



STATE BOARD OF OPTOMETRY
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MEETING MINUTES

Friday, May 18, 2012
 Department of Consumer Affairs – HQ 2
 1747 N. Market Blvd
 First Floor Hearing Room
 Sacramento, CA 95834

Members Present

Lee Goldstein, O.D., M.P.A.
 Board President
 Alex Arredondo, O.D.
 Board Vice President
 Ken Lawenda, O.D.
 Fred Naranjo, M.B.A., Public Member
 Alex Kim, M.B.A., Public Member
 Donna Burke, Public Member
 Ed Rendon, M.A., Public Member

Staff Present

Mona Maggio, Executive Officer
 Lydia Bracco, Fingerprint Coordinator
 Jessica Sieferman, Probation Monitor
 Cheree Kimball, Continuing Education Auditor
 Dillon Christensen, Enforcement Office Technician
 Christina Hasting, Enforcement Analyst
 Michael Santiago, Senior Staff Counsel
 Anahita Crawford, Deputy Attorney General

Excused Absence

Monica Johnson, Public Member
 Secretary

Guest List

On File

9:00 a.m.

FULL BOARD OPEN SESSION

1. **Call to Order – Roll Call – Establishment of a Quorum**
 Board President, Lee Goldstein, O.D. called the meeting to order at 9:15 a.m. Public Member, Ed Rendon arrived at 9:20 a.m. Dr. Goldstein called roll and a quorum was established.
2. **Petition for Reinstatement of License**
Dr. Larry Franklin Thornton, O.D.
3. **Petition for Reduction of Penalty or Early Termination of Probation**
Dr. Phillip Joseph McEldowney, O.D.

Administrative Law Judge, Danette Brown presided over the hearings. Board members heard the following petitions:

- A. Dr. Larry Franklin Thornton, O.D., License Number OPT 6369
 Agency Case Number: CC 2005-117
- B. Dr. Phillip Joseph McEldowney, O.D., License Number OPT 9742
 Agency Case Number: CC 2003-181

FULL BOARD CLOSED SESSION

4. **Pursuant to Government Code §11126(c)(3), the Board will Meet in Closed Session for Discussion and Possible Action on Disciplinary Matters.**

The Board convened into closed session at 10:40 a.m. to deliberate on the following petitions:

- A. Dr. Larry Franklin Thornton, O.D., License Number OPT 6369
Agency Case Number: CC 2005-117
- B. Dr. Phillip Joseph McEldowney, O.D., License Number OPT 9742
Agency Case Number: CC 2003-181

Closed session ended at 11:10 a.m. and the meeting adjourned for a 15 minute break.

FULL BOARD OPEN SESSION

5. President's Report

The Board reconvened into open session at 11:30 a.m.

Dr. Goldstein acknowledged Public Member, Fred Naranjo who has served, with him on the Board, for nine years. He acknowledged Professional Member, Alex Arredondo and Public Member, Ed Rendon who are completing their terms with the Board. Dr. Goldstein thanked the Members for participation and time served. Dr. Goldstein reminisced of his experience serving this Board, stating key periods.

Dr. Goldstein, as president of the Board and a distinguished alumnus, will be participating in the graduation ceremony on May 19, 2012 of the University of California-Berkeley, School of Optometry. He will assist the new optometrists in the optometric oath as well as provide a speech.

Mr. Naranjo spoke words of praise regarding the accomplishments of Board and staff members during his tenure and of his pleasure and pride in serving this Board.

Dr. Arredondo who represented the Board at an accreditation meeting with the Western University of Health Sciences College of Optometry on April 23-24, 2012 provided an overview of his experience and shared he was very impressed with the accreditation process. He sat at the entrance interview with the College President, Dr. Philip Pumerantz, the Dean, Dr. Elizabeth Hoppe, and other Professors and Administrators. Dr. Pumerantz also provided a speech at the Western accreditation meeting on his philosophy of health care (e.g. importance of health care, importance of providers, providers being the driving force to healthcare, etc.). Afterwards they were provided with a tour of the facilities (Zebra Fish Lab, Vision Science Lab, Ophthalmic Optics and Pre-Clinical Labs).

Also, Dr. Arredondo was very impressed with the way the Pre-Clinical Lab was set up (very high tech, 13 to 20 students able to practice in one room, etc.). Next Dr. Arredondo visited the school's Eyewear Center where he was shown some of the Primary Care Modules (Clinical Research, Pediatrics, Vision Therapy, etc.). In each of these sections, a professor provided an overview of module education. Dr. Arredondo then attended a Session on the Curriculum of the Optometry School, where members of the Accreditation Council on Optometric Education (ACOE) were present. He noted that the outreach and the enthusiasm of the students was exciting.

6. Executive Officer's Report

Executive Officer, Mona Maggio provided a report on the following:

Department of Consumer Affairs – New Member to the Executive Team

Ms. Maggio announced that Tracy Rhine was appointed as Deputy Director of the Legislative and Policy Review Division. Ms. Maggio spoke highly of Ms. Rhine.

Board Members

Ms. Maggio met with Deputy Director of Appointments, Terry Hollowman, with the Office of the Governor on February 7, 2012 and with Deputy Director of Board/Bureau Relations, Department of Consumer Affairs, Reichel Everhart on February 21, 2012, to discuss the current and pending

vacancies on the Board. On February 16, 2012, the Executive Officers met with the Agency Secretary and the Appointments Office to discuss upcoming appointments. Ms. Maggio was informed at the meeting that the Optometry Board would be coming up for appointments in the next week.

Board Staffing

Ms. Maggio announced that Christina Hasting accepted the Staff Services Analyst (SSA) (General) position in the Board's Enforcement Program effective May 14, 2012. Christina has a Bachelor of Arts Degree in Communications from California State University, Sacramento. She previously served as an SSA with the Employment Development Department and most recently as a customer service specialist at Ameripride. Ms. Maggio introduced and welcomed Christina to the Board.

