

BOARD OF OPTOMETRY
Public Meeting
June 8, 2006

1. Call to Order

The meeting was called to order at 9:12 a.m. by Dr. Hernandez and a quorum was established. Present were Ms. Johnson, and Noda, Drs. Goldstein, Hernandez, Pollack, and Simonds. Dr. Susy Yu arrived at 9:45 a.m. Also present were staff members Taryn Smith, Margie McGavin, Gary Randolph, and Staff Counsels Don Chang and Spencer Walker.

2. Approval of Minutes

Move to approve the minutes of the February 2, 2005 meeting. M – Hernandez, S – Simonds, MSP – Unanimous.

3. Election of Officers

Business and Professions Code Section 3014 requires that the Board of Optometry elect a President, Vice-President, and Secretary. Each of which will serve a one-year term or until a qualified successor is elected. Any member of the Board may hold office.

The Board made the following nominations and vote for the following offices:

Move to elect Dr. Lee Goldstein as Board President. M – Hernandez, S - Yu, MSP – Unanimous.

Move to elect Dr. Susy Yu as Vice President. M – Hernandez, S – Goldstein, MSP – Unanimous.

Move to elect Audrey Noda as Secretary. M – Hernandez, S – Yu, MSP – Unanimous.

4. Pending Legislation

Taryn Smith presented written and verbal update reports on several bills of interest to the board.

A. Assembly Bill 579 (Aanastad)

According to the sponsor, the bill proposes to amend Business and Professions Code Section 3129 to modernize the current restriction on advertising free optometric services to allow publicizing charitable events, like free screenings, while still protecting consumers from “bait-and-switch” tactics.

Representatives of the California Optometric Association and Board’s Executive Officer met with Assembly Member Aanastad to discuss

amending COA sponsored bill (AB 579) to include language that would facilitate licensure for out of state optometrists modeled after the AOA “licensure by endorsement” and similar legislation for dentists. Assembly Member Anastad agreed to take the amendments with COA and the Board as co-sponsors.

Move to support amendment of B&P Code Section 3129 to support advertising. M – Goldstein, S – Noda , MSP – Unanimous.

B. Assembly Bill 1382 (Nakanishi)

AB 1382 provides that it is a deceptive marketing practice for any person to advertise that contact lenses may be obtained without confirmation of a valid prescription.

Move to support AB 1382. M – Simonds, S – Goldstein, MSP – Unanimous.

C. Assembly Bill 2256 (Assembly Business and Professions Committee)

At the November 2005 Board meeting, the Board voted to pursue legislation to eliminate the requirement for optometric corporations to register with the Board after having already done so with the Secretary of State. The California Optometric Association has indicated support for the amendments.

Due to the non-controversial nature of the amendments, the Business and Professions Committee has agreed to pursue the changes in their Omnibus Bill. The amendments were submitted to Legislative Counsel for drafting the week of January 23, 2006 and are expected to appear in an Omnibus Bill this spring.

D. Assembly Bill 1476 (Figueroa)

Existing law provides for the licensure and regulation of optometrists by the State Board of Optometry, in the Department of Consumer Affairs, and authorizes the board to appoint an executive officer. These provisions will become inoperative on July 1, 2008, and will be repealed on January 1, 2009.

This bill would, instead, make these provisions inoperative on July 1, 2010, and would repeal them on January 1, 2011.

Move to extend sunset. M – Simonds, S – Goldstein, MSP – Unanimous.

5. Pending Regulations

Taryn Smith reported on the following potential or pending changes to the California Code of Regulations:

CCR Section 1515 (Advertising of Services)

This regulation provides that violations of 651, 651.3, or 17500 of the CCR are cause for discipline by the board. Effective January 1, 2006, B&P Code Section 3110 (g) defines violation of B&P 651 or 17500 as cause for discipline AB 488. Chapter 393, Statutes of 2005). Therefore, this regulation is superfluous and should be repealed.

Status: Repealed effective March 13, 2006

CCR Section 1530 (Examination Results)

This regulation sets the passing score for licensing exams at 75%. Effective January 1, 2005 B&P Section 3054 was amended to require the Board to establish passing grades for the licensure examination to be “based on psychometrically sound principles of establishing minimum qualification and levels of competency” (AB 2464, Chapter 426, Statutes of 2004). Section 3054 is now in conflict and takes precedent over CCR Section 1530; therefore, this regulation should be repealed.

