



STATE BOARD OF OPTOMETRY
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MEETING MINUTES

Friday, December 14, 2012
 Southern California College of Optometry
 Blake Room
 2575 Yorba Linda Blvd
 Fullerton, CA 92831-1699

| <u>Members Present</u> | <u>Staff Present</u> |
|--|---------------------------------------|
| Alex Arredondo, O.D., Board President | Mona Maggio, Executive Officer |
| Monica Johnson, Board Vice President | Andrea Leiva, Policy Analyst |
| Alex Kim, Board Secretary, Public Member, M.B.A. | Jessica Siefertman, Probation Monitor |
| Ken Lawenda, O.D., Professional Member | |
| Madhu Chawla, O.D., Professional Member | |
| Donna Burke, Public Member | |
| William Kysella, Public Member | |
| Fred Dubick, O.D., Professional Member, M.B.A. | Guest List |
| Glenn Kawaguchi, O.D., Professional Member | On file |

9:30 a.m.

FULL BOARD OPEN SESSION

1. **Call to Order – Roll Call – Establishment of a Quorum**

Board President, Alex Arredondo, O.D. called the meeting to order at 9:30 a.m. Dr. Arredondo called roll and a quorum was established.

2. **Disciplinary Process – Overview**

Deputy Attorney General, and Board Liaison, Anahita Crawford provided an overview of the complaint handling and disciplinary process.

The California State Board of Optometry was created by the Legislature in 1973, for the purpose of protecting the public's health, safety and welfare. Therefore, protection of the public is the responsibility, and highest priority, of the Board. Part of the purpose of the Board is the institution of disciplinary actions for violations of the law, and regulations governing the practice of optometry. State agencies are permitted to regulate the practice of licensees through their general powers and licensing laws, and state boards were created by the state to regulate such practice.

The licensing agency has an ***Enforcement Program/Unit*** which is responsible for enforcing the applicable laws, rules and regulations; and which, receives complaints (i.e. patients, other licensees, concerned parties, etc.).

Once a ***complaint*** is received, a ***preliminary review and assessment***, is performed to confirm appropriate jurisdiction. After jurisdiction is confirmed, the agency has to make a ***determination*** of whether or not they have enough information to proceed or if the complaint needs to be referred to the Department of Investigation (DOI) for further investigation. The agency will also make a determination of ***handling priority***. For example if it is determined that there exists an immediate public risk the determination would be expedited handling priority. The agency's investigations may be handled several ways. If insufficient information is obtained, the investigation may be referred to DOI, or if enough information is received, the complaint may be sent straight to an expert for review of violations of laws. Additionally, the agency may correspond with licensees and other important sources of information via questionnaires and declarations.

Possible determinations derived from the investigatory process include the following:

- No violation of law has occurred and the case is closed;
- There may be a violation but there is insufficient evidence to determine a violation;
- There has been a violation but of such a minimal and non-serious nature and the licensee enters into an agreement to remain compliant. This type of case will be closed but with merit;
- There is a violation, but it does not quite rise to the level of revoking the license or placing the licensee on probation. In these instances the agency may decide to issue a citation or fine;
- An accusation is warranted. This is the beginning of the formal disciplinary process and the entire investigation file is sent to the Attorney General's (AG) Office.

The AG's office then reviews the case to determine if the evidence within the file can support the filing of a pleading against the licensee. An action for denial of license case; in which, the applicant requests a **Hearing** is also sent to the AG's Office. This is called a **Statement of Issues** which includes the facts surrounding the denial and the laws by which denial is based. The burden-of-proof is on the applicant.

In an **Accusation** (action to revoke or suspend a license) for a serious violation, the burden-of-proof is on the Complainant, and supported by clear and convincing evidence. The Respondent must file a **Notice of Defense** within 15 days of being served by the AG's office. Otherwise, the license is revoked by default.

A **Petition for Revocation of Probation** occurs when a licensee on probation violates a term of his/her probation. The AG's office files a petition to revoke the probation. Once a Petition is filed and a Notice of Defense is provided, a decision must be made for disposal of the case. This will either occur by **Settlement or Trial**. In the instance of a Settlement, the Administrative Procedures Act (APA) allows agencies to issue a settlement decision without conducting a Hearing. Once an agency has filed an Accusation or a Statement of Issues, the case may be resolved by way of a **Stipulated Settlement** (written statement between the parties which agrees that a particular disciplinary order may become imposed). Settlements are the most cost effective means of disposing of cases.