Vacancies

Ms. Maggio reported that she has been working to fill a couple of vacancies. Currently the Board has a limited term office technician (OT) position filled by Dillon Christensen. This position expires on August 12, 2012. The Board's Budget Change Proposal (BCP) for Fiscal Year 2011/12 to authorize a permanent full-time OT Position was denied by the Department of Finance in July 2011. The OT position is essential to ensure that the Board addresses the increasing workload in the Enforcement Program in an efficient and timely manner. Therefore, justifications had to be written and submitted which has resulted in the possible authorization of a slightly less than full time OT position.

The manager position received last year will not be filled. The Board does not yet meet the allegation guidelines (criteria to hire) that Human Resources (HR) has in place.

Budget

Budget Analyst, Wilbert Rumbaoa, from the Department of Consumer Affairs Budget Office presented an overview of the Board's budget.

To date (March 2012) the Board's budget is 1.5 million. Expenditures as of March 31 are roughly 1.1 million or 68% of the budget. Projected surplus for this fiscal year is \$73,000 or 4.7% of the budget. The fund condition in current year remains at 4.3 months of reserve. In this budget year it is at 3.91000.

Drs. Ken Lawenda and Alex Arredondo inquired about the average fund status of the Boards and if our reserve is considered financially sound. Mr. Rumbaoa responded that although the fund condition varies amongst the Boards, anything over three months is considered good. Mr. Rumbaoa assured the Members that the Board's budget is solid.

Drs. Arredondo and Lawenda inquired about the million dollar general fund loan. Mr. Rumbaoa explained that when there is a current need and/or the Board is raising fees, it is at that time when the loan would have to be repaid. Mr. Rumbaoa and Dr. Goldstein discussed that the loan would have to be repaid before fees could be raised. The Board would not be able to pursue regulations without repayment. Dr. Goldstein does not foresee the Board supporting any fee increases in the short term.

Dr. Lawenda inquired about the state's triple A credit rating at this time and if we should be concerned about it. Mr. Rumbaoa declined to answer (at this time) but stated that he would attempt to find the answer.

Mr. Alex Kim inquired if any further borrowing of the Board's funds is anticipated. Mr. Rumbaoa replied that due to the state's budget shortfall, the Governor just issued his May Revise. Although there will be reductions to the state and possibly more borrowing, the Board of Optometry's fund would not be able to support another General Fund (GF) loan at this time.

Ms. Maggio commented on Budget Letter (BL) 12-05 which provides guidance for submitting Out of State Travel (OST) Blanket requests. The OST Blanket requests Ms. Maggio has submitted over the last couple years have been declined due to the budget shortfall. However, Ms. Maggio announced that the Association of Regulatory Boards of Optometry (which is important because the Board belongs to this organization) will be holding their next meeting in San Diego. Therefore, she anticipates that some staff and Board members will be attending that meeting.

BreEZe

Ms. Maggio reported that the BreEZe Project is moving along as planned with some staff members involved (Jessica Sieferman, Cheree Kimball, and Andrea Leiva). The BreEZe team is working to make all of the different boards/bureaus forms as uniform as possible since these forms will be available for online use by licensees and applicants. Ms. Sieferman took a break from her full time work with the project to assist in the office. Ms. Maggio has been asked to send Ms. Sieferman back to the Department of Consumer Affairs Headquarters in preparation for the rollout of BreEZe early next year.

California E-mail Services

Ms. Maggio explained that DCA board/bureaus participated in the migration to California E-mail Services (CES). Unfortunately, department staff has experienced a number of problems with e-mails since the migration (e.g., missing e-mail, deletions of e-mail, e-mail not being delivered, etc.). Ms. Maggio requested that if a reply from her is not received within a day to two, to call her because e-mail issues are still occurring.

Licensing Statistics

Ms. Maggio provided licensing statistical handouts to the Members. Amongst the handouts was a table showing the number of optometrists becoming glaucoma certified per Dr. Goldstein's request. Ms. Maggio requested that Members advise her of any statistical data they may be specifically of interest so that she may request these types of analysis from Mr. Robinson.

Dr. Goldstein commented on the success of the increasing number of optometrists becoming glaucoma certified which is increasing at a rate of about 23 doctors per month.

Ms. Maggio announced that she is advertising to hire a high school student as a youth aid to assist Mr. Robinson.

Dr. Arredondo expressed his pride and gratitude in being a Member and "working with such fine people."

Dr. Lawenda requested that a licensing statistics table or chart be created showing any net increase or decrease of optometrists over the last few years. He also requested information regarding how many of California's optometrists are American Board of Optometry (ABO) certified.

Ms. Maggio reported on the issue of continued competency. Under the prior administration there had been discussion about the department holding a workgroup for the various healing arts boards who are interested in working on continued competency and having discussions as a group. Although Ms. Maggio has mentioned this to the new Executive Team, she does not see a decision forthcoming anytime soon. Therefore, Ms. Maggio stated that she will be initiating a workgroup for the Board. The plan is to hire a consultant or work with the department's Strategic Planning and Development Unit for development of a workgroup and action plan. Dr. Goldstein agreed that this should be on the Board's work agenda.

Sunset Review

The Board's sunset review is scheduled for 2012/2013.

Ms. Maggio provided to the Board Members a review explaining sunset review and a copy of the previous sunset report from 2002. Additionally, she provided a template which will be used for the upcoming sunset review (e.g. number of licensees, changes to Board, budget over last five years, history of the Board, etc.). There will also be specific questions which will be provided after the review.

Ms. Maggio has assigned staff certain portions to begin work on the report. DCA's Budget Office will assist with the budget portion of the report.

An important concern to note is that the issues discovered and described at the end of the 2002 report must be addressed and a responses provided. Ms. Maggio stated she would also like to consider the development of a subcommittee for in-depth insight on practice issues that staff would not have knowledge about. She announced that the report has to be submitted to the Legislature in September 2012. The Hearing will be held, most likely, in January or February.

Dr. Lawenda inquired and Ms. Maggio responded that the Association of Regulatory Boards of Optometry (ARBO) provides staff with a copy of their minutes. Ms. Maggio provides ARBO with state reports regarding Board activities which ARBO includes in their meeting packets. Occasionally ARBO provides updates regarding their activities. Maggio noted that one of ARBO's particularly beneficial services is sending out e-mail blasts in response to Board member questions. Dr. Goldstein and Ms. Maggio discussed attending ARBO meetings (e.g. whether or not it is worth the money spent).