Status: Repealed effective March 14, 2006.

CCR Sections 1566 and 1566.1 (Consumer Notice)

This regulation updates requirement for optometrists to post a notice that advises patients how to contact the Board and their right to obtain a copy of their prescription for corrective lenses. Federal law which supercedes state law is currently cited in the regulation. Additionally, the Board’s new address and phone numbers should be incorporated into the regulations.

Status: Effective date is February 9, 2006.

CCR Section 1579 Citable Offenses

This regulation was addressed under Agenda Item 9 - Report and Possible Action from the Enforcement Committee.

1575 (Disciplinary Guidelines)

This regulation was addressed under Agenda Item 9 - Report and Possible Action from the Enforcement Committee.

1536 (Continuing Education)

This regulation was addressed under Agenda Item 8 - Report and Possible Action from the Continuing Education Committee.

6. Executive Officer's Report

Taryn Smith provided written and verbal report on the following:

Licensing Exam

On April 22, 2006, the Enforcement Manager and the Executive Officer observed the practical portion of the National Board of Examiner in Optometry (NBEO) held at the California University Berkeley campus.

Applicant Tracking System

The Board was scheduled to begin converting its manual application review process to an automated system, known as the Applicant Tracking System (ATS), in July 2006. However, due to workload issues, the Department of Consumer Affairs' Office of Information Services rescheduled the Board's transition date to November 2006. The \$70,000 set up cost is built into the operating budget for Fiscal Year 2006/07.

Enforcement Program

The Board recruited expert witnesses to act as consultants for the Enforcement Program last year. Ten applications have been received to date. At the February 2005 Board meeting, the Board instructed staff to work with Board member(s) to develop a test enforcement case. Test case development was placed on hold pending the success of the Board-sponsored legislation to recast and revise the enforcement statutes in the Optometry Practice Act (Assembly Bill 488 (Bermudez)). The bill was signed into law and took effect January 1, 2006. The applicants, as well as existing experts, will have to be informed of the changes before they are tested on their knowledge of the laws.

Note: This project was placed on hold due to staff changes in the Enforcement Program. The new Enforcement Manager reported to work for the board in March of this year and has begun working on these projects.

Staff has been working on developing training sessions to educate investigators on the practice of optometry and the laws regulating it. The sessions will be held at Southern California College of Optometry and Berkeley School of Optometry. The training was originally envisioned to take place this summer, but it was postponed pending the outcome of AB 488 (Bermudez). In the meantime, staff has been working with DOI and the schools to develop the training program and projected costs associated with the training. The Board's Liaison to the Attorney General's Office will assist with training content and presentation. Expert witnesses will also be invited to attend the training.

Note: This project was placed on hold due to staff changes in the Enforcement Program. The new Enforcement Manager reported to work for the board in March of this year and has begun working on these projects.

On April 27, 2006, the Board staff met with two VSP Fraud Division personnel. The purpose of the meeting was to share information and ideas pertaining to investigating and taking action on fraud cases.

Publication of 2006 Law Book

The California Laws and Regulations Related to the Practice of Optometry (2006 Edition) was published at no cost to the Board in March 2006. The new Law Book contains State and Federal laws and regulations affecting California licensed optometrists. The Law Book can be purchased from the vendor or downloaded at not cost from the Board's website.

State Board of Optometry Budget

The Board's revenue continues to fall significantly short of its expenditures and reserve funds continues to shrink. As previously reported and discussed, a fee increase will be necessary. The only question is when it should be pursued. Budget estimates for Fiscal Year 2006/07 initially indicated an immediate need for a fee increase. However, it has since been determined that the savings generated by the reduced use of investigators from the Division of Investigations are sufficient to delay pursuit of a fee increase until the 2006/07 legislative session.

Fee increases are notoriously difficult to implement via legislation and always require cooperation from the Administration, the Legislature and the profession. Staff has met on numerous occasions with representatives from the Administration to discuss the Board's budget and will continue to do so. Board staff has also discussed this issue with staff from policy committees in the Assembly and Senate. The California Optometric Association has already indicated they would support the Board's efforts to increase revenue. Staff will continue to monitor the situation for the best time to go forward with a fee increase.

