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 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, 1992 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]* At that time, 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The legislature has now repealed the Auctioneer and Auction Licensing Act (*see* LEGISLATION).

LEGISLATION

SB 685 (Wright), as amended May 19, suspends the licensing requirement for auctioneers and auction companies until the licensing provisions of the Auctioneer and Auction Licensing Act are repealed or until a state agency or commission is designated to permit and enforce compliance with those provisions. This urgency bill took effect on July 30, the day it was signed by the Governor (Chapter 255, Statutes of 1993).

AB 259 (Hannigan), as amended August 26, repeals the Auctioneer and Auction Licensing Act, and requires every auctioneer and auction company to maintain a surety bond in the amount of $20,000 with the Secretary of State. This bill was signed by the Governor on October 11 (Chapter 1170, Statutes of 1933).

BOARD OF CHIROPRACTIC EXAMINERS

Executive Director:
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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—five chiropractors and two public members. In June, Governor Wilson appointed Deborah Pate, DC, of San Diego to fill a chiropractor seat on BCE; in July, the Governor appointed John Bovée of Sacramento, assistant executive director of the Western Mobilehome Association, to fill a public member seat on the Board.

MAJOR PROJECTS

BCE Reacts to Margolin Bill, Adopts Emergency Unprofessional Conduct Regulations. During the summer and early fall, the Board adopted several emergency regulations to address what has been identified by Assemblymember Burt Margolin, Chair of the Assembly Health Committee, as a state of emergency affecting public health and safety in California. The Committee became aware of a series of advertisements run by chiropractors in San Diego newspapers during 1991 and 1992; in the ads, the chiropractors indicated that spinal manipulation could be substituted for vaccinations for school-aged children. These ads, coupled with a March 1993 *Wall Street Journal* article in which ten to fifteen chiropractors were quoted as citing the effectiveness of chiropractic in treating the symptoms of ear infections in children, prompted Assemblymember Margolin to introduce AB 2294, which would prohibit chiropractors from substituting chiropractic for immunization and from using chiropractic to treat infectious diseases. However, the provisions of that bill will take effect only if the bill is passed by the legislature, signed by the Governor, and approved by the electorate (*see* LEGISLATION); at a May 11 Assembly Health Committee hearing on the bill, the Committee expressed concern that a state of emergency exists and urged the Board to adopt emergency regulations addressing these issues pending passage and voter approval of AB 2294.

Thus, at its June 5 meeting, BCE considered the adoption—on an emergency basis—of three amendments to section 317, Title 16 of the CCR, which defines actions which constitute unprofessional conduct. BCE first considered proposed section 317(w), which provides that it is unprofessional conduct for a chiropractor to offer to substitute, advertise that he/she will substitute, or actually substitute a spinal manipulation for a vaccination. Following discussion, BCE adopted the emergency language, which was approved by the Office of Administrative Law (OAL) on June 21.

Next, BCE considered proposed section 317(x), which provides that it is unprofessional conduct for a chiropractor to treat communicable diseases listed in Health and Safety Code section 3380, including diphtheria, hepatitis B, hemophilus influenza Type B, measles, mumps, pertussis (whooping cough), poliomyelitis, rubella, and tetanus. However, the section provides that it does not prohibit a chiropractor from treating any conditions, diseases, or injuries within the legal scope of chiropractic practice as set forth in section 302, Title 16 of the CCR, in any patient with a communicable disease. Following discussion, BCE adopted the emergency language, which was approved by OAL on June 21.

Finally, BCE considered proposed section 317(y), which—as then worded—

provided that unprofessional conduct includes the "offer, advertisement, or treatment of infectious disease with spinal manipulation as a substitute for a prescribed controlled substance pursuant to the California Uniform Controlled Substance Act, commencing at Health and Safety Code section 1100." The section also stated that it does not prohibit the treatment of any conditions, diseases, or injuries within the legal scope of chiropractic practice set forth in section 302, Title 16 of the CCR, in any patient with an infectious disease.

In response to this proposed action, California Medical Association (CMA) representative Vonnie Gurgin expressed CMA's belief that the matter should be dealt with in BCE's scope of practice regulation, instead of its unprofessional conduct regulation. According to CMA, section 302(a), Title 16 of the CCR, should be amended to clarify that a chiropractic license issued in California does not authorize the holder to treat or diagnose any infectious disease; however, the treatment of neurological conditions within the scope of practice of chiropractic in any patients with an infectious disease is not prohibited.