7. Regulations

A. ***Discussion and Possible Action Pertaining to the Comments Received During the 45-Day Comment Period of California Code of Regulations (CCR) §1575. Disciplinary Guidelines***

Review of Legal Opinions

Ms. Maggio reported that the Department of Consumer Affairs (Department) received a legal opinion from the Attorney General pertaining to the Uniform Standards Related to Substance Abuse. The Attorney General's legal opinion differed from the Legislative Counsel's legal opinion, so the Department requested that all Boards implementing SB 1441 hold off on taking anymore action until the opinions could be reviewed. At the March 2, 2012 meeting, the Board voted to take the Department's recommendation and moved to deal with this issue at a future meeting.

On April 5, 2012, the Department's review of the two legal options was completed and a memo was issued to advise the healing arts boards. The Department's findings are as follows:

1. The Department, the Attorney General and Legislative Counsel all agree that healing arts boards do not have the discretion to modify the content of specific terms or conditions of probation that make up the Uniform Standards.
2. The Department, the Attorney General and Legislative Counsel all agree that, unless the Uniform Standards specifically provide, all Uniform Standards must be applied to cases involving substance-abusing licensees, as it is their belief that the Legislative intent was to "provide the full implementation of the Uniform Standards."
3. The Department agreed with the Attorney General that the Substance Abuse Coordination Committee (SACC) is not the entity with rulemaking authority over the Uniform Standards. The entities with the rulemaking authority to implement the Uniform Standards are the individual boards. The SACC was limited to the creation of the Uniform Standards, but is not authorized to implement them.

Based on the findings above, the Department recommended that all healing arts boards move forward as soon as possible to implement the mandate of Business and Professions Code §315 (Uniform Standards), and to work with their legal counsel to 1) include a definition of what constitutes a “substance-abusing licensee,”; and to 2) determine if the Uniform Standards should be placed in a regulation separate from the Disciplinary Guidelines.

Ms. Maggio recommended that the Board take the Department’s recommendation and move forward with the Uniform Standards Related to Substance Abuse and Disciplinary Guidelines as planned. There is already a definition of what constitutes a “substance-abusing licensee” in the Board’s regulation, and it was decided at the September 16, 2011 Board meeting that the Uniform Standards should be incorporated by reference in the regulation together with the Disciplinary Guidelines.

Dr. Goldstein opened the floor for discussion. There were no further comments from the public or Board members.

Dr. Lawenda moved to accept the recommendations from staff and the Department of Consumer Affairs. Donna Burke seconded. The Board voted unanimously (7-0) to pass the motion.

Member	Aye	No	Abstention
Dr. Goldstein	X		
Dr. Arredondo	X		
Mr. Rendon	X		
Mr. Naranjo	X		
Dr. Lawenda	X		
Mr. Kim	X		
Ms. Burke	X		

Review of comments received during the 45-day comment period pertaining to text of CCR §1575, and vote to accept proposed modified text as a result of the comments received

Ms. Maggio reported that The Department and the Center for Public Interest Law (CPIL) commented that the regulation as proposed allows the Board to diverge from the Uniform Standards if the licensee establishes that, in his or her particular case, appropriate public protection can be provided with modification or omission of a specific standard as a term of probation.

Pursuant to SB 1441, the uniform standards **shall** be used by all healing arts boards dealing with substance-abusing licensees, whether or not the board chooses to have a formal diversion program. Thus, the unambiguous language and intent of the statute are clear: the uniform standards are mandatory. Once a licensee is determined to be a substance-abusing licensee, the uniform standards must be applied. The first paragraph in CCR §1575 states that the Board must “comply” with the standards, which is correct. However, subsection (b) of CCR §1575 conflicts with that paragraph and renders the uniform standards discretionary, when they clearly are not.

The Department and CPIL both recommend that the Board strike all the language in subsection (b) after the word “apply” in the fourth line of the subsection. Ms. Maggio recommended that the Board accept these comments because the uniform standards are indeed mandatory, and move to amend the language as suggested to comply with SB 1441.

Dr. Goldstein opened the floor for discussion. He commented that the Board has already thoroughly talked about this for the last year. There were no further comments from the public or Board members.

Donna Burke moved to accept the comments, and the proposed modified text to initiate a 15-day public comment period, and if no adverse comments are received to authorize the Executive Officer to make any non-substantive changes to the proposed regulations before completing the rulemaking process, and adopt the proposed amendments to the regulation. Dr. Lawenda seconded. The Board voted unanimously (7-0) to pass the motion.

Member	Aye	No	Abstention
Dr. Goldstein	X		
Dr. Arredondo	X		
Mr. Rendon	X		
Mr. Naranjo	X		
Dr. Lawenda	X		
Mr. Kim	X		
Ms. Burke	X		

Review of additional proposed modified text within the Disciplinary Guidelines and vote to accept or reject proposed modified text

Ms. Maggio reported that upon further review of the proposed changes being made to the Board's Disciplinary Guidelines and other boards' Disciplinary Guidelines, staff is recommending the following modifications. Minor changes have also been made throughout the document such as format change, grammar and, style, but are not relevant enough to be considered as they are non-substantive in nature.

- Quarterly Reports: Modified to incorporate by reference the Quarterly Report of Compliance form (DG-QR1(05/2012)). Ms. Siefertman provided the document to the members for review and discussion.
- Probation Monitoring Costs and Cost Recovery: Modified to delete the language requiring the Respondent to reimburse the Board for costs incurred even though the Respondent filed for bankruptcy. This language is not consistent with the Federal Bankruptcy Code, which allows for the discharge of certain debts, including cost recovery. Thus, since Federal Law overrides State Law, the Board cannot circumvent the Bankruptcy Code provisions, and this language must be removed.
- Take and Pass California Laws and Regulations Examination: Modified to re-add the language permitting two options (condition subsequent and condition precedent) when it comes to passing the exam. At the last Board meeting there was discussion to only keep the condition precedent option where the probationer ceases practice until they pass the exam. Staff still believes the Board needs two options.

