 12:1 CRLR 177] The legislature did not repeal the Auctioneer and Auction Licensing Act, the provisions of law which establish the Commission and its Board of Governors and set forth their respective jurisdiction, or any other provision affecting the licensing of auctioneers or the conduct of auctions in California. It simply eliminated all funding for the Commission, preventing it from paying the attorneys handling its lawsuit and from functioning in any other way.

The 1993-94 legislative session may include bills attempting to re-fund the Commission, abolish the statutes creating the Commission, and/or abolish the Auctioneer and Auction Licensing Act altogether.

BOARD OF CHIROPRACTIC EXAMINERS

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In 1922, California voters approved an initiative which created the Board of Chiropractic Examiners (BCE). Today, the Board's enabling legislation is codified at Business and Professions Code section 1000 *et seq.*; BCE's regulations are located in Division 4, Title 16 of the California Code of Regulations (CCR). The Board licenses chiropractors and enforces professional standards. It also approves chiropractic schools, colleges, and continuing education courses.

The Board consists of seven members, including five chiropractors and two public members. The terms of BCE members Barbara J. Bagwell, Ph.D., and Patricia B. Quibell, a physical therapist, expired on November 10. They may continue to serve during a one-year grace period, and Governor Wilson must name their replacements. On December 10, the Governor appointed Lloyd Boland, son of Assemblymember Paula Boland, to serve on BCE; Boland has a chiropractic practice in Simi Valley.

MAJOR PROJECTS

OAL Again Rejects BCE's Review Panel Regulations. On October 26, the Office of Administrative Law (OAL) rejected BCE's proposed adoption of sections 306.1 and 306.2, Title 16 of the CCR. Section 306.1 would have created Chiropractic Quality Review Panels, defined their responsibilities, and specified the rights of chiropractors under review by these panels. Section 306.2 would have defined the Board's obligations to outside experts who evaluate the performance of a licensee, are members of the Chiropractic Quality Review Panels, administer BCE's examinations, or perform educational evaluations. [12:4 CRLR 216]

OAL found that the rulemaking file submitted by BCE failed to comply with the clarity and necessity standards of the Administrative Procedure Act (APA). According to OAL, proposed section 306.1 is unclear because it differs from the

Board's description of its intended effect; is hard to understand; is not a complete regulatory scheme; and contains ambiguous and undefined terms. OAL found that proposed section 306.2 is also unclear because it differs from the Board's description of its intended effect. According to OAL, the problem stated in the rulemaking record which proposed section 306.2 is intended to address is that the Board's "ability to obtain expert professional opinions will be severely limited if the Board is unable to provide protection to experts against potential litigation stemming from their rendered opinions." However, OAL found that the rulemaking record contained no facts, studies, or other information supporting this statement and the need for the regulation.

This marks the third time that OAL has disapproved BCE's proposed regulatory language regarding the review panels. [12:2&3 CRLR 249] As a result, OAL offered its assistance to BCE regarding the Board's attempt to meet its rulemaking objective. BCE officials met with OAL staff in mid-December to discuss means by which the Board could meet its objective. At this writing, BCE has until March 3 to modify and resubmit proposed sections 306.1 and 306.2 to OAL for approval.

BCE Proposes Mental and Physical Illness Regulation. On November 13, BCE published notice of its intent to amend section 315, Title 16 of the CCR, which currently provides that when BCE has reasonable cause to believe that a chiropractor is mentally ill to the extent that it may affect his/her ability to conduct, with safety to the public, the practice authorized by his/her license, the Board may order the licensee to be examined by one or more physicians specializing in psychiatry designated by the Board. If the licensee is found to be mentally ill by one or more such physicians, the results of which indicates that such illness affects his/her ability to conduct, with safety, the practice authorized by his/her license, BCE may seek to place the licensee on probation, suspend his/her right to practice, revoke his/her license, or take such other action in relation to his/her license as the Board in its discretion deems proper.