Medi-Cal Re-Enrollment Project

On May 30, 2006, the Department of Health Services informed the board that it is currently re-enrolling 571 optometrist in Los Angeles County for the purpose of authorizing Medi-Cal services at the addresses listed on their applications. At that time 58 of the 107 renewal applications being reviewed showed addresses not registered with the board and that 85% are in need of a Fictitious Name Permit.

DHS and the Board are working cooperatively to notify the optometrists that they are not in compliance with registration requirements, which will delay their re-enrollment.

Because of the immediate time frame involved, the Department of Health Services has requested that the Optometry Board expedite applications to correct or update these deficiencies. Board staff has already corrected about 15% of the deficiencies.

Disaster Preparedness/Risk Assessment

The changing threat paradigm and recent emergencies, including localized acts of nature, accidents, technological emergencies, and military or terrorist attack-

related incidents, have shifted awareness to the need for viable plans to ensure the capability of state agencies to continue their essential functions. On April 18, 2006, the Governor issued Executive Order S-04-06 (Attached), which mandates that all state agencies prepare Continuity of Operations/Continuity of Government plans. The Governor's Office of Emergency Services has published a template plan to assist state agencies when developing a continuity plan. The Board will develop its own continuity plan, based on the aforementioned template, for submittal by September 1, 2006.

The Department of Consumer Affairs' Information Security Office conducted a security risk assessment of the Board's offices in April 2006. The risk assessment included an on-site visit to the Board, a tour of the Board's physical premises and interviews with various staff members. The only finding was the vulnerability of Board operations in the event of an emergency due to the outdated business continuity plan.

7. Fictitious Name Permits

Staff reported on long standing problems with the procedures for reviewing applications for Fictitious Name Permits (FNP) and recommended changes in procedures to address the problems.

Business and Professions Code Section 3078 makes it unlawful for optometrists to practice under a false or assumed name. However, the law does provide for the Board of Optometry to issue a Fictitious Name Permit (FNP) permitting the optometrist to use a name specified in the permit, if and only if, the Board finds to its satisfaction that:

- 1) The name under which the applicant or applicants propose to operate is in the judgment of the board not deceptive or inimical (harmful) to enabling a rational choice for the consumer public and contains at least one of the following designations: "optometry" or "optometric."
- 2) The names of all optometrists practicing at the location designated in the application are displayed in a conspicuous place for the public to see, not only at the location, but also in any advertising permitted by law.
- 3) No charges which could result in revocation or suspension of an optometrist's license to practice optometry are pending against any optometrist practice at the location.

The requirement that a business name not be "deceptive or inimical to enabling rational choice" has made it necessary to develop clarifying policy statements to guide staff and licensees as follows.

- 1) No name submitted on a FNP that is the same or similar to that of a previously issued FNP in the same 30-mile geographical location shall be approved.
- 2) No word or phrase, such as “optical” or “health center” may be used that suggests a practice other than that of optometry.
- 3) Fictitious names may include a geographical locator or the family name of a present or past practitioner at the location, e.g., “Sacramento Optometry,” “Valley Street Optometric Center” or “Smith Optometric Center.”
- 4) No OD has exclusive rights to a geographic location or area.
- 5) No more than one fictitious name can be used at any one location.

The Board will sometimes receive applications to use fictitious business names that are similar to, and within 30 miles of, the location of an existing FNP. When this occurs, staff will often work with the applicant to modify the name to a degree that the similarity is, in the judgement of staff, no longer potentially confusing to the public. If an acceptable business name cannot be found, the application will be denied or voluntarily withdraw.

Business and Professions Code section 17910 requires every person who regularly transacts business in this state for profit under a fictitious business name to file a fictitious business name statement not later than 40 days from the time he or she commences to transact such business. The statement must be filed with the county clerk in the county where the principal place of business is located. Within 30 days thereafter, it must be published once a week for four successive weeks, with at least five days between each date of publication, in a newspaper of general circulation in the county where the principal place of business is located. An affidavit of publication must be filed with the county clerk within 30 days after the completion of the publication. (B&P § 17924) The statement is valid for 5 years. This legal requirement is necessary so the public is able to locate individuals who transact business under any name other than their own.