Dr. Goldstein commented that it all depends on the severity of the case. Some probationers see hundreds of patients, some don't. But he sees how re-writing the condition still give the Board the option to chose. Most of the time, the Board would want the probationer to pass the exam fairly quickly, considering that the Board does not let new licensees practice without passing the exam. It would not be a good idea to make an exception for probationers.

Ms. Maggio commented that staff believed it to be too punitive to restrict a probationer from practice until passage of the exam when their violation is not gross negligence or incompetence. If the probationer does not pass the exam the first time, they must wait 180 days to re-examine, and if they don't pass the second time, that's another 180 days for a total of one year that they will not be permitted to practice.

Dr. Goldstein commented that how can something like this be decided because each situation is different. Ms. Anahita Crawford commented that the Board has the option to use a petition to revoke if the probationer does not pass the exam, regardless of what option the Board chooses.

Mr. Santiago clarified that options are used only if the Board already has in place certain criteria, such as for violations a-d the Board uses Option #1, and for the rest of the violations the Board uses Option #2. There has to be a condition that is applicable, and then the Board can move to an option if some other situation applies, or if at the discretion of the Board, a stricter standard must be used. Thus the Board must decide what the general condition is before establishing options that fit different situations. This will be easier for staff.

Dr. Goldstein, Ms. Burke and Ms. Maggio agreed that the Condition Precedent was the appropriate language to keep. Ms. Anahita Crawford commented that if the Board chooses this option, then there will be less settlements because probationers are essentially suspended upon the start of their probationary period.

Dr. Goldstein commented that he did not want to do this if it would be a hardship on probationers. Mr. Santiago commented that the solution is to reduce the time period in which they need to take the exam from 12 months to six months. The Board agreed and made the change.

Mr. Santiago recommended the use of Option #1, Condition Subsequent. The Board agreed and made the change because it would require the probationer to cease practice until passage of the second exam.

- Community Services: Modified to re-format the text of this requirement to clarify that the Board has discretion to determine what community services are appropriate, depending on the violation.
- Abstention from Use of Controlled Substances/Alcohol: Modified to strengthen and clarifies the requirement pertaining to the Respondent's intake of lawfully prescribed drugs to prevent the Respondent from relapsing. Also adds a timeline for submission of quarterly reports and the required information that must be included in each report.
- Biological Fluid Testing: Modified to delete reference to a page number because it is incorrect.
- Worksite Monitor: Modified to clarify and re-format the condition. Modified to permit only an optometrist or an ophthalmologist to be worksite monitors and not other healthcare practitioners. Modified to permit the worksite monitor to disagree with the Board's monitoring plan and provide their own recommendation for approval. Modified to add language requiring that the worksite monitor begin monitoring the Respondent within 60 calendar days and requires Respondent to make all records available for the worksite monitor's review. Modified to add language permitting the Board to require the Respondent to cease practice if a worksite monitor is not obtained and approved within 60 calendar days of the effective date of the Decision. Deletes language pertaining to substance abusing licensees because the uniform standards already deal with such licensees. Adds language establishing guidelines in the event the worksite monitor resigns, or is no longer available, or if the Respondent fails to find a worksite monitor in the time allotted. Adds language describing the required information that must be included in each quarterly report.

- Direct Supervision: Modified to add language describing the required information that must be included in each quarterly report and when they must be submitted, and that an ophthalmologist can be a supervisor.
- Psychotherapy of Counseling Program: Modified to reduce the amount of time a Respondent has to submit to the Board for its approval the name of a psychotherapist from 60 calendar days to 30 calendar days. Also adds a timeline for submission of quarterly reports and the required information that must be included in each report.
- Mental Health Evaluation: Modified to add language to give the Board authority to suspend a Respondent from practice if the mental health evaluation establishes that the Respondent is unsafe to practice. Adds language that establishes guidelines if the mental health evaluation determines that the Respondent needs treatment, and what would occur if the Respondent continues having mental health issues even after treatment. Re-adds the optional language previously deleted that permits the Board to restrict the Respondent from practice until the Board has determined that he/she is mentally fit to practice safely. Also adds a timeline for submission of quarterly reports and the required information that must be included in each report.
- Medical Health Evaluation: Modified to add language giving the Board authority to require the Respondent to undergo medical treatment based on the medical evaluation results. Also adds a timeline for submission of quarterly reports and the required information that must be included in each report.
- Medical Treatment: Modified to reduce the amount of time a Respondent has to submit to the Board for its approval the name of a physician from 60 days to 30 days. Also adds a timeline for submission of quarterly reports and the required information that must be included in each report.
- Audit Required: Modified to reduce the amount of time a Respondent has to submit to the Board for its approval the name of three third party auditors from 60 days to 30 days. Requires the auditor to submit quarterly reports following format and schedule provided by the Board. Requires the auditor to review the Respondent's accusation and decision and create a monitoring plan if the auditor disagrees with the Board's plan. Requires the auditor to begin auditing the Respondent within 60 calendar days of the effective date of the decision, and requires the Respondent to provide all documentation. Establishes guidelines in the event the Respondent fails to find an auditor, or the auditor resigns or is no longer available. Gives the Board the authority to suspend practice if the Respondent does not comply with the condition. Also changes the formatting of the condition to match the other condition in the document.
- Continuing Education: Modified to reduce the amount of time a Respondent has to submit to the Board for its approval educational programs or courses from 60 days to 30 days.
- Medical Record Keeping Course: Modified to add this course for cases where the Respondent is deficient in medical record keeping, and that deficiency is a cause for the violation(s). This course is necessary to ensure that after probation, the Respondent is ready to return to practice and apply what was learned in this remedial course to prevent future violations from occurring.

Ms. Maggio recommended the Board to accept all the changes. Dr. Goldstein opened the floor for further discussion by the public and the Board members. There was no further discussion.