BCE's proposed amendments to section 315 would also allow the Board to require an examination when a physical illness affecting the safety of a chiropractor's practice is suspected; provide that the Board may order the licensee to be examined by one or more physicians, psychologists, or chiropractors designated by the Board; and provide that a licensee's



failure to comply with a disciplinary order issued pursuant to section 315 constitutes grounds for the suspension or revocation of his/her license. At this writing, BCE is scheduled to conduct a public hearing on these proposed amendments on January 7 in San Diego.

BCE Proposes Diversion Program Regulation. On November 13, BCE published notice of its intent to adopt new section 315.1, Title 16 of the CCR, creating a diversion program for chiropractors; the program would be voluntary for a chiropractor who has an alcohol and/or drug abuse problem, mental illness, or physical illness which impairs his/her ability to safely treat the public. [12:4 CRLR 217] Section 315.1 would authorize BCE to establish one or more Diversion Evaluation Committees which would identify and seek ways to rehabilitate impaired chiropractors; each committee would consist of one BCE member, a licensee of the Medical Board of California, and a public member who has knowledge and expertise in the management of impairment.

Among other things, section 315.1 would specify the duties and responsibilities of the committees; establish the procedure for reviewing applicants who request admission to the program; specify reasons why applicants may be denied admission to the program; specify conditions under which a chiropractor's participation in the program may be terminated; and provide for the confidentiality of all Board, committee, and program records relating to a chiropractor's application to or participation in the program. Notably, the proposed regulation specifies that only applicants who voluntarily request admission may participate in the program. At this writing, BCE is scheduled to conduct a public hearing on this proposed regulation at its January 7 meeting in San Diego.

BCE Proposes Practical Exam Appeal Process Regulation. On November 13, BCE published notice of its intent to adopt new section 353, Title 16 of the CCR, to implement an appeal process for applicants who fail BCE's practical examination. Because the Board currently accepts appeals of the practical examination by following established procedures enforced in a uniform way, such policies constitute regulations and must be adopted pursuant to the APA. Section 353 would establish an appeal process for unsuccessful candidates who believe that they were not provided a fair and equitable opportunity to demonstrate their professional competence through the examination process. Specifically, the new regulation would provide that an appeal must be based on one or more of the following

grounds: (1) significant procedural error in the exam process, including content or format; (2) evidence of adverse discrimination; or (3) evidence of substantial disadvantage to an individual candidate. [12:4 CRLR 217] At this writing, BCE is scheduled to conduct a public hearing on this proposed regulation at its January 7 meeting in San Diego.

Board Alters Application Form. On November 27, OAL approved BCE's non-substantive changes to section 321, Title 16 of the CCR, regarding its application for a license to practice chiropractic. Among other things, the changes require social security number and certain documentation. These changes became effective on December 17.

Rulemaking Update. The following is a status update on other BCE rulemaking proposals reported in recent issues of the *Reporter*.

• **Unprofessional Conduct Regulation.** At its January 7 meeting, BCE is expected to revisit the proposal by the California Medical Association that the Board adopt one of two alternative versions of proposed new section 317(v), Title 16 of the CCR, concerning unprofessional conduct by chiropractors. Both versions of this proposed regulation drew strong opposition from the chiropractic community at BCE's June 1992 public hearing; many participants claimed that either version of the new section would serve to greatly limit the right and ability of chiropractors to treat and diagnose their patients without the supervision of other health care professionals. [12:4 CRLR 215]

• **Preceptor Regulation.** On December 10, BCE submitted its rulemaking file to OAL regarding its adoption of new section 313.1, Title 16 of the CCR. This regulation would provide for the implementation of preceptor programs in approved chiropractic institutions. [12:4 CRLR 216] At this writing, the regulatory action awaits review and approval by OAL.

