

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 fifteen members (including all the dental practitioners); the Senate Rules Committee and the Assembly Speaker each appoint one public member.

At its December 4, 2020 [meeting](#) (Agenda item 18), the Board elected RDH member Joanne Pacheco as President, RDA member Rosalinda Olague as Vice President, and licensee member Dr. Alan Felsenfeld, DDS as Board Secretary, effective January 1, 2021.

On April 7, 2021, Governor Newsom [appointed](#) Dr. Steven D. Chan, DDS, as a licensee member of the Board. Dr. Chan was previously appointed to the Board in 2016, and served as a Board Member, Board Secretary, and was the Vice President as of the October 9, 2020 Board [meeting](#). Since that meeting, Dr. Chan did not serve on the Board until he was reappointed on April 7, 2021.

HIGHLIGHTS

Department of Consumer Affairs Permits Dentists to Administer Covid-19 Vaccine

On January 4, 2021, DCA Director Kimberly Kirchmeyer issued [DCA-21-104](#), which waived restrictions on dentists from ordering and administering COVID-19 vaccines. To order or administer COVID-19 vaccines under this waiver, dentists must complete a group of trainings on best practices, vaccine safety, and Pfizer and Moderna-specific data. Dentists are also required to comply with all applicable federal and state recordkeeping and reporting requirements, as well as act in accordance with any applicable FDA emergency use authorization. This waiver is in response to the high demand the medical field is experiencing for personnel to distribute the COVID-19 vaccine. Dental associations, such as the California Dental Association and the American Dental Association, have both advocated for dentists to participate in vaccination efforts.

Shortly thereafter, on January 27, 2021, Ms. Kirchmeyer issued [DCA-21-111](#), superseding DCA-21-104, which changed the trainings required for dentists to order and administer COVID-19 vaccines. These new trainings cover similar issues as the previous trainings, but more concretely explain the differences between the Moderna and Pfizer vaccines. All other aspects of the initial waiver discussed above remain in place.

On the same day, Governor Newsom issued Executive Order [N-02-21](#), which extends liability protections to specified licensees participating in the State’s vaccination administration program, including dentists, and directs the DCA boards and bureaus to “prioritize the investigation of complaints against licensees who have allegedly engaged in the diversion of COVID-19 vaccine or vaccine-administration supplies provided by the federal government, in violation of applicable federal requirements, for financial gain.” The Governor’s Executive Order extends Government Code section 8659 and allows immunity from liability for health care professionals and providers who provide services during a state of emergency at the express or implied request of state or local authorities. The overt goal of this liability waiver is to maximize the number of health care professionals and providers who continue to respond to state and local officials’ call to render services in connection with the COVID-19 pandemic. Health care professionals will not be subject to discipline for performing “their duties consistent with standards of care prevailing during the emergency, and boards . . . should ensure that such professionals’ and providers’ actions are assessed in the context of the standards of care, including any state waivers or health orders, in effect during an emergency, rather than with the benefit of hindsight.” This protects consumers by prioritizing investigations related to vaccine delivery under these orders, but also protects dentists from liability caused by the administration of the vaccine. In addition to

dentists, the Executive Order extends the liability waiver to any physician, pharmacist, registered nurse, nurse practitioner, or any other type of nurse.

Both DCA-21-111 and Executive Order N-02-21 became effective on January 27, 2021, and may be amended as circumstances require. At this writing, both are still in effect as written.

Maximum Malpractice Fine Imposed By Dental Board Doubled

On February 10, 2021, the Office of Administrative Law (OAL) [approved](#) DBC’s proposed rulemaking on Citations and Fines. This [proposed language](#) amends sections 1023.2 and 1023.7 of the CCR to set the maximum penalty for Class A crimes, Class B crimes, and unlicensed practice. Section 1023.2(a) defines a Class A violation as a violation of a statute/regulation that either “presents a substantial probability that death or serious physical harm to a patient could result therefrom” or in which “the person has been issued three class B violations within a 24-month time period immediately preceding the act.” Section 1023.2(b) defines a Class B violations as a violation that involves “a person who has violated a statute/regulation relating to the practice of dentistry which does not present a substantial probability that either death or serious physical harm to a patient will result therefrom.” Finally, section 1023.7 empowers the executive officer of the Dental Board to “issue a citation . . . against any unlicensed person who is acting in the capacity of a licensee under the jurisdiction of the board and who is not otherwise exempt from licensure.” Class A violations, Class B violations, and unlicensed practice were previously punishable by a minimum fine of \$50, with a maximum fine of \$2,500. The new regulation doubles the maximum fine for these three classifications of crimes to \$5,000.

