

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

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

On July 23, 2020, Governor Newsom [appointed](#) Alicia Montell, DDS, as a licensee member of the Board. Ms. Montell has been the Director of Dental Services at the San Francisco Department of Public Health since 2019.

Additionally on July 23, 2020, Governor Newsom reappointed both Meredith McKenzie, Esq. and James Yu, DDS, MS, to the Board. Ms. McKenzie has served on the Board since 2013, and Mr. Yu has served on the Board since 2018.

At this writing, there are two public member vacancies on the Board, to be appointed by the Governor.

HIGHLIGHTS

Board Closely Watches Failed Bill to Regulate Mail-Order Teeth Alignment Companies

On August 8, 2020, [AB 1998 \(Low\)](#) failed to pass the Assembly Committee on Business, Professions, & Economic Development. As amended June 3, 2020, this bill would have amended sections 1680, 1683.1, and 1683.2 of, and added section 1684.1.1 to, the Business and Professions Code, requiring dentists and orthodontists to review X-rays of patients' teeth before providing certain orthodontic treatments. The bill would have also required patients to be provided specified information in a dental treatment plan, and specified that licensed dentists and other professionals under the jurisdiction of the Dental Board of California (DBC) not be required to sign an agreement that limited their ability to file a complaint or provide information to the Board.

An outgrowth of DBC's last sunset review process, the Board had [voted](#) to watch AB 1998 [Agenda Item 11(a)], which was highly controversial. DBC stated in its 2018 [response](#) to Legislative Oversight's background paper on its sunset review issues, that it is possible for a consumer to go through the mail-order teeth realignment process without ever actually consulting with a licensed dentist, which has raised nation-wide concerns.

According to the author, AB 1998 would have banned "dangerous and harmful teleorthodontics" by largely prohibiting direct-to-consumer dental aligner products until

legislation is passed to establish parameters for how teleorthodontics companies may operate. The author further stated, “California is proud to be the incubator of innovation—but we cannot sacrifice patient health and safety in exchange for making billionaires out of tech bros.”

According to a bill analysis, groups such as the American Association of Orthodontists and the California Association of Orthodontists supported the legislative changes as important measures for consumer protection. The bill was opposed by groups such as SmileDirectClub and the Black Small Business Association of California on the basis that a blanket mandate for radiographs would be contrary to the standard of care for dentistry and preempts a dentist’s judgment in the care for his or her patient. Opponents also argued that teledentistry is an affordable option for many low-income communities, specifically, communities of color. According to SmileDirectClub’s 2019 [lawsuit](#) against DBC, traditional braces can cost over \$5,000, and SmileDirectClub charges just under \$2,000.

If AB 1998 had passed, it would have required providers to order new X-rays if consumers could not produce them. According to a bill analysis, this is already the standard of practice for orthodontists and dentists, and it would diminish the ease and convenience of SmileDirectClub and other teledentistry options. The American Association of Orthodontists testified that X-rays are essential to the diagnosis and prevention of root issues, bone disease, and oral cancer; without X-rays being required, teeth may be aligned but unhealthy.

Despite some consumer satisfaction, reporting by news outlets and the Better Business Bureau have led to a weakening public image for SmileDirectClub. According to a bill analysis, the Better Business Bureau reported that it has received over 1,670 complaints about SmileDirectClub, Inc. since 2014, including reports of cracked teeth, misaligned bites, migraines, and jaw pain after using the teeth-straightening trays from clients who purchased mail-order

aligners like the ones offered by SmileDirectClub. SmileDirectClub has [sued](#) NBC over a news segment alleging the company's malpractice, which SmileDirectClub says is "defamatory" and has requested damages of \$2.85 billion.

As further outlined in the testimony surrounding AB 1998, a separate news article revealed that the largest telehealth orthodontics company's lead dentist was at risk of losing his California license following a two-year DBC investigation. DBC accused the lead dentist of "violating state law, defrauding state dental regulators and acting with gross negligence toward patients while helping [the company] grow its business." Prior to DBC's accusation, SmileDirectClub filed a lawsuit [as cited to above], against the Dental Board members, alleging that its investigation into the company's practices constituted harassment.