Donna Burke moved to accept the recommended modifications and other language as amended at today’s meeting; initiate a 15-day public comment period, and if no adverse comments are received, to authorize the Executive Officer to make any non-substantive changes to the proposed regulations before completing the rulemaking process, and adopt the proposed amendments to the regulation. Dr. Lawenda seconded. The Board voted unanimously (7-0) to pass the motion.

Member	Aye	No	Abstention
Dr. Goldstein	X		
Dr. Arredondo	X		
Mr. Rendon	X		
Mr. Naranjo	X		
Dr. Lawenda	X		
Mr. Kim	X		
Ms. Burke	X		

B. Consideration and Possible Action to Delegate to the Department of Consumer Affairs Authority to Receive Sponsoring Entity Registration Forms and to Registering Sponsoring Entities for Sponsored Free Health Care Event that Utilize the Services of Optometrists.

Ms. Maggio reported that at its March 2, 2012 meeting, the Board voted to begin a rulemaking to implement Business and Professions Code §901 which requires out-of-state optometrists to obtain authorization from the Board prior to participating in a sponsored free health-care event in California.

Prior to Noticing this regulatory action with Office of Administrative Law (OAL), the Department contacted all healing arts boards that have proposed regulations relevant to sponsored free health care events, advising that the boards may need to further clarify the Department’s role in receiving and registering sponsoring entities. The Medical Board of California (MBC), Board of Occupational Therapy (BOT), and the Board of Vocational Nursing and Psychiatric Technicians (BVNPT) had all submitted their final rulemaking files to OAL. On March 13, 2012, OAL issued a Decision to Disapproval of MBC’s proposed regulations due to failure to comply with clarity and necessity

OAL’s primary clarity concern related to the specific content of MBC’s Form 901-A in relation to the content of similar forms proposed by other healing arts boards within the Department, BVNPT and BOT used similar forms incorporated by reference, and each form contained language similar to MBC’s form indicating that only one registration form per event should be completed and submitted to DCA. OAL was concerned what there was not one common form with a uniform set of regulatory requirements which would, with certainty, allow for the filing of a “single, common form” that meets the regulatory requirements of the three agencies. OAL could not easily understand how the “only one form per event” provision on each of the individual board’s form would work in practice. The differing forms from each board could create the potential for confusion and uncertainty among sponsoring entities legally required to comply with the regulations.

Ms. Maggio recommended that the Board adopt the Resolution to formally delegate authority to the Department to receive sponsored entity registration forms and to register sponsoring entities for sponsored free health care events that utilize the service of optometrists and to direct staff to add the adopted Resolution to the Board’s Sponsored Free Health Care Events rulemaking file.

By delegating authority to the Department, sponsoring entities will clearly understand that they should submit a single, common form that meets the regulatory requirements of multiple healing arts boards, rather than filing registration forms with each individual healing arts board.

Dr. Goldstein asked about the Board’s influence on these clinics (e.g. whether or not the Board would review them for correctness) and he asked if anyone could see any problems that may potentially arise from adopting the Resolution.

Regulations Coordinator, Katherine Demos addressed Dr. Goldstein’s questions. Ms. Demos clarified that the sponsoring entity form is the Department’s form and will be reviewed by the Department. The Board will have its own form for out-of-state professionals who wish to come for the event. It’s up the Board (according to the Board’s laws) whether or not the professional would be allowed to participate in the event. Ms. Demos and Dr. Goldstein discussed this and Dr. Goldstein was reassured that the Board would still have the same jurisdiction over optometrist professionals and optometry students as previously.

Ed Rendon moved to adopt the language as proposed by the Department. Alex Kim seconded. The Board voted unanimously (7-0) to pass the motion.

Member	Aye	No	Abstention
Dr. Goldstein	X		
Dr. Arredondo	X		
Mr. Rendon	X		
Mr. Naranjo	X		
Dr. Lawenda	X		
Mr. Kim	X		
Ms. Burke	X		

8. Legislation Update

Ms. Maggio reported on the following bills:

Assembly Bill 761 (R. Hernandez)

This bill is sponsored by the California Optometric Association. Government and External Affairs Director of the California Optometric Association (COA), Kristine Shultz, provided an overview of Assembly Bill (AB) 761. AB 761 will allow optometrists to perform simple diagnostic tests in the office rather than having to order them from a laboratory.

Ms. Burke, Ms. Shultz and Dr. Goldstein discussed the technology changes that have made it possible to perform these more simple tests, which are called Clinical Laboratory Improvement Amendments (CLIA) tests. Dr. Lawenda commented that the COA will be offering a course at the Monterey Symposium that will cover CLIA testing. Ms. Shultz added that optometrists will still have reporting requirements and will have to be licensed by the Department of Public Health to perform CLIA testing.

Ms. Maggio announced that the Board is in support of this bill.

Assembly Bill 778 (Atkins)

AB 778 is sponsored by LensCrafters and Californians for Healthy Vision. This bill is in the Senate Business, Professions and Economic Development Committee, and will probably go to hearing in June 2012. The Board continues to be in opposition of this bill. However, Dr. Goldstein and staff have taken the following steps in order to continue dialogue between the author, the Board and all interested parties.:

- *January 18, 2012* – Dr. Goldstein, Ms. Maggio, Mr. Santiago, Policy Analyst, Andrea Leiva, and Department of the Attorney General Liaison, Anahita Crawford, met with Assembly Member Atkins to discuss this bill and the reason the Board is in opposition.
- *April 5, 2012* – Dr. Goldstein, Ms. Maggio, Mr. Santiago, Ms. Leiva, Ms. Crawford, Senior Assistant Attorney General, Alfredo Terrazas, Supervising Deputy Attorney General (San Diego Office – Licensing Section), Linda K. Schneider, and Deputy Attorney General (San Diego Office), Sherry Ledakis, met with staff from the Department of Managed Health Care to learn more about their licensing and enforcement of Knox-Keene health plans.
- *May 3, 2012* – Ms. Maggio, Mr. Santiago, Ms. Leiva, Mr. Terrazas, Ms. Schneider, and Ms. Ledakis, representatives from the Legislative Unit of the Department of Consumer Affairs, and 22 other stakeholders met with Sean Henschel, Chief of Staff for Assembly Member Toni Atkins to discuss AB 778. Some of the stakeholders present included the COA, First Sight Vision Services, LensCrafters/Luxottica, the California Academy of Eye Physicians and Surgeons, and all these groups respective lobbying firms.