In the case of a Stipulated Settlement the respondent must provide the Agency with documentation demonstrating the respondent's rehabilitation and fitness to practice, and any mitigating circumstance information. The terms are negotiated between staff and the AG's Office; however, final acceptance of the settlement rests with the Board. If the Board does not vote to adopt the stipulation, the stipulation becomes void. The Stipulated Settlement is transmitted to the Board by a letter (from the AG's Office) which includes a case assessment of the weaknesses and strengths of the case and why the Stipulated Settlement is a fair resolution of the case. Typically, the AG's office is never allowed to influence decision making of cases by the Board, however, this type of resolution is one exception to that rule.

The terms of the Stipulated Settlement are confined to the **Disciplinary Guidelines**. The AG's Office cannot deviate from the Disciplinary Guidelines. If a Stipulated Settlement cannot be negotiated, the case goes to Hearing before an Administrative Law Judge (**ALJ**). These are proceedings administered by the Office of Administrative Hearings (OAH). The facts are determined and a decision is made based on those facts. Individuals who are denied a license by the state agency or licensees who are opposing a disciplinary action have the right to a Hearing before the Board takes any formal action. Hearings are heard by the ALJ or the ALJ and the agency. The ALJ presides over the Hearing, rule on the admissibility of evidence, act as legal advisors and provide a **Proposed Decision** to the Board. Ultimately it is the Board's decision to accept or not accept the proposed decision. If the Board decides to reject the decision, the Board must do one of the following:

- 1) Reject decision and refer case back to the ALJ to take additional evidence on certain issues;
- 2) Reject decision and decide case itself. The Board may hear some additional evidence but if so, the Board must hear additional evidence on both sides.

In most instances proposed decisions are adopted by the Board.

Any person who has had their license revoked may petition for reinstatement of their license after meeting certain requirements. Any person suspended or on probation may petition for modification of their penalty or early termination. The AG's office represents public interest at these Hearings, and aids in the fact finding. Both the AG's office and the petitioner must be given an opportunity to present oral or written argument to the Board, and the petitioner must provide evidence to a clear and convincing standard that he/she is entitled to the relief sought. The Board's decision should include the reasons for the decision and conditions for licenses being reinstated (**probation**).

Board Vice President, Monica Johnson asked who decides to petition the ALJ to compel a psychological evaluation (agency or AG's office)? Ms. Crawford explained that the agency makes this decision, which is usually the result of a complaint or arrest report coming to the agency's attention that someone is behaving bizarrely or doing something that may indicate a mental health problem. Ms. Johnson requested a chart or outline which walks through the complaint process, which Probation Monitor, Jessica Sieferman agreed to provide.

Dr. Arredondo inquired and Ms. Crawford clarified that there is no right for a jury trial in the case of administrative hearings. Additionally, there is no right to a trial before a superior court judge. These cases are the jurisdiction of the OAH. If the petitioner decides to appeal the decision, the case would then go before the Superior Court. The case can be moved up from there to the Appellate Court.

Professional Member, Ken Lawenda, O.D. asked and Ms. Crawford explained that the decision to revoke a license due to a mental illness is based on how the licensee's conduct may demonstrate a likelihood of harm occurring to a patient. A licensee with a mental illness that is properly managed with medication would not be something the Board would be looking at unless they have a history of going off of their medication, acting bizarrely and possibly hurting patients. Dr. Lawenda inquired and Ms. Crawford reported that more times than not, the AG's Office becomes aware of these types of cases because the licensee was acting in some bizarre manner and someone reported it.

Public Member, William Kysella asked and Ms. Crawford responded that in cases where there are two credible expert witnesses, the ALJ must provide an explanation as to why the opinion of one witness was chosen over the other. If the ALJ does not provide an explanation, the Board has the option of rejecting the decision. There were no further questions signaling the conclusion of Ms. Crawford's presentation.