SmileDirectClub Suit, Against DBC Alleging Antitrust Activity, Dismissed and Appealed to the Ninth Circuit

Jeffrey Sulitzer, D.M.D, et al. v. Joseph Tippins, et al., Case No. 2:19CV08902 (C.D. Cal.). Jeffrey Sulitzer, owner of SmileDirectClub, a direct-to-consumer teledentistry company that provides teeth aligners to customers, brought a [legal action](#) against DBC in October 2019, alleging that the Board was participating in behavior to illegally protect the dental industry from the competitive prices of SmileDirectClub. [[25:2 CRLR 3–5](#)] On April 22, 2020, the initial complaint was [dismissed](#) with leave to amend due to numerous deficiencies in the allegations made against defendants. On May 22, 2020, SmileDirectClub filed a first amended complaint. DBC then filed a second motion to dismiss the claims. On July 16, 2020, the Court [dismissed](#) all claims of SmileDirectClub without leave to amend. The lower court agreed with DBC's argument that it was legitimate for the Board, responding to a third-party complaint about the possible unlicensed practice of dentistry by Smile Direct or its agents, to have investigators visit SmileDirect's retail

locations in California, and to gather evidence about the possible unlicensed practice of dentistry. Although the plaintiffs did not like the way the investigation was carried out, the court found their claims did not rise to the level of federal antitrust activity found in the *North Carolina* case, see below.

As alleged in the complaint, DBC, through one of its investigators in the Board's Enforcement Unit, investigated SmileDirectClub. This investigation culminated in a May 31, 2018 raid, which was the impetus of the lawsuit. The raid of the SmileDirectClub store allegedly frightened and intimidated SmileDirectClub employees and customers, which in turn harmed its business. SmileDirectClub's plea for relief included treble damages of an unspecified amount, and a jury trial rather than a bench trial.

This lawsuit's claims are based, in part, on the Sherman Antitrust Act and *North Carolina Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. 494 (2015). In *North Carolina*, the Supreme Court of the United States [held](#) that a state regulatory board controlled by market-participants that took action without oversight by the state was in violation of antitrust law. Federal antitrust laws are an essential component to the free market, and state regulatory boards are immune from antitrust litigation only if they are subject to active supervision by the state. The *North Carolina* case stands for the proposition that "when a state empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest." The implications of this case are still unclear for the Dental Board, which is made up of [thirteen board members](#), ten of whom are market-participants.

On July 17, 2020, SmileDirectClub filed its [Notice of Appeal](#) in the Ninth Circuit Court of Appeals.

Board Planned Implementation of AB 2138 Modified, Comment Period Extended

On May 18, 2020, the Dental Board of California (DBC) published [modified text](#) for regulations to implement [AB 2138 \(Chiu\) \(Chapter 995, Statutes of 2018\)](#), and on June 2, 2020, [extended](#) the public comment period from June 2 through June 17, 2020. The Board initially [noticed](#) its intent to amend sections 1019 and 1020, Title 16 of the CCR on February 18, 2020. According to the [initial statement of reasons](#), the proposed amendments are the Board's efforts to implement AB 2138 regarding denial of applications, and revocation or suspension of licenses due to criminal convictions. [\[25:2 CRLR 6–7\]](#) The stated goal of the legislation is to diminish obstacles to licensing for people with convictions who are rehabilitated, and to limit DBC's ability to use prior convictions or acts when denying licenses for dentistry specifically.

In addition to numerous revisions to the language meant to increase clarity, the Board added reference to sections 1670.1, 1680(e), and 1681(c) in several places to clarify that a criminal sentence is not completed until parole or probation is completed. The modified language makes clear that this consideration comes into play both at initial licensure, and in any professional misconduct determination.