Ms. Maggio reported that there was not any real outcome from the meeting on May 3, 2012. The groups still have many concerns about enforcement. She explained that this bill would authorize a registered dispensing optician an optical company, a manufacturer or distributor of optical goods, or a non-optometric corporation to own a specialized health care service plan that provides or arranges for the provision of vision care services, share profits with the specialized health service plan, contract for specified business services with the specialized health care service plan, and jointly advertise vision care services with the specialized health care service plan. The bill would prohibit those persons or entities from engaging in conduct that would influence or interfere with the clinical decisions of an optometrist, as specified, and would set forth provisions that apply to medical records. This bill contains other related provisions and other existing laws.

Dr. Goldstein opened the floor to comment. There were no comments.

Assembly Bill 1926 (J. Solorio)

The sponsor for AB 1926 is NEW Asurion. It is currently in the Senate Business, Professions and Economic Development Committee. The Board does not have a position at this time. AB 1926 broadens the statutory definition of service contracts to include optical products, thereby enabling these types of service contracts to be sold.

Dr. Goldstein inquired and Ms. Shultz confirmed that this bill is a warranty issue. Under current law if an optometrist wanted to sell a warranty, it would be an insurance product regulated by the Department of Insurance. AB 1926 is a warranty. Additionally, it is much easier to complete in terms of regulation and registration.

Assembly Bill 690 (E. Hernandez)

AB 690 is sponsored by the COA. It has passed the Senate, and has been referred to the Assembly Committee on Health. The Board holds no position at this time.

Ms. Maggio asked Ms. Schultz to report on this bill. Ms. Schultz explained that AB 690 will implements a federal provision which makes it a violation for health plans to discriminate against classes of providers as it pertains to contracting issues. Currently, optometrists are oftentimes treated differently then ophthalmologists when contracting. Optometrists have additional requirements put upon them or they are excluded altogether from the health plan panel. The goal is that AB 690 will improve patient access to health care.

Dr. Goldstein opened the floor to comments.

Ms. Burke asked if there is any known opposition to the bill. Ms. Shultz responded that some concerns have been expressed by the health plans and technical amendments have been made

which may eliminate their concerns. But there has not been any formal opposition received at this time. Additionally, the Medical Association has raised some questions but has not come out with a letter of opposition.

Mr. Naranjo asked and Ms. Schultz responded that the ophthalmologists have not taken a position on this bill. She reported that in the past the American Medical Association has been strongly opposed to the federal provision and has tried to get rid of it because the laws would open the door for other providers to equally compete with medical doctors for these patients. Therefore the purpose of AB 690 is to codify the provisions.

Dr. Goldstein clarified that a federal provision already exists, but the concern is that the provision may be revoked or replaced. AB 690 would keep California in the position of allowing optometrists and ophthalmologists parity in this regard.

Mr. Naranjo noted that the health plans may be considering that they pay optometrists and ophthalmologists differently. Ms. Shultz responded that the pay may or may not have anything to do with it but quality of care should be the only reason for any differentiation of treatment for the same service.

Senate Bill 1575

SB 1575 is an Omnibus Bill by the Senate Business, Professions & Economic Development Committee. This bill has passed the Senate Business, Professions & Economic Development and has been referred to the Senate Appropriations Committee. SB 1575 is for the Boards change and is just "clean up" language. The bill amends §3057.5 Eligibility of Graduates from Foreign Universities by switching the word "person" with "graduates of foreign universities." The Board wanted to ensure that it was clear this statute was referring to graduates of foreign universities and not just an individual.

Ms. Maggio provided handouts to the Members covering two additional bills.

Assembly Bill 1932

As amended AB 1932 will require that, by January 1, 2014 and annually thereafter, every healing arts board issue a specified written report to the Department of Veterans Affairs and the Legislature that clearly details the methods of evaluating the education, training, and experience obtained in military service, and whether that education training and experience is applicable to the Board's requirements for licensure.

Ms. Maggio explained that it would be very expensive to pull together an evaluation report of this nature (something close to \$100,000). Additionally, the Board has no data that suggests the Board has ever received a request from a veteran who has stated he/she has gained experience in the military that he/she would like to apply to my optometric education. Licensees who are currently in the military have to have an active current license with the state in which they hold a license to be able to provide services as an optometrist while in the military.

Assembly Bill 1976

This bill requires those boards that approve the schools, to work with the schools to develop a process for the schools to evaluate this training. Ms. Maggio reported that she sent this information to the schools in California to see if they have taken a position or are familiar with this. She has not heard back from the schools and stated she will follow up with them regarding this.

Dr. Goldstein suggested we may want to take an oppose position.

Ms. Maggio stated that she responded back to the Department that AB1976 is not applicable to the California State Board of Optometry because our requirements for licensure require that the

doctor have a degree from an accredited college, pass a national licensure exam, and pass a state exam. Regarding AB 1932 she focused on what it would take for this Board (and cost) to put together an evaluation of the veterans training and education.

Dr. Goldstein opened the floor to comment.

Ms. Burke suggested the Board watch AB 1932 as it could have an impact on the department with staff requirements. Dr. Goldstein agreed to watch AB 1932.

Senate Bill 1215 (Emmerson)

The Board is sponsoring this bill. SB 1215 passed unanimously at the Senate on May 1, 2012 and will most likely be assigned to the Assembly Business, Professions and Consumer Protection Committee next. The bill will be heard between the dates of June 4 and July 6, 2012.

The purpose of this bill is to define temporary practice, and to create a retired license status and a retired volunteer status.

Ms. Maggio reported that two issues have surfaced that will require amendments.

- 1) Addition of language to ensure that it is clear that the Board retains jurisdiction over all licensees, regardless of the status of his or her license.