• **Chiropractic Referral Services and Information Bureaus.** BCE has still not published notice of its intent to amend section 317.1, Title 16 of the CCR, concerning chiropractic referral services and information bureaus. [12:4 CRLR 217] According to BCE staff, the language of the draft amendments previously considered by the Board must be rewritten to correspond with AB 316 (Epple) (Chapter 856, Statutes of 1992), which provides that, notwithstanding Business and Professions Code section 650 or any other provision of law, it is unlawful for a person licensed pursuant to the Chiropractic Act,

or any other person, to participate in or operate a group advertising and referral service for chiropractors, under eight specified conditions.

• **HIV Prevention Course Requirement.** At this writing, BCE still has not published notice of its intent to amend sections 355 and 356, Title 16 of the CCR, to require licensed chiropractors to complete an approved continuing education (CE) seminar in human immunodeficiency virus (HIV) transmission prevention and to specify that the Board recommends that special attention in CE seminars be given to—among other things—HIV prevention. [12:4 CRLR 217]

• **Regulation Defining "Adjustment."** BCE decided not to modify and resubmit to OAL its proposed adoption of section 310.3, Title 16 of the CCR, which would have defined a chiropractic adjustment and/or manipulation; OAL rejected the proposed section on July 29 on the basis that BCE failed to comply with the necessity, clarity, and procedural standards of the APA. [12:4 CRLR 215]

LEGISLATION

Future Legislation. The International Chiropractic Association of California (ICAC) plans to closely watch any workers' compensation reform bills introduced in the 1993-94 legislative session. ICAC anticipates that managed care programs are on the horizon and will attempt to ensure that chiropractors are included on an equal basis with other health care practitioners in any such reform; managed care programs seek to ensure that health care providers give treatment that is effective and cost-efficient while creating financial incentives for both the provider and patient to select the most cost-efficient option. ICAC also intends to closely monitor any personal injury legislation introduced during the 1993-94 session to ensure that chiropractors are treated as equals to other health care professionals.

RECENT MEETINGS

At BCE's October 15 meeting, Executive Officer Vivian Davis reported that the Board had been officially notified that the travel line items in the 1992-93 fiscal year budget have been cut by 50% as part of the legislature's attempt to balance the state's budget; the travel budgets of most other occupational licensing agencies were cut in the same manner. In order to comply with the legislature's mandate to limit travel whenever possible, BCE cancelled its December meeting.

Also at the October meeting, staff reported that a chiropractor had requested that BCE consider adopting general regu-



lations regarding the use of manipulation under anesthesia (MUA). [12:4 CRLR 218] The chiropractor requested that the regulation require that a chiropractor be certified by an approved program and conduct MUA only in facilities approved by the state so that the public would be protected from the use of MUA by unqualified persons. Although the Board noted that no such provisions are being considered at this time, members entertained suggestions as to the type of protocol, qualifications, and requirements necessary for such a regulation. The Board was informed that no state has adopted any such regulation to date; however, Texas and Florida are considering doing so in the near future.

■ FUTURE MEETINGS

May 6 in Sacramento.
July 29 in San Diego.

CALIFORNIA HORSE RACING BOARD

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The California Horse Racing Board (CHRB) is an independent regulatory board consisting of seven members. The Board is established pursuant to the Horse Racing Law, Business and Professions Code section 19400 *et seq.* Its regulations appear in Division 4, Title 4 of the California Code of Regulations (CCR).

The Board has jurisdiction and power to supervise all things and people having to do with horse racing upon which wagering takes place. The Board licenses horse racing tracks and allocates racing dates. It also has regulatory power over wagering and horse care. The purpose of the Board is to allow parimutuel wagering on horse races while assuring protection of the public, encouraging agriculture and the breeding of horses in this state, generating public revenue, providing for maximum expansion of horse racing opportunities in the public interest, and providing for uniformity of regulation for each type of horse racing. (In parimutuel betting, all the bets for a race are pooled and paid out on that race based on the horses' finishing position, absent the state's percentage and the track's percentage.)