However, BCE noted that American Public Health Association President Helen Rodriguez-Triaz, MD, has expressed opposition to AB 2294, commenting that the proposed amendment is "highly undesirable from the point of view of good health practice" and that "[s]ince there are many infectious diseases, particularly those caused by viruses, for which we have neither specific nor effective conventional medical treatment, measures that strengthen individual resistance to casual infectious agents are beneficial." According to Rodriguez-Triaz, there is "a growing body of evidence that spinal manipulation may indeed have effects on cellular and possibly hormonal responses of the immune system. The law should not be used to keep patients from obtaining treatments that may help their bodies fight infection, particularly when the treatments are otherwise approved and regulated by existing code." Following discussion, BCE temporarily tabled its emergency adoption of section 317(y) regarding infectious diseases.

At its July 29 meeting, BCE considered the emergency adoption of a revised version of section 317(y). As revised, the section states that "treatment for infectious disease" constitutes unprofessional conduct; however, it is not unprofessional conduct for a chiropractor to treat "neuromusculoskeletal or other conditions, diseases or injuries within the scope of practice of chiropractic in any patient with an infectious disease." After considerable discussion, the Board adopted the emergency regulation. On August 26, however, OAL disapproved section 317(y) on the basis that is unclear under Government Code section 11349.1 because the phrase "infectious disease" was not defined; OAL rejected BCE's assertion in the rulemaking file that "[the] term is easily understood by the average person." OAL noted that many people use the term "infectious disease" as a synonym for a contagious disease, but others use the term for anything that causes an infection. OAL concluded that, in order to adequately protect the public's health and to give chiropractors a clear concept of what constitutes unprofessional conduct, "it is imperative that the term 'infectious disease' be defined."

On September 9, BCE held a public hearing on the proposed permanent adoption of subsections 317(w), (x), and (y). In response to the OAL disapproval and to comments received at the prior meetings, BCE revised the language of section 317(y) to add a definition of the term "infectious disease" ("a disease caused by pathogenic microorganisms in the body"); the section prohibits treating patients for infectious disease, but does not prohibit the treatment of neuromusculoskeletal or other conditions, diseases, or injuries within the scope of practice of chiropractic in any patient with an infectious disease.

At the September 9 public hearing, a number of chiropractors in attendance voiced their opposition to proposed section 317(y), arguing that it constitutes an unnecessary and unwarranted constraint on their ability and right to practice chiropractic. These witnesses challenged the Board and Assemblymember Margolin to cite an instance where a chiropractor's mistreatment of an infectious disease has resulted in harm to a patient, and argued that both proposed section 317(y) and AB 2294 represent improper attempts to limit the practice of chiropractic to dealing with sprains and strains only, contrary to the homeopathic approach to chiropractic as taught by most chiropractic colleges. The Board also received comments from members of the general public; many of those testifying expressed opposition to any action which would limit their right to choose the type of care they want to receive.

Supporters of proposed section 317(y) contended that it would not significantly alter the actual practice of most chiropractors, since the proposed language does not prohibit the treatment of neuromusculoskeletal or other conditions, diseases, or injuries within the scope of practice of chiropractic in any patient who happens to have an infectious disease. Supporters also opined that the passage of AB 2294 would impose a more serious restraint on chiropractors, and expressed hope that Assemblymember Margolin would drop the measure if BCE adopts section 317(y).

Following the September 9 public hearing, the Board adopted all three subsections on a permanent basis; it also adopted section 317(y) on an emergency basis. OAL approved BCE's emergency addition of section 317(y) on September 27. As to sections 317(w) and (x), BCE must forward to OAL a Certificate of Compliance by October 19 or the emergency language will be repealed by operation of law on the following day; regarding section 317(y), BCE must forward to OAL a Certificate of Compliance to OAL by January 25 or the emergency language will be repealed by operation of law on the following day.

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

• ***BCE Examination of Chiropractors with Mental/Physical Illness***. At this writing, BCE's proposed amendments to section 315, Title 16 of the CCR, still await adoption by BCE and review and approval by OAL. The changes would authorize the Board to require an examination of a chiropractor when it suspects that a mental or physical illness is affecting the safety of the chiropractor's practice; the Board may order the licensee to be examined by one or more physicians, psychologists, or chiropractors designated by the Board; and a licensee's failure to comply with an order issued pursuant to section 315 constitutes grounds for the suspension or revocation of his/her license. *[13:1 CRLR 126]* In response to objections raised by the California Medical Association, BCE has modified the proposed language to clarify that the Board may not refer a licensee to a chiropractor to examine the licensee's mental fitness *[13:2&3 CRLR 199]*, but has not yet adopted the proposal.