On February 28, 2020, the Dental Board posted [notice](#) of the rulemaking. [[25:2 CRLR 8](#)]. According to the [Initial Statement of Reasons](#), this rulemaking is meant to rectify the lower

penalty, which was viewed by the Board as insufficient to properly function as a deterrent against violations of statutes and regulations.

On April 9, 2020, the Board explained in its [Notice of Cancellation of Hearing](#) that if the Board had received a written request for a public hearing from any interested person, it would hold a hearing. No public hearing was held on this matter.

According to the Board's notice, when deciding whether to issue a citation, section 1023.4 requires that the executive officer consider the following factors when assessing the amount of an administrative fine: (1) the good or bad faith exhibited by the cited person; (2) the nature and severity of the violation; (3) evidence that the violation was willful; (4) history of violations of the same or similar nature; (5) the extent of cooperation with the Board; and (6) the extent to which the cited person has mitigated or attempted to mitigate any damage or injury caused by his or her violation. The Board noted in its rulemaking proposal that it has expanded its use of cite and fine to address a wider range of violations that can be more efficiently and effectively addressed through a cite and fine process with abatement and/or remedial education outcomes.

Further, these fines can be enforced even when patient harm is not found, but the quality of care provided to the customer is substandard. Examples of "lesser" violations include documentation issues, such as recordkeeping; unprofessional conduct for the failure to disclose or report convictions, such as driving under the influence; and disciplinary actions taken by another professional licensing entity.

Although the Board considered alternatives, such as not changing anything or raising the maximum from \$2,500 to an alternative number lower than \$5,000, these decisions were ultimately rejected as ineffective.

According to the [Final Statement of Reasons](#), this rulemaking is determined to have a small economic impact, estimated at a maximum of \$36,000 per year. This is not viewed as a sufficiently large impact to justify more rigorous scrutiny by the State, especially within the context of the dental industry, where the average salary of a dentist in California is approximately \$150,000 per year.

The new regulation became effective on February 10, 2021.

Senate Bill 607 Would Eliminate Clinical and Practical Examination For Registered Dental Assistants In Extended Functions

During the Board's December 4, 2020 [meeting](#) [Agenda item 16(c)ii], the Board voted to approve a [legislative proposal](#) that would delete the clinical or practical examination requirement for RDAEFs. As the law currently stands, the RDAEF examination is offered approximately eight times per year. Because the examination consists of a clinical and practical examination, it must be held at a dental school that has enough space to accommodate the approximately 25 to 30 candidates that are tested at each examination. Before the COVID-19 pandemic, the examinations were typically held at the University of California, Los Angeles (UCLA), and the University of California, San Francisco (UCSF). In May of 2020, UCLA and UCSF alerted the Board that the schools would not be able to host the test due to Governor Newsom's stay-at-home order in light of COVID-19. After unsuccessfully searching for an alternative way to complete the examinations, the Board canceled the June and August 2020 examinations.

Under the Governor's declaration of an emergency due to COVID-19 in [Executive Order N-39-20](#), the Director of DCA is authorized to waive laws and regulations pertaining to professional licensing requirements during the state of emergency. On August 21, 2020, the Board

requested that the Director temporarily suspend the clinical and practical examination licensing requirements for RDAEF applicants due to the inability to secure a testing location due to COVID-19 concerns. On August 31, 2020, the Board received notice that their waiver request was denied.

Through its work with the Office of Professional Examination Services (OPES), a unit within DCA, the Board has already established that “due to ethical and practical considerations, dental licensure examinations are moving away from patient-based assessments and this trend has been accelerated by the COVID-19 pandemic.” In support of eliminating the RDAEF clinical and practical examination, the Board pointed out challenges with how the exam is administered, including that RDAEFs are a supervised profession requiring supervising dentists to determine when a RDAEF is ready to practice and perform the duties of the licensure. The Board also stated that it had not received consumer complaints relating to RDAEFs performing the procedures tested on the clinical and practical examinations. The Board has already eliminated the RDA practical examination due to similar issues as those that face the administration of the RDAEF examination.

As part of the [December Meeting Materials](#) [at p. 199], the Board was asked to review a letter from the RDAEF Association. The Association acknowledged that dental licensure examinations should move away from patient-based assessments and supported the removal of the clinical patient portion of the RDAEF examination. However, the Association expressed reservations about eliminating any bench-restorative examinations, reminding the Board that these examinations were a useful metric for determining the strengths and weaknesses of different RDAEF programs in the past. Historically, high fail rates have notified the Board that a particular RDAEF program’s curriculum was deficient, and the RDAEF Association argued that removing these examinations could degrade the quality of the RDAEF program and the quality of the RDAEFs themselves. The RDAEF Association concluded by stating: “[s]hould the Board move

forward with the elimination of both the clinical and restorative portion of the examination, the RDAEF Association would look forward to working with the Dental Assisting Council and Board staff to develop a meaningful process to maintain quality educational programs for the RDAEF.”