Staff and guests were asked to introduce themselves. The staff members included Executive Officer, Mona Maggio, Policy Analyst, Andrea Leiva, Probation Monitor Jessica Sieferman, and Legal Counsel, Don Chang. The guests included Executive Director, Bill Howe and Jason Gabhart with the California Optometric Association, Michelle Peña with the University of San Diego, Mary Cavanaugh, O.D., and Academic Dean of the Southern California College of Optometry, Morris Berman, O.D.

3. Petitions for Reduction of Penalty or Early Termination of Probation

A. Dr. Susanne Anderson, OPT 6613

Dr. Susanne Anderson, O.D. requested a continuance of her petition. Therefore, her Petition will be heard at a later date.

Administrative Law Judge, Jennifer Russell presided over the hearing. Board members heard the following petition:

B. Dr. Brent Gibson,

Dr. Brent Gibson, O.D., License Number OPT 10198

Agency Case Number: CC-2009-125

To avoid any appearance of any impropriety or bias, Professional Member, Glenn Kawaguchi, O.D. recused himself from this proceeding and will take no part whatsoever in the decision. Dr. Kawaguchi used to work with Dr. Gibson.

FULL BOARD CLOSED SESSION

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

The Board convened into closed session to deliberate on the following petition:

Dr. Brent Gibson, O.D., License Number OPT 10198
Agency Case Number: CC-2009-125

FULL BOARD OPEN SESSION

5. Welcome – President’s Report

A. Committee Appointments

At the August 10, 2012 meeting the Board elected officers for 2012/2013 and members volunteered for Board committees. The appointments are as follows:

Practice and Education Committee

Alex Arredondo, O.D.
Madhu Chawla, O.D.
Fred Dubick, O.D.

Consumer Protection Committee

Monica Johnson
Ken Lawenda, O.D.
Donna Burke

Public Relations/Outreach Committee

Donna Burke
Alexander Kim

Legislation and Regulation Committee

Seven members volunteered to serve on this committee. Dr. Arredondo announced that since the interest in this committee is so large, legislative and regulatory issues will be brought to the full Board for discussion.

Meetings

Dr. Arredondo reported that committee meetings should be held on an “as needed” basis since there is no law or Board policy mandating a set requirement for committees to meet.

Ms. Maggio requested to address a question brought to her at the last Board meeting about why the committees had not been meeting. During the last two years the Board membership was at a bare quorum of six members. Therefore, the former Board President, Dr. Lee Goldstein, O.D., decided to limit the number of committee meetings and refer issues to the full Board for discussion versus holding committee meetings. Only workgroups in glaucoma were appointed. Board policy is that this is the discretion of the Board President. Another factor is that, this Board, as well as other state agencies, is under the Governor’s order to restrict travel except for mission critical issues. Ms. Maggio has to obtain approval from the Department of Consumer Affairs, for all travel including mission critical Board and committee meetings. Additionally, Ms. Maggio stated that it is difficult to set committee dates throughout the year until there are topics to discuss.

Dr. Lawenda inquired and Ms. Maggio responded that holding the committee meetings in this manner would not render the Board unable to vote on a disciplinary matter because disciplinary matters are mission critical; therefore the Board would meet. Additionally, if a decision on a

proposed decision had to be made by the deadline and the Board was not scheduled or able to meet, a mail ballot would be conducted.

B. Other

Dr. Arredondo reported that he attended a very fascinating meeting on collagen and cross linking to stop the development of Keratoconus. Dr. Arredondo often sees Keratoconus cases in his practice. He described the process of how the treatment is performed.

6. Approval of Board Meeting Minutes

Members were asked to approve the minutes of the following meetings:

- A. August 10, 2012
- B. August 31, 2012
- C. October 19, 2012

Ken Lawenda moved to approve the August 10, 2012 Meeting Minutes as edited. Alex Kim seconded. The Board voted unanimously (9-0) to pass the motion.

| Member | Aye | No | Abstention |
|---------------|-----|----|------------|
| Dr. Arredondo | X | | |
| Ms. Johnson | X | | |
| Mr. Kim | X | | |
| Dr. Lawenda | X | | |
| Dr. Chawla | X | | |
| Ms. Burke | X | | |
| Mr. Kysella | X | | |
| Dr. Dubick | X | | |
| Dr. Kawaguchi | X | | |