Each Board member serves a four-year term and receives no compensation other than expenses incurred for Board activities. If an individual, his/her spouse, or dependent holds a financial interest or management position in a horse racing

track, he/she cannot qualify for Board membership. An individual is also excluded if he/she has an interest in a business which conducts parimutuel horse racing or a management or concession contract with any business entity which conducts parimutuel horse racing. Horse owners and breeders are not barred from Board membership. In fact, the legislature has declared that Board representation by these groups is in the public interest.

■ MAJOR PROJECTS

DOJ's Investigation of Positive Clenbuterol Cases Continues. As of December 31, CHRB is still awaiting the state Department of Justice's (DOJ) report regarding its investigation of the Board's dismissal of four cases involving positive tests for the illegal drug clenbuterol. [12:4 CRLR 219] DOJ Special Agent Ron Eicher has completed the investigation and submitted a written report to DOJ; the report is being reviewed by DOJ officials, who may request follow-up investigation. DOJ will then forward the report to the Sacramento County District Attorney, who may also request additional investigation; if the District Attorney determines that there have been no criminal violations, the report and recommendations will be submitted to the Board.

Commissioner Rosemary Ferraro has expressed concern that DOJ's report will focus only on possible criminal violations, and not include a complete investigation into the circumstances and procedures which led to CHRB Executive Secretary Dennis Hutcheson's dismissal of three of the clenbuterol positives. CHRB Chair Ralph Scurfield agreed that a thorough investigation of the entire matter, not just the criminal aspects, is necessary, since the Board is being accused of selective enforcement and attempting to cover up the dismissals; there have also been rumors of possible lawsuits against the Board. In the face of this public outrage, Commissioner Ferraro feels that even if there were no criminal violations, the Board must address its policies and procedures that allowed the clenbuterol positives to be dismissed. Accordingly, Special Agent Eicher has assured the Board that DOJ's report will include a thorough investigation of all aspects of the case dismissals.

Commissioner Ferraro has also been critical of DOJ's appointment of Eicher to conduct the investigation; because Eicher worked as an investigator for the Board in the early 1980s, Ferraro is concerned that his past connection with the Board will compromise his objectivity. However, Eicher's background with CHRB is one of

the reasons DOJ chose him to conduct the investigation. The Board wanted the investigation to be expedited, and DOJ felt that this could be most easily accomplished by appointing someone familiar with the industry to conduct the investigation.

In a related matter, the Board devoted part of its November 20 meeting to discussing the handling of the horsemen's split sample. CHRB Equine Medical Director Dr. Dennis Meagher explained that the Board's current split sample program allows a trainer who is faced with a positive test result on the official sample to request a second test on the horsemen's sample. However, Meagher noted that sometimes the CHRB-approved laboratories are unable to test for the drug substance identified in the official sample; the inability of the Board-approved laboratories to test for particular substances leaves the horsemen with no viable alternative. As a result, CHRB staff proposed that the Board adopt a policy statement recognizing several additional laboratories which are capable of performing the required testing to which horsemen could be referred for testing the split sample; under the policy, the horsemen would have the alternative of using one of the newly-identified laboratories or accepting the results of the official laboratory without having their split sample tested. The Board unanimously approved staff's recommendation.

Alternative Forms of Gambling at Racetracks. At CHRB's October 22 meeting, Brian Sweeney of the California Horsemen's Benevolent and Protective Association reiterated his request that CHRB discuss the impact on the horse racing industry of allowing alternative forms of gambling on the grounds of a racetrack; at CHRB's July 30 meeting, Sweeney had urged CHRB to schedule hearings in order to receive input on this issue. [12:4 CRLR 220] Although the item was not listed on its October agenda, the Board briefly discussed one form of alternative gambling—the California Lottery's introduction of Keno, which offers players a new game every five minutes. Some industry members in attendance opined that the new Keno game could have a serious detrimental financial effect on the horse racing industry. In addition, industry members expressed a general concern that the Lottery is developing other games which would also detrimentally affect horse racing. Senator Ken Maddy, a leading supporter of the horse racing industry in the state Senate, echoed the industry members' concerns and confirmed the fact that the Lottery Commission is considering other games which would probably