At its December 4, 2020 [meeting](#), the Board voted 12–1 to approve the proposed statutory changes eliminating the statutory authority for the RDAEF practical and clinical examination and to direct staff to find an author to carry the bill to repeal the requirements of the RDAEF clinical and practical examination permanently.

On February 18, 2021, California Senator Richard Roth, chair of the Senate Business, Professions, and Economic Development Committee, introduced the Board’s legislative proposal as part of [SB 607 \(Roth\)](#). The bill is scheduled for hearing before the Senate Business, Professions, and Economic Development Committee on April 19, 2021 (*see* LEGISLATION).

RULEMAKING

The following is a status update on recent rulemaking proceedings that DBC has initiated:

- ***California Dentistry Law and Ethics Examination:*** On April 13, 2021, the Board published [notice](#) of its intent to amend section 1031, Title 16 of the CCR regarding its passing score for the California Dentistry Law & Ethics Examination as set forth in the [proposed language](#). According to the [Initial Statement of Reasons](#), OPES conducted an occupational analysis of the dental profession in 2018 and recommended that the Board should amend its existing regulation, which sets the passing score for the Law and Ethics examination at 75% and instead replace it with a criterion-referenced passing score in order to make it legally defensible. The public comment period on the proposed amendment expires on June 7, 2021. At this writing, the Board has not scheduled a public hearing with respect to this rulemaking proposal but will do so if it receives a written request 15 days prior to the expiration of the public comment period.

- **Citations and Fines:** On February 10, 2021, OAL [approved](#) the Board’s proposal to amend sections 1023.2 and 1023.3, Title 16 of the CCR, to raise the maximum penalty amount to \$5000 for Class A and Class B violations related to the practice of unlicensed dentistry. The new regulations became effective on February 10, 2021 (see HIGHLIGHTS).

- **Substantial Relationship Criteria and Criteria for Evaluating Rehabilitation:** On January 22, 2021, OAL [approved](#) DBC’s proposed amendments to sections 1019 and 1020, Title 16 of the CCR to implement [AB 2138 \(Chiu\) \(Chapter 995, Statutes 2018\)](#), and adopt criteria to be used in determining whether an act is substantially related to dentistry for purposes of license denial, suspension, or revocation. This regulation also set terms for rehabilitation, or other subsequent misconduct, when determining licensure suspension or revocation. The Board initially published notice of its intent to amend these regulations on February 18, 2020. [[25:2 CRLR 6–8](#)] The new regulations became effective on January 22, 2021.

LEGISLATION

- [AB 29 \(Cooper\)](#), as introduced December 7, 2020, would amend section 11125 of the Government Code to expand the Bagley-Keene Open Meeting Act to require state bodies to post all writings and materials online the same day they are disseminated to the members of the governing body of the agency, or at least 72 hours in advance of the meeting, whichever is earlier. According to the author, the bill is designed to ensure that the public has access to, and has a chance to review, all information associated with an agenda item prior to a meeting of the state agency, board, or commission. [*A. Appr*]

- [AB 107 \(Salas\)](#), as amended March 24, 2021, would amend sections 115.6 and 5132 of the Business and Professions Code, and add section 95 to the Military and Veterans Code to allow DBC, and other licensing boards under DCA, to grant temporary licenses to out-of-state

licensed applicants who are married to an active-duty member of the United States military. *[A. M&VA]*

- [AB 225 \(Gray\)](#), as introduced January 11, 2021, would amend section 115.6 of, and add section 115.7 to, the Business and Professions Code. AB 225 would allow all DCA boards, including DBC, to issue a license to veterans or their spouses who have a license to practice in another state and meet other requirements. *[A. M&VA]*

- [AB 526 \(Wood\)](#), as amended April 6, 2021, as it relates to DBC, would amend section 1209 of, and add sections 1625.6 and 1645.2 to, the Business and Profession Code to authorize dentists to independently prescribe and administer influenza and COVID-19 vaccines and permit dentists to administer rapid COVID-19 tests. *[A. Appr]*

