

# DENTAL BOARD OF CALIFORNIA

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*Protection of the public shall be the highest priority for the Dental Board of California in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.*

— Business and Professions Code § 1601.2

**T**he Dental Board of California (DBC) is a consumer protection agency within the state Department of Consumer Affairs (DCA). DBC is charged with enforcing the Dental Practice Act, Business and Professions Code section 1600 *et seq.* The Board’s regulations are located in Division 10, Title 16 of the California Code of Regulations (CCR).

DBC licenses and regulates dentists (DDS/DMD), and issues specialty permits for a variety of functions to licensed dentists who qualify for them, including permits to administer general anesthesia, conscious sedation, and oral conscious sedation for adult and minor patients. Under Business and Professions Code section 1638, DBC issues oral and maxillofacial surgery (OMS) permits to qualified dentists and physicians. OMS dentists may seek an additional permit and be authorized to perform elective facial cosmetic surgery under section 1638.1. DBC issues permits to unlicensed individuals who qualify as orthodontic assistants and dental sedation assistants.

DBC also licenses (1) registered dental assistants (RDA), and (2) registered dental assistants in extended functions (RDAEF). To assist the Dental Board in regulating RDAs and RDAEFs, the legislature has created the Dental Assisting Council (DAC) in Business and Professions Code section 1742. The DAC consists of seven members: the RDA member of the

Dental Board plus one other Dental Board member, and five RDAs. These members are appointed by the Dental Board and represent a broad range of dental assisting experience and education (including at least one RDAEF). The DAC is authorized to consider all matters relating to dental assistants on its own initiative, or upon the request of the Dental Board, and make appropriate recommendations in the following areas: requirements for dental assistant examination, licensure, permitting, and renewal; standards and criteria for approval of dental assisting educational programs, courses, and continuing education; allowable dental assistant duties, settings, and supervision levels; appropriate standards of conduct and enforcement for dental assistants; and requirements regarding infection control.

DBC sets standards for approval of dental schools and dental assistant training programs and determines subject matter for license examinations. It licenses applicants who pass the exam and meet Board requirements for licensure, sets standards for dental practice, and disciplines licensees who do not meet those standards. DBC is also responsible for registering dental practices (including mobile dental clinics) and corporations; establishing guidelines for continuing education requirements for dentists and dental assistants; approving radiation safety courses; and administering the Diversion Program for substance-abusing dentists and dental assistants.

DBC consists of 15 members: eight practicing dentists, one RDH, one RDA, and five public members. Business and Professions Code section 1602 requires all of the professional members of the Board to have been actively practicing for at least five years prior to their appointment. The Governor appoints 13 of the Board's 15 members (including all of the dental practitioners); the Senate Rules Committee and the Assembly Speaker each appoint one public member.

On February 6, 2020, Governor Newsom [appointed](#) Alan L. Felsenfeld, DDS, of Marina del Rey, to the Board. Dr. Felsenfeld is a board-certified Oral and Maxillofacial surgeon who has been in practice since 1977 and was a professor of oral and maxillofacial surgery at the University of California, Los Angeles School of Dentistry.

## **HIGHLIGHTS**

### **Smile Direct Club Sues Dental Board of California Staff and Members in Federal Court**

On October 16, 2019, Smile Direct Club, and its owner, Jeffrey Sulitzer, D.M.D., a dentist licensed to practice in California, filed a [complaint](#) in the Central District of California against an investigator, the Executive Officer, and all individual Board members of the Dental Board of California alleging violations of the Federal Sherman Antitrust Act; several Constitutional violations, including the Dormant Commerce Clause, the Equal Protection Clause, and Substantive Due Process; as well as California’s Unfair Competition Law. (*Jeffrey Sulitzer, D.M.D, et al. v. Joseph Tippins et al.*, Case No. 2:19CV08902 (C.D. Cal.)).

Smile Direct describes itself as a revolutionary approach to help reduce cost and increase access to orthodontic services that threaten to disrupt the more traditional dental industry. Customers can access services through mail correspondence or by visiting one of SmileDirect’s “SMILESHOP” stores or “SmileBus,” where clients can get photos taken of their teeth and gums and fill out dental and health histories which are then reviewed online by a Treating Dentist who will prescribe the patient treatment. According to the complaint, SMILESHOP stores or SmileBuses have taken information from over 100,000 consumers in California and tens of thousands have been approved for treatment.