Problem Areas

Staff described a need for improved method of regulating the names optometrists use in connection with their practice. Unless the problem is addressed, there exists the opportunity for legal challenges. Identifiable areas of concern regarding current procedures for issuing FNP's are:

1. The 30-mile rule could be considered an underground regulation.
2. It should not be the responsibility of the board to protect, assign or facilitate the creation of a business name.
3. There is a perception that FNP's are issued to protect a business name rather than protect the consumer public

4. Despite the requirements listed above, Board staff must use a great deal of discretion when considering whether to approve an applicant for a FNP.

Proposal to Modify Procedure

According to California law, persons wishing to do business without revealing their name/s, must file a “doing business as” (dba) with their local or county government. The burden of regulating names of businesses rests on the local or county entity. With this in mind, the following procedures for applying and issuing Fictitious Names Permits would be:

- 1) The board could require applicants for an FNP submit proof of a filed DBA from a local or county government
- 2) Board would retain its authority to enforce the FNP requirements specified in Business and Professions Code Section 3078, which are outlined on page one of this report.

The proposed procedures would add another step in the application process, but would eliminate the need to review applications to determine if the business is so close to an existing business that it would be deceiving to the public. With the exception of the 30 mile standard, the board would revise the FNP application and include instructions that the applicant should research existing business names to ensure they are not applying for an FNP for name that is similar to an existing FNP also.

The above procedure would avoid duplication of efforts, in the event a person is granted an FNP, but the "d.b.a." is denied at the county level. It would also do away with the Board's 30-mile rule provided, however, that where the applicant or applicants are practicing optometry in a community clinic, as defined in subdivision (a) of Section 1204 of the Health and Safety Code, this subdivision shall not apply.

Move to instruct staff to modify procedures for processing FNP applications to require the applicant to provide proof of having obtained a “dba” from the county government in which the practice is located. M – Simonds, S – Goldstein, MSP – Unanimous.

8. Continuing Education Requirements

The Committee Chair, Richard Simonds, OD, reported on Committee activities.

Due to pending legislation, (AB 579), which will eliminate the Board’s authority to require CPR as a condition for license renewal, that the Committee determined that it was not necessary to promulgate regulations to eliminate the CPR requirement.

The Committee discussed appropriate manner for encouraging optometrists to take courses on child and elder abuse detection. It was determined that the board

can recognize such courses as part of the 8-hours permitted under the “patient care management” category.

Move to recognize as patient care management courses in child and elder abuse detection. M – Simonds, S – Pollack - MSP - Unanimous

9. Enforcement Committee

The rulemaking file to change the Board’s cite and fine authority was submitted to the Office of Administrative Law (OAL) for review on March 23, 2006. The file was rejected due to technical procedural problems. The Board was presented with proposed language, dated June 8, 2006, which were drafted in order to address the problems identified by OAL.

Move to adopt modified language to California Code of Regulations Section 1575 dated June 8, 2006 and instruct the Executive Officer to continue with the rulemaking process on Section 1575. M – Simonds, S – Johnson, MSP – Unanimous.

The Board was presented with draft Recommended Guidelines for Disciplinary Orders and Conditions of Probation dated May 2006, which reflect minor changes to the first draft (dated November 2005). The Board was also presented draft language to amend CCR Section 1579 to incorporate by reference the revised Disciplinary Orders.

Move to adopt draft language and incorporate by reference the draft disciplinary guidelines into California Code of Regulations Section 1575 and instruct the Executive Officer to continue with the rulemaking process on Section 1579. M – Simonds, S – Goldstein, MSP – Unanimous.

10. Reduction Of Penalty

An Administrative Law Judge conducted a hearing to consider a Petition for Reduction of Penalty or Early Termination of Probation from Howard Joel Wiess, OD. The proposed decision will be drafted by the Judge and presented to the Board for consideration and vote at the next Board meeting.

11. Closed Session

The Board voted to adopt the stipulated settlement in the Matter of Statement of Issues against Sergio Ortiz, OD.

The Board voted to adopt the stipulated settlement in the Matter of Statement of Issues against Phillip McEldowney, OD.

The Board voted to adopt the stipulated settlement in the Matter of the Accusation against John Brasier, OD.

The Board voted to adopt the stipulated settlement in the Matter of the Accusations against Huyen Mong Nguyen, OD.

12. Open Session

13. Public Comment

None received.

14. Future Agenda Items

None.

15. Adjournment

Meeting was adjourned at 3:19 p.m.

Audrey Noda, Secretary