- [AB 646 \(Low\)](#), as amended April 14, 2021, would add section 493.5 to the Business and Professions Code to require DCA licensing boards, including DBC, that post information on their website about a revoked license due to a criminal conviction, to update or remove information about the revoked license within 90 days should the Board receive an expungement order related to the conviction. According to the author, the bill is designed to reduce employment barriers for people with previous criminal records who have been rehabilitated and whose conviction has been dismissed or expunged through the judicial process. *[A. Appr]*

- [AB 1026 \(Smith\)](#), as introduced February 18, 2021, would add section 115.4 to the Business and Professions Code to require all DCA regulatory boards to grant a 50% fee reduction for an initial license to an applicant who has served as an active member of the United States Armed Forces or the California National Guard and was honorably discharged. According to the author, this legislation will help remove financial barriers for veterans looking to enter licensed professions, bring skilled labor into California, and help reduce veteran homelessness. *[A. B&P]*

- [AB 1236 \(Ting\)](#), as amended April 15, 2021, as it relates to DBC, would add section 502 to the Business and Professions Code to require all boards that oversee healing art licensees, including DBC, to collect specific demographic information, post the information on their websites that they each maintain, and provide this information annually to the Office of Statewide Health Planning and Development, while maintaining confidentiality, beginning July 1, 2022. According to the author, communities of color are more likely to use needed health care services when their provider speaks their language or shares the same cultural background. However, the current data is insufficient for determining the State’s capacity to address the needs of our diverse population. By expanding demographic data collection on healthcare workers, the State can better identify healthcare disparities, conduct targeted outreach strategies, and craft solutions to ensure comprehensive coverage and greater healthcare access for all Californians. *[A. B&P]*

- [AB 1386 \(Cunningham\)](#), as introduced February 19, 2021, would amend section 115.5 of the Business and Professions Code to prohibit DCA licensing boards, including DBC, from charging an initial licensing fee to an applicant who is an active-duty member of the United States Armed Forces who is assigned to a duty station in this state and who holds a current license in another state or territory in the vocation or profession for which the applicant is seeking a license. According to the author, who is also the sponsor of the bill, this bill is intended to relieve the burden on military families from having to pay a new licensing fee each time they relocate to a different state. *[A. B&P]*

- [SB 607 \(Roth\)](#), as amended April 13, 2021, is an omnibus bill amending various sections of the Business and Professions Code to make technical and clarifying changes. As it applies to DBC, the bill would amend section 115.5 to require all boards under the DCA to waive

application and initial licensure fees for military members and their spouses under specified conditions and amend section 1724 to specify that the application fee for a pediatric minimal sedation permit cannot exceed \$1,000, and the renewal fee cannot exceed \$600. Additionally, the bill would amend sections 1753, 1753.55, 1753.6, and repeal section 1753.4 of the Business and Professions Code to implement the Board’s legislative proposal to remove the requirement for RDAEFs to pass practical and clinical examinations to become licensed (see HIGHLIGHTS).

[S. BP&ED]

LITIGATION

- *Jeffrey Sulitzer, D.M.D, et al. v. Joseph Tippins et al., Case No. 2:19-CV-08902 GW (MAAX) (C.D. Cal.); Docket No. 20-55735 (9th Cir.):* On November 24, 2020, Plaintiffs/Appellants SmileDirectClub, LLC and Jeffrey Sulitzer filed their [opening brief](#) in the Ninth Circuit Court of Appeals, challenging the Central District of California’s [dismissal](#) of their antitrust and constitutional claims against DBC and its members. Plaintiffs allege that, following a complaint by an orthodontic trade association, the members of DBC, its Executive Director, and an investigator unlawfully agreed to target Plaintiffs with an intrusive investigation that suppressed the competitive threat posed by Plaintiffs’ “clear aligners” product—an alternative to traditional braces—in violation of section 1 of the Sherman Act. [[26:1 CRLR 5–6](#)] On December 2, 2020, the Pacific Legal Foundation filed an [amicus curiae brief](#) in support of Appellants, arguing that the Board members’ alleged actions raise a reasonable inference of anticompetitive conspiracy. On December 2, 2020, the U.S. Department of Justice filed an [amicus brief](#) in support of Appellants, also briefing the Ninth Circuit on the antitrust issues pertaining the alleged actions of the Dental Board. At this writing, the matter is fully briefed. A date for oral argument has not yet been set.

- ***Mohammadreza Yazdi v. Dental Board of California, Case No. S265591*** (Supreme Court of California): On January 13, 2021, the California Supreme Court denied the plaintiff's petition for review, thus finalizing the appellate court's October 6, 2020 [order](#) affirming 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. [[26:1 CRLR 9](#)]