The complaint alleges that Board investigators have attempted to “harass and intimidate” SmileDirect in order to “squell the competition” posed by SmileDirect services. It alleges that Board investigators first requested information regarding specific dentists and patient records, but upon finding no wrongdoing, began state-wide raids of SMILESHOPS in Oakland, San Francisco, and Hollywood, California. The complaint alleges that the raids were so aggressive that they frightened and intimidated employees, and consumers fled the stores, causing serious harm to SmileDirect’s “business, revenue, goodwill, employee relations, and market reputation.” Further, SmileDirect argues the SmileBus employees were not engaging in the practice of dentistry as defined in the Dental Practice Act and were not required to have any certification or registration. According to SmileDirect, the Dental Practice Act, which authorizes the Board to regulate the Practice of Dentistry, does not cover services provided by SmileDirect because the Act does not give the Board authority to regulate non-clinical support services such as those provided in the SMILESHOPS and SmileBuses.

Smile Direct generally alleges that the Board members’ and investigator’s actions impact the dental market by restricting consumers’ access and options to affordable orthodontic treatment and stifle competition in order to protect the interests of traditional dentists such as those regulated by the Board. With respect to the constitutional claims, Plaintiffs allege that the alleged conduct affects interstate commerce because SmileDirect is an out-of-state company that is being discriminated against in the California market by shielding California providers from competition, and that California dentists prescribe clear aligner therapy treatment using products that are sold across state lines, and produced outside of California, and thus interstate commerce is interrupted when the Board restricts such sales. Additionally, they allege that the Board members and its investigators violated substantive due process in that SmileDirect was not given an opportunity to

be heard on these issues. SmileDirect seeks injunctive relief as well as actual, direct, incidental, and consequential damages.

On December 23, 2019, the Board and all Defendants filed a motion to dismiss. A hearing on the motion is scheduled for April 23, 2020.

## **Assemblymember Evan Low Introduces Legislation to Require Dentists to Conduct In-Person Examinations Before Approving Teleorthodontics Treatment**

[AB 1998 \(Low\)](#), as introduced January 27, 2020, would amend section 1680 of the Business and Professions Code to make it unprofessional conduct for a dentist to diagnose and correct malpositions of human teeth or use orthodontic appliances without first performing an in-person examination. This bill would change existing law by clarifying that the required examination must be “in-person.”

The bill comes at a time of ongoing [legal disputes](#) between SmileDirectClub and the Dental Board of California regarding the practice of teledentistry, and increased scrutiny of direct-to-consumer teleorthodontics companies, such as those that permit consumers to purchase self-applied clear aligners for teeth without first seeing a dentist. Assemblymember Low, as chair of the Assembly Committee on Business & Professions, authored [AB 1519 \(Low\) \(Chapter 865, Statutes of 2019\)](#), which initially amended section 1680 to establish basic requirements for these products prior to treatment. In a [press release](#), the author states that this bill is intended to further establish patient protections with respect to teleorthodontic services. According to the author, “[t]he industry should view AB 1998 as a sign that the Legislature is serious about requiring meaningful safeguards if these questionable and controversial business practices are allowed to

continue.” He promises to gather broad stakeholder input, including input from teleorthodontic companies, before further amending the bill. Assemblymember Low has also stated that he “intends to convene an informational hearing to discuss how policymakers should correctly balance patient access and patient safety as emerging telehealth products come to market.”

At this writing, AB 1998 is pending in the Assembly Business & Professions Committee.

## **Proposed Regulations to Implement AB 2138 (Chiu) to Establish Substantial Relationship Criteria for Criminal Convictions and Evaluating Rehabilitation of Applicants and Licensees**

On February 18, 2020, DBC published [notice](#) of its intent to amend sections 1019 and 1020, Title 16, of the CCR, to specify criteria regarding criminal convictions and rehabilitation of licensees convicted of criminal offenses, as set forth in the [proposed language](#). According to the [initial statement of reasons](#), the proposed amendments are the Board’s efforts to implement [AB 2138 \(Chiu\), \(Chapter 995, Statutes of 2018\)](#), regarding denial of applications, and revocation or suspension of licenses due to criminal convictions.