• ***Exam Appeal Process Regulation***. At this writing, BCE's adoption of section 353, Title 16 of the CCR, which would implement an appeals process for those applicants who fail BCE's practical examination, awaits review and approval by OAL. *[13:2&3 CRLR 199]*

• ***Preceptor Program Regulation***. In response to comments raised by OAL regarding BCE's proposed adoption of section 313.1, Title 16 of the CCR, which would provide for the implementation of preceptor programs in approved chiropractic institutions, the Board withdrew its original rulemaking proposal for modification. *[13:2&3 CRLR 199]* At its June 5

meeting, BCE adopted a revised version of section 313.1 which—among other things—requires preceptor programs to maintain malpractice insurance which covers the preceptee for the duration of the approved preceptor program. Because the Board made significant changes to the original language of section 313.1, it is expected to renotice the proposed action in the near future.

• ***Diversion Program Regulation***. At this writing, BCE's proposed adoption of section 315.1, Title 16 of the CCR, which would create a voluntary diversion program for substance-abusing chiropractors, awaits review and approval by OAL. *[13:2&3 CRLR 199]*

LEGISLATION

AB 179 (Snyder). Existing law provides that it is unlawful for any person licensed as a chiropractor to charge, bill, or otherwise solicit payment from any patient, client, or customer for any clinical laboratory test or service if the test or service was not actually rendered by that person or under his/her direct supervision, unless the patient, client, or customer is apprised at the first, or any subsequent, solicitation for payment of the name, address, and charges of the clinical laboratory performing the service. As amended June 18, this bill deletes the requirement that the patient, client, or customer be apprised for any subsequent solicitation for payment of the name, address, and charges. The bill would prohibit this provision from applying to a clinical laboratory of a health facility, as defined, or a health facility when billing for a clinical laboratory of the facility, or to any person licensed for one of those practices, if the standardized billing form used by the facility or person requires a summary entry for all clinical laboratory charges.

Existing law provides that it is unlawful for a chiropractor to charge additional charges for any clinical laboratory service that is not actually rendered by the licensee to the patient and itemized in the charge; existing law prohibits that provision from being construed to prohibit any itemized charge for any service actually rendered to the patient by the licensee. This bill also provides that the prohibition against additional charges is not to be construed to prohibit any summary charge for services actually rendered to a patient by a health facility, or by a person licensed for one of those practices if the standardized billing form used by the facility or person requires a summary entry for all clinical laboratory charges. This bill was signed by the Governor on August 25 (Chapter 304, Statutes of 1993).

AB 667 (Boland). The Pharmacy Law regulates the use, sale, and furnishing of dangerous drugs and devices. Existing law prohibits a person from furnishing any dangerous device, except upon the prescription of a physician, dentist, podiatrist, or veterinarian. However, this prohibition does not apply to the furnishing of any dangerous device by a manufacturer or wholesaler or pharmacy to each other or to a physician, dentist, podiatrist, or veterinarian, or physical therapist acting within the scope of his or her license under sales and purchase records that correctly give the date, the names and addresses of the supplier and the buyer, the device, and its quantity. As amended March 29, this bill would provide that the prohibition does not apply to the furnishing of any dangerous device by a manufacturer or wholesaler or pharmacy to a chiropractor acting within the scope of his/her license.

Existing law authorizes a medical device retailer to dispense, furnish, transfer, or sell a dangerous device only to another medical device retailer, a pharmacy, a licensed physician and surgeon, a licensed health care facility, a licensed physical therapist, or a patient or his or her personal representative. This bill would additionally authorize a medical device retailer to dispense, furnish, transfer, or sell a dangerous device to a licensed chiropractor. *[A. Health]*

AB 2294 (Margolin). The Chiropractic Act provides that a license to practice chiropractic does not authorize the practice of medicine, surgery, osteopathy, dentistry, or optometry, nor the use of any drug or medicine now or hereafter included in materia medica. As amended May 25, this bill would also provide that a license to practice chiropractic does not authorize the treatment of infectious disease, nor the substitution of chiropractic for immunization. This bill would provide for the submission of these amendments to the voters; they shall become effective only when approved by the electors. *[A. Inactive File]*

RECENT MEETINGS

At its July 29 meeting, staff noted that the Board may want to modify its existing regulations concerning chiropractic referral services; for example, staff suggested that the Board consider creating a funding mechanism to provide resources to monitor registered referral services on a continual basis. Also, section 317.1, Title 16 of the CCR, requires the answering service of a referral service to refer each caller to the next chiropractor on its list on a rotating basis, with specified exceptions; staff stated the Board should define the term "rotating basis." BCE directed staff to develop draft regulatory language and present it for the Board's consideration at its October meeting.

FUTURE MEETINGS

January 6 in San Diego.

CALIFORNIA HORSE RACING BOARD

Interim Executive Secretary: Roy Minami
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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

CHRB's Search for New Executive Secretary Continues. At its May 28 meeting, CHRB appointed Roy Minami to