Rational: The Medical Board of California (MBC) recently lost a court of appeal case related to taking disciplinary action against a licensee that held a retired license. The retired licensee's attorney alleged the MBC lacked jurisdiction to impose discipline because, as the holder of a retired license status, the physician was not permitted to engage in the practice of medicine. MBC staff and legal counsel believed that MBC does have the jurisdiction to impose discipline on any license it issues because that license can opt to change their license status by meeting limited requirements. If the MBC lacked jurisdiction to impose discipline, it may create a non-practice status loophole that would insulate any licensee from discipline by transferring his or her license to an inactive status. However, the court ruled that the holder of a retired status license is not a licensee under the Board's jurisdiction and that the Board's disciplinary authority is relevant to the holder of a retired license, "only if and when the retired licensee seeks to return to the practice of medicine an files an application" with the Board for restoration of his or her license.

MBC is proposing to clarify their language via an omnibus bill this legislative session.

Staff is recommending that the Board amend the language of SB 1215 using MBC's proposed language as a model to ensure that it is clear that the Board retains jurisdiction over retired licenses and retired licensees with a volunteer designation. Business and Profession Code §3090 of the optometry practice act would be amended and added to SB 1215 as follows:

3090. Action for Violation of Chapter or Regulations; Board Powers

Except as otherwise provided by law, the board may take action against all persons guilty of violating this chapter or any of the regulations adopted by the board. The board shall enforce and administer this article as to licenseholders, including those who hold licenses that do not permit them to practice optometry, such as, but not limited to, retired, retired with a volunteer designation, or inactive, and the board shall have all the powers granted in this chapter for these purposes, including, but not limited to, investigating complaints from the public, other licensees, health care facilities, other licensing agencies, or any other source suggesting that an optometrist may be guilty of violating this chapter or any of the regulation adopted by the board.

Dr. Goldstein commented that he cannot see how the Board would have jurisdiction over someone who has been retired for a number of years. If such a person practiced, he or she would be

practicing without a license which is a violation in any case. He further clarified that a license with volunteer status would be allowed to practice and it seems to him that the Board would hold jurisdiction over them anyway.

Ed Rendon left the meeting.

Mr. Naranjo asked and Dr. Goldstein defined the two retired categories this bill would create. One status is "retired". This retired optometrist would not be able to practice and would not be required to take continuing education (CE). Within three years if he/she wanted his/her license reinstated, he/she could take the required CE, pay the fee and have his/her license reinstated. If retired for longer than three years, he/she would be required to go through a testing procedure in addition to taking CE, and paying the fee.

The other category is "Retired with a volunteer designation. This optometrist would renew his/her license for less money (\$50), he/she is still licensed and must take CE and meet all the other requirements. But this optometrist pays a lower fee because he/she is not getting paid to practice.

Ms. Demos commented that she is not certain where the authority comes from to allow the Board to retain jurisdiction over all licensees for all time. For three years following the status change of licensure to "retired" the license can be reinstated. So for that three year time period, in which, simple reinstatement is possible, the Board may retain jurisdiction.

Dr. Goldstein argued that he is not sure an amendment is even necessary. His particular feeling is that "a nice piece of legislation has been written that has received a lot of support and the Board should go with it the way it is." He does not see this as a major issue.

Dr. Goldstein opened the floor to comment.

Dr. Lawenda inquired if accepting the amendments per staff recommendation, will it satisfy or just open the door for future trouble.

Ms. Demos, Mr. Santiago, and Dr. Lawenda discussed whether the purpose is to have jurisdiction over **all** licensees. If it is all licensees then how long does the Board retain jurisdiction over them? And does it even make sense if (for example) a licensee changes professions and later has a conviction, for the Board to go after him/her? If the purpose is to retain jurisdiction over **only** those licensees with retired status or retired with a volunteer designation, then Mr. Santiago and Dr. Lawenda agreed that the Board should take a closer look at this issue.

Board members and staff agreed to not amend.

2) Increasing the retired license fees.

Ms. Maggio explained her conversations with the DCA Budget Office about the proposed fee structure for the retired classification. The Board's budget analyst recommended raising the fee structure to avoid loss or revenue. She noted that it is difficult to determine how many optometrists currently in inactive status will want to retire. Ms. Maggio and Dr. Goldstein discussed the options of amending or not amending, letting the bill pass and then watching to see how many doctors will take advantage of the retired status option.

Dr. Goldstein's opinion is to leave the bill as it is. Dr. Lawenda and Ms. Burke expressed agreement about not making any changes.

9. Enforcement Report

Ms. Siefertman reported on the following:

Analyst Certification Training (ACT)

DCA's Strategic Organization, Leadership, and Individual Development (SOLID) recently designed the ACT Program. ACT consists of six courses that are designed to strengthen the skills of analysts in various areas (e.g. techniques for analyzing data, recording, project management, public speaking). All of the Board's Enforcement Unit will be attending this training. They should be certified within the calendar year.

Data Clean-Up Project

As previously reported, Enforcement staff was preparing to clean up all of its data in the current CAS system in order to make the conversion to BreEZe as simple as possible. This project includes correcting action codes, Disciplinary Orders, Cost Recovery amounts, etc. Using the Board's retention schedule, staff will identify only the necessary data needed to convert to BreEZe. However, due to the necessity of the Exception Report Project, priorities have shifted and this project has been put on hold.

Fingerprint Program

Ms. Maggio provided an overview of the fingerprint program.

The fingerprint regulations became effective June 21, 2010 and the first notification of the requirement was sent to licensees with their license renewal invoices in July of that year. To date, the Board has received 157 RAP sheets from the Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI). Staff has worked diligently to investigate the allegations against the optometrists by contacting law enforcement agencies and courts to request documents.

Based on the statute of limitations, the Board has seven years from the date of conviction or three years from the date the Board discovers the conviction – whichever comes first – to file an accusation against an optometrist based on the conviction substantially related to the practice of optometry. For licensees with convictions outside the statute of limitations, the license application is reviewed to determine if it was signed after the conviction and, if so, did the licensee correctly answer the conviction statement question.

If a licensee failed to disclose a conviction, it would be a misrepresentation of fact on their application, for which there is no statute of limitations, and will be referred to the enforcement unit for further investigation.