Specifically, AB 2138 mandates that the Board must develop criteria through the rulemaking process to aid it when considering the denial, suspension, or revocation of a license, in determining whether a crime is substantially related to the qualifications, functions, or duties of the dental profession. Pursuant to section 481 of the Business and Professions Code, the Board must consider three criteria when evaluating whether a crime is “substantially related” to the dental profession: (1) The nature and gravity of the offense[s]; (2) The number of years elapsed since the date of the offense[s]; and (3) The nature and duties of the profession in which the applicant seeks licensure or in which the licensee is licensed. Regarding rehabilitation, AB 2138 prohibits the

Board from denying a license on the basis that an applicant was convicted of a crime, if the applicant made a showing of rehabilitation. The initial statement of reasons further states that the proposed changes “may create jobs, new businesses, and expand businesses to the extent that potential licensees were not able to apply previously because of license barriers and now can.”

At the Board’s meetings on February 7, 2019 [[Agenda Item 10\(b\)](#)], and August 15, 2019 [[Agenda Item 20\(a\)](#)], members discussed current law as it applies to licensees or applicants who have been convicted of a substantially related crime, and how AB 2138 creates new standards under which the Board would be authorized to deny an applicant based upon a crime or act substantially related to dentistry. At these meetings, the Board discussed and approved proposed changes to the CCR which incorporates the substantial relationship criteria required by AB 2138. The Board has not scheduled a public hearing on this proposed action. However, the Board will hold a hearing if it receives a written request from any interested person. The written comment period is open for any interested person to submit comments. The written comment period closes at 5:00 p.m. on Tuesday, April 28, 2020.

## **MAJOR PUBLICATIONS**

The following reports/studies have been conducted by or about DBC during this reporting period:

- [\*2019 Leadership Accountability Report\*](#), December 2019, (DBC’s annual report to the Secretary of the California Business, Consumer Services and Housing Agency, detailing its (1) mission and strategic plan; (2) strategic plan goals and objectives; (3) integrity and ethical values; (4) ability to report ethical concerns; (5) oversight structure; (6) Workforce Action Plan; (7) monitoring protocols; and (8) risk assessment processes.)

# RULEMAKING

- *Proposed Regulatory Changes to Increase Maximum Fines Assessed by the Board* (On February 28, 2020, the Board posted [notice](#) of its intent to [amend](#) sections 1023.2 and 1023.7, Title 16 of the CCR to increase the maximum administrative fines for citation and unlicensed practice that the Board may assess from \$2,500 to \$5,000—the statutory maximum. According to the [Initial Statement of Reasons](#), these amendments are necessary to protect the public’s health and wellbeing because the existing \$2,500 maximum has been insufficient to deter wrongful or substandard conduct, and also to provide the Board with a more efficient and less costly alternative to full investigation and discipline by the attorney general’s office for substandard conduct. On April 1, 2020, the Board posted [notice of cancellation of the public hearing](#) due to the COVID-19 pandemic, and extending the public comment period through April 29, 2020. DBC will hold a hearing upon request.)

- *Implementation of [AB 2138 \(Chiu\) \(Chapter 995, Statutes 2018\)](#)* (On February 18, 2020, DBC [noticed](#) its proposal to [amend](#) sections 1019 and 1020, Title 16 of the CCR to adopt “substantial relationship” criteria for determining whether applicants’ past crimes are relevant to work as an optometrist for purposes of denying a license. According to the [Initial Statement of Reasons](#), the Board noticed these regulations to comply with AB 2138 (see HIGHLIGHTS). Public comment period expires April 28, 2020.)

# LEGISLATION

- [AB 1998 \(Low\)](#), as introduced January 27, 2020, would amend section 1680 to the Business and Professions Code to provide that the failure of a treating dentist to perform an in-



person examination pursuant to that required of a patient of record is unprofessional conduct under the Dental Practice Act (see HIGHLIGHTS). *[A. B&P]*

- [SB 653 \(Chang\)](#), as amended January 23, 2020, is a two-year bill that would amend and add several sections of the Business and Professions Code to authorize dental hygienists to apply fluoride varnish to a patient without the supervision of a dentist. The bill would also allow dental hygienists to provide preventative services and screenings for nonprofit events and organizations. According to the author, due to the limited number of dentists in California, more preventive services are needed, and dental hygienists are an underutilized, yet available resource to address this need. *[A. Desk]*

- [SB 878 \(Jones\)](#), as introduced January 22, 2020, would add section 139.5 to the Business and Professions Code to require licensing boards to display current wait times for licensure applications and renewals on their websites. According to the author, current DCA processing system is ancient and should be more transparent to allow licensees to know their application status in order to continue their profession without unnecessary delays. *[S. BP&ED]*