Donna Burke moved to approve the August 31, 2012 Meeting Minutes as edited. Monica Johnson seconded. The Board voted: 8-Aye, 0-No, and 1-Abstention to pass the motion.

| Member | Aye | No | Abstention |
|---------------|-----|----|------------|
| Dr. Arredondo | X | | |
| Ms. Johnson | X | | |
| Mr. Kim | X | | |
| Dr. Lawenda | X | | |
| Dr. Chawla | X | | |
| Ms. Burke | X | | |
| Mr. Kysella | X | | |
| Dr. Dubick | | | X |
| Dr. Kawaguchi | X | | |

Fred Dubick moved to approve the October 19, 2012 Meeting Minutes as edited. Madhu Chawla seconded. The Board voted: 7-Aye, 0-No, and 2-Abstention to pass the motion.

| Member | Aye | No | Abstention |
|--------|-----|----|------------|
|--------|-----|----|------------|

| | | | |
|----------------------|----------|--|----------|
| Dr. Arredondo | X | | |
| Ms. Johnson | | | X |
| Mr. Kim | X | | |
| Dr. Lawenda | X | | |
| Dr. Chawla | X | | |
| Ms. Burke | | | X |
| Mr. Kysella | X | | |
| Dr. Dubick | X | | |
| Dr. Kawaguchi | X | | |

7. Executive Officer’s Report

Ms. Maggio provided an overview of the following:

A. Budget

The Board of Optometry is a Special Fund California state government agency, which means it supports its operations entirely through fees charged to licensees and applicants. The Board’s licensees pay renewal and application fees that fund operations, including complaint investigation, and licensing examination administration. Renewal fees represent the vast majority of revenue. Application fees and other forms of income (i.e., interest, fines, etc.) make up the remaining balance of the Board’s revenues. The Board does not receive any funds from the state General Fund.

Although categorized as a Special Fund agency, the Board’s budget is incorporated into the Governor’s budget. Upon approval of the Governor’s budget, the Board is permitted to spend its funds. Any increase to the Board’s spending authority is requested through the Budget Change Proposal (BCP) process. BCPs are typically sought for additional staff, to increase a position’s time base (half time to full time), or funding for a position that was established without funds or to increase spending authority for a special project such as an occupational analysis. BCP requests are prepared a year in advance.

In April 2013, staff will begin drafting the BCPs for 2014. These will include a possible BCP for an Occupational Analysis, and a BCP for the Board’s operations line. There are a few operational areas in need of additional funding such as printing and postage because the printing and mailing of a newsletter is one of the principal ways the Board communicates with licensees. Each time a newsletter is sent, it goes to a percentage of licensees and counties selected. Staff would like to send these newsletters to all of the Board’s licensees.

The 2012/2013 budget for the Board is \$1,693,603. As of October 31, 2012, the Board has spent \$594,265 reflecting 34% of the total budget. Ms. Maggio reported that she will have the budget analyst attend the February meeting to answer Member’s questions.

B. Personnel

Bradley Garding joined the Board in October 2012 as an Enforcement Technician in the Enforcement Unit. Rob Stephanopoulos joined the Board in September 2012 as an Enforcement Analyst. The Board’s receptionist, Elizabeth Bradley has been out on extended medical leave. Staff is currently in the process of hiring a seasonal clerk to serve as the receptionist. Additionally, staff hopes to hire an AARP staff person in the next few weeks.

C. Sunset Report

The 2012 Sunset Report was delivered to the Business, Professions & Economic Development Committee on its due date, November 1, 2012. Ms. Maggio confirmed with Dr. Leondra Clark, Consultant to the Committee, that hearings will be conducted in March 2013. Staff anticipates but has not yet received additional questions/issues prior to the hearing.

D. BreEZe Update

The Board is scheduled for Release 2. This is the transition from two archaic database systems to the one new system. This transition was to occur in April 2013; however, there is not a firm "go-live" date at this time. Staff is currently performing a huge manual data clean-up due to erroneous entry by former department staff, long ago.

E. Examination and Licensing Programs

A. International (Foreign) Graduate Education Evaluations

It has been decided that this issue needs further background research and discussion, and will be brought back to the Board at a future meeting.