As reported by the Board at its May 14, 2020 [meeting](#), a public comment letter signed by twenty listed organizations, such as UC Irvine School of Law, Legal Aid at Work, and San Jose State University, argued “that the proposed regulations fall short of the intent of [AB 2138], which included combating discrimination against people with records who have demonstrated rehabilitation and seek to establish themselves professionally.” The Board voted to reject these comments and defended the articulated rulemaking, countering that the purpose of AB 2138 was narrower, merely “to clarify substantial relationship criteria and criteria for rehabilitation.” Among other topics, the joint letter commented that “section 1020 relied too heavily on law enforcement's reports and determination of the applicant's progress,” and raised the fact that rehabilitation can take many different forms. The organizations offered expanded language of examples of

rehabilitation, including: volunteer service; successful employment in a related field; history of work experience in an employment social enterprise; unpaid work in the community; furthered education; abstinence from controlled substances and/or alcohol; stability of family life; fulfillment of parental and familial responsibilities; new and different social and business relationships from those which existed at the time of the underlying charges at issue; and change in attitude of the applicant. Again, the Board voted to reject these comments stating that it “can and already does give serious consideration to these factors when considering whether an applicant is rehabilitated.”

The Office of Administrative Law (OAL) is currently reviewing the proposed regulations.

RULEMAKING

- ***Diversion Evaluation Committee Membership:*** On September 23, 2020, DBC published [notice](#) of its intent to amend section 1020.4, Title 16 of the CCR to add a public member to the composition of Board diversion evaluation committees (DECs), remove the requirement that a licensed dental auxiliary must serve on each committee, and remove the term limits for committee members, as set forth in the [proposed language](#). According to the [Initial Statement of Reasons](#), it is becoming increasingly difficult for the Board to recruit qualified individuals to serve on DECs, and the proposed amendments will enhance the Board’s ability to fill the committees, and also allow current DEC members to continue serving. The Public Comment period on the proposed amendment expires on January 5, 2021.

LEGISLATION

- [SB 653 \(Chang\)](#), as amended January 23, 2020, amends sections 1911, 1925, 1926, and 1926.05 of, and adds sections 1911.5 and 1926.01 to, the Business and Professions Code to authorize dental hygienists to apply fluoride varnish to a patient without the supervision of a dentist and to provide preventative services and screenings for nonprofit events and organizations.

According to the author, this change will help supplement the low quantity of dentists and allow dental hygienists to help provide preventative services. Governor Newsom signed SB 653 on September 24, 2020 (Chapter 130, Statutes of 2020).

- [SB 878 \(Jones\)](#), as amended June 18, 2020, adds section 139.5 to the Business and Professions Code to require licensing boards to maintain and post current wait times for licensure applications and renewals via their website. According to the author, this will prevent delay and increase transparency for applicants. Governor Newsom signed SB 878 on September 24, 2020 (Chapter 131, Statutes of 2020).

LITIGATION

- *Jeffrey Sulitzer, D.M.D, et al v. Joseph Tippins et al.*, Case No. 2:19-CV-08902 GW (MAAX) (C.D. Cal.). On July 16, 2020, the court [dismissed](#) the plaintiff's complaint, which alleged that DBC was violating antitrust laws by harshly investigating SmileDirectClub. SmileDirectClub's founder, Jeffrey Sulitzer, [issued](#) a notice of appeal on July 17, 2020 (see HIGHLIGHTS).

- *Mohammadreza Yazdi v. Dental Board of California*, Case No. B298130 (Cal. Ct. App., Oct. 6, 2020). On October 6, 2020, the Second District Court of Appeals [affirmed](#) the Los Angeles Superior Court's denial of petitioner orthodontist's writ of mandate challenging DBC's decision ordering a stayed, probational revocation of his license. The appellate court found that the Board acted within its discretion to impose the disciplinary action against petitioner, and that substantial evidence supported each of the Board's various findings that petitioner's conduct fell below the standard of care.