As of May 14, 2012, there have been 406 rejected fingerprints for numerous reasons – mainly, the characteristics of their fingerprints are too low to be processed. In all rejection cases, a letter is sent information the optometrist that their fingerprints were rejected. If the fingerprints are rejected three consecutive times, staff sends a request to the DOJ and/or FBI to have a “name search” completed.

Dr. Goldstein asked and Ms. Siefertman explained that of the 406 rejections, there can be four for the same optometrist.

The last notification of the requirement will be sent with the renewal invoices in July 2012, and that will complete a 2-year renewal cycle. In January 2013, Board staff will audit the fingerprint program to ensure all licensees have been fingerprinted. Those licensees who have yet to be fingerprinted will be notified by the Board.

Ms. Maggio commented on the fingerprint process. As part of the fingerprint process staff discovered that sometimes the fingerprints results were not being matched up with the record. So staff met with the Applicant Tracking System (ATS) Team to question why this is occurring. Staff learned that when a licensee/applicant is fingerprinted, the fingerprint record contains pieces of

data that are electronically sent through multiple data bases. Each time a record is sent, via interface, each database looks for specific pieces of data called "Key Identifiers" to match the fingerprint record to the database record. Those Key Identifiers include Last Name, First Name, Date of Birth (DOB), and Social Security Number (SSN). All Key Identifiers must be present and correct for records to match and complete the data transfer. Otherwise the fingerprint results just sit somewhere out in cyberspace and never match up with the database record.

The ATS team informed staff of an "Exception Report" that we should have been utilizing and would have informed us of the problem. Due to the lack of training on the data transfer process and the exception report, staff was unaware of the necessary steps to successfully transfer data from the exception report and into the correct record.

On March 19, 2012, Board staff, aware there was a problem with not receiving results, initiated a meeting with the Office of Information Services (OIS). During that meeting, OIS ran the Board's exception report starting on March 19, 2010 through March 19, 2012. The report contained 651 pages of data exceptions. These exceptions included 144 rap sheet records and 95 rejected records.

Staff immediately took necessary steps to transfer the rap sheet records from the exception report. Eighty-five cases were opened, 61 closed, and 24 are pending (which means staff has ordered the records and the cases are in the investigation process). Those cases past the statute of limitations were cross referenced with the conviction statement on each licensee's initial application and they were opened and closed as a complaint.

This issue is affecting the Board's statistics. Ms. Maggio explained she does not want the Members to think that the Board is not meeting the Performance Measures set by the Department and adopted by the Board.

Ms. Maggio provided documents and explanations showing how the Board is meeting the Department's Performance Measures of opening up a complaint with 5-7 days of receipt. Usually they are opened and assigned to an analyst within 4-5 days of receipt. However, because staff had to open all of these complaints using the dates they actually came to the Board, the statistics report is showing the average number of days to close or assign a case as 209 days instead of the typical 4-7 number of days. Ms. Maggio explained that relates only to those cases that were on the exception report and not relate to any of the consumer complaints staff receives.

As of May 14, 2012, the 651-page exception report is now down to 451 pages. A date to clear all of the exceptions on the report has been set for July 1, 2012. Ms. Maggio reported on the assignment of duties for clearing the exception report.

Ms. Burke inquired and Ms. Maggio responded that if the Governor's proposed four-day workweek is implemented, she still believes the exceptions will be cleared by July 1.

Dr. Lawenda commented on his surprise at the number of RAP sheets. He thought the number would be much lower. Dr. Lawenda asked and Ms. Maggio responded that staff looks at the age of the case and the circumstances surrounding the conviction. Regardless of the age of the conviction, the Board will still be informed about it. Factors the Board takes into consideration include: age of the case (how many years since the conviction occurred), circumstances surrounding incident, relevance to the practice of optometry (whether it substantially relates), nature of incident (seriousness criteria), and rehabilitation (what the individual has done to rehabilitate himself/herself).

Drs Lawenda & Goldstein, Ms. Maggio, and Mr. Santiago discussed the likelihood of having a level of consistency of criteria among the boards.

Mr. Naranjo inquired about the process for dealing with non-disclosure of a conviction. Ms. Maggio clarified procedures. If the Board lost jurisdiction because of the age of the crime then the license application is reviewed. If the conviction occurred prior to licensure, and they disclosed it on the application, nothing is done because they answered truthfully and it was probably investigated at the time. If the licensee marks "no" and information is later received that he/she was convicted of a crime, they will receive a letter informing them that non-disclosure of a crime has been discovered and they are directed to explain why they didn't disclose it. Ms. Maggio added that this type of situation is probably cause for a citation rather than revocation of licensure.

Ms. Burke inquired about the BreZE project and the Sunset Review. Ms. Maggio reported on working with the Department to arrange time for Jessica to spend some time with the BreZE team again. Also, Ms. Maggio is working on having Christina trained to assist with the project.

Ms. Maggio explained that the Sunset Review will be huge task requiring a great deal of work. A couple of Members will assist staff with completing the task, which includes testifying on the report with staff and answering any questions the Legislature has.

Dr. Goldstein commended Ms. Maggio and the staff for being up front about the problem with the exception report and dealing with it the best they can. He noted that probably everyone in the room has had some kind of similar experience at one time or another and the Board will make it through this.

10. Public Comment for Items Not on the Agenda

Note: The Board may not discuss or take action on any matter raised during this public comment section, except to decide whether to place the matter on the agenda of a future meeting [Government Code Sections 11125, 11125.7 (a)]

There were no public comments.

11. Suggestions for Future Agenda Items

There were no suggestions offered.

12. Adjournment

Donna Burked moved to adjourn the meeting. Alex Arredondo seconded. The Board voted unanimously (6-0) to pass the motion.

Member	Aye	No	Abstention
Dr. Goldstein	X		
Dr. Arredondo	X		
Mr. Naranjo	X		
Dr. Lawenda	X		
Mr. Kim	X		
Ms. Burke	X		

The meeting adjourned at 3:15 p.m.

Monica Johnson, Board Secretary

Date