B. International Graduates Seeking Therapeutic Pharmaceutical Agent (TPA) Certification

Because accredited US schools/colleges of optometry no longer provide 80-hour TPA didactic courses, international graduates who have successfully met the Board's optometrist license standards cannot meet the requirements as listed under Business & Professions (B&P) 3041.3(b)(1). This is problematic for a few of our new licensees because, not only can they not prescribe therapeutic pharmaceutical agents to their patients, those that have the desire cannot obtain glaucoma certification. Although the percentage of newly-licensed California Optometrists educated in schools/colleges located outside of the US is currently very low, we have issued licenses to some and expect the percentage to increase in the future. Staff seeks a possible alternative to the current laws that are in place and seeks the Board members review and recommendation of this matter. Staff wishes to refer this issue to the Education and Practice Committee for guidance, then bring this back to the Board at a future meeting.

F. Enforcement Program

Probation Monitor, Jessica Sieferman provided an overview of the Enforcement Program.

The Board had another case where a Superior Court Judge ruled and took action against a cosmetic lens dispenser who did not have a license to prescribe cosmetic lenses. The District Attorney Office pressed charges and the Board received \$5,000, which is equivalent to what the Board would receive for a citation. Mr. Kysella inquired and Ms. Sieferman clarified that the total fine was \$20,000. There were conditions that allowed the respondent to pay only a portion of the fine if he met the conditions. Regardless, he had to pay the \$5,000 to the Board for the costs involved in the investigation. Ms. Burke asked and Ms. Sieferman responded that patients who purchased illegal lenses are contacted and informed that they may return the lenses (and if they bring a receipt) have their money returned. Dr. Lawenda questioned and Ms. Sieferman explained that the distributors, who supply the illegal lenses to the sellers the Board takes action against, are also investigated.

Ms. Sieferman reported that staff is now in phase III of the data clean-up project. The clean-up project had been broken down into three parts (phase I - complaints, phase II - citations, and phase III - disciplinary). The complaints and citations moved along fairly quickly because the bulk of it was off of the retention schedule. The phase III disciplinary project is much more involved and will take significantly more time because these remain on the retention schedule for 75 years.

The Board's contract with Phamatech (drug testing provider) expired in June. However, it is known that Phamatech has been chosen again and will continue to be the Board's drug testing vendor. The new contract should be issued fairly soon. Additionally, Ms. Sieferman is working with the BreEZe team to develop an interface with Phamatech so their data can automatically be added into our database.

Ms. Sieferman provided a brief overview of the fingerprint program which is overseen by Fingerprint Coordinator, Lydia Bracco. So far 201 rap sheets have been received. Out of these, 25 were not opened because they were previously investigated, 176 were opened and 94 were closed because they exceeded the Board's Statute of Limitations. When a case has

exceeded the Statute of Limitations, the initial license application is reviewed because if the optometrist failed to provide disclosure on the initial application, the Statute of Limitations no longer applies. Fifty-one cases were investigated and subsequently closed. Seven have had final discipline imposed. Eight are pending discipline and 16 are still being investigated. Ms. Johnson asked and Ms. Sieferman responded that the Statute of Limitations is seven years from the date of occurrence, or three years from the date the Board learns of the misconduct. There are some exceptions. For example there is no Statute of Limitations for sexual misconduct.

Ms. Sieferman reported that there have been 424 rejected fingerprints. This does not mean that 424 people's fingerprints were rejected as an optometrist's fingerprints can be rejected up to three times before the Department of Justice (DOJ) will perform a name search. In January 2013 the Board will conduct an audit of the fingerprint program to ensure all optometrists have complied with the fingerprint requirement.

Licensing statistical data documents were provided to the Board members. Dr. Lawenda inquired and Ms. Maggio explained that the reason only 18% (14 out of 75 new applications for licensure received) have been issued is due to the fact that applicants submit their application before taking the law exam. The applicant sometimes waits as long as a full year before submitting the remaining documents. Transcripts are usually the last to arrive.

8. Discussion and Possible Action on Retention Schedule

Ms. Sieferman provided an overview of the Board's retention schedule.

The Records Retention Schedule specifies how long the Board will maintain fiscal and electronic files. With regards to enforcement, the schedule is based on how cases are closed. Ms. Sieferman explained that a licensee may obtain a DUI (for example) and based on how the case is closed may be purged in five years. The problem comes in when this licensee obtains another DUI after the previous records have been purged. This makes it difficult to show a pattern of DUIs or substance abuse. Courts and police records, for DUIs, are also purged after five years. Staff is recommending that the retention schedule for conviction cases be changed to 25 years for maintaining records.

Monica Johnson moved to change the retention schedule as advised. Donna Burke seconded. The Board voted unanimously (9-0) to pass the motion.

| Member | Aye | No | Abstention |
|---------------|-----|----|------------|
| Dr. Arredondo | X | | |
| Ms. Johnson | X | | |
| Mr. Kim | X | | |
| Dr. Lawenda | X | | |
| Dr. Chawla | X | | |
| Ms. Burke | X | | |
| Mr. Kysella | X | | |
| Dr. Dubick | X | | |
| Dr. Kawaguchi | X | | |

9. Rulemaking Calendar

Ms. Leiva reported on the following:

A. Update on California Code of Regulation (CCR) § 1575, Uniform Standards Related to Substance Abuse and Disciplinary Guidelines

The package was submitted to DCA for final review on October 1, 2012. Since this package was set to expire on October 21, 2012, staff was able to obtain an extension of 90 days to complete the final review period. January 16, 2013 is the new date for final submission to the Office of Administrative Law (OAL). Staff is confident about meeting this completion date.

B. Update on CCR § 1514, Renting Space and Practicing on Premises of Commercial (Mercantile) Concern and § 1525.1, Fingerprint Requirements

The package was approved by OAL on September 25, 2012 and the regulations became effective October 25, 2012. This regulation is for clarification purposes. It does not contain many substantial changes.

C. Discussion and Possible Action on Comments Received During the 45-Day Comment Period for CCR § 1508, § 1508.2, and § 1508.3. Sponsored Free Health Care Events

Ms. Leiva introduced the issue, explaining that this regulatory action is regarding the process for out-of-state optometrists to obtain authorization from the Board prior to participating in a sponsored free health-care event in California. One comment, which contained three comments, was received from the California Academy of Eye Physicians and Surgeons. This comment was directed at the Board and the Medical Board of California, but the Board only considered and responded to the comments related to the Board’s regulations. Ms. Leiva presented all the comments and provided proposed responses to the members for consideration.

For the first comment regarding prescriptions and whether explicit language needed to be included in the regulations to specify that out-of-state optometrists would be permitted to prescribe:

Fred Dubick moved to accept the proposed response to the comment as written. Monica Johnson seconded. The Board voted unanimously (9-0) to pass the motion.

| Member | Aye | No | Abstention |
|---------------|-----|----|------------|
| Dr. Arredondo | X | | |
| Ms. Johnson | X | | |
| Mr. Kim | X | | |
| Dr. Lawenda | X | | |
| Ms. Burke | X | | |
| Dr. Chawla | X | | |
| Dr. Dubick | X | | |
| Dr. Kawaguchi | X | | |
| Mr. Kysella | X | | |

For the second comment regarding certifications and whether certifications were considered above and beyond licensure:

Fred Dubick moved to accept the proposed response to the comment as written. Madhu Chawla seconded. The Board voted unanimously (9-0) to pass the motion.

| Member | Aye | No | Abstention |
|---------------|-----|----|------------|
| Dr. Arredondo | X | | |
| Ms. Johnson | X | | |
| Mr. Kim | X | | |
| Dr. Lawenda | X | | |
| Ms. Burke | X | | |
| Dr. Chawla | X | | |
| Dr. Dubick | X | | |
| Dr. Kawaguchi | X | | |
| Mr. Kysella | X | | |

For the third comment regarding discipline by the Board and incorporation by reference:

Ms. Johnson requested that some language be added to the proposed response that it is clear that any actions the Board takes in referring a matter to the practitioners home licensure state could subject him or her to administrative penalties. She commented that the comment is misplaced and does not make sense.

Mr. Kysella asked the Board's legal counsel about the appropriateness of adding language similar to the Medical Board to the Board's form. Mr. Chang responded that for the purposes of this form, the current language is adequate. If an out-of-state optometrist self certifies falsely, the Board would have authority to take action for fraud on the form, which is typically what a Board does in this situation. The Board decided to leave the statement as written on the form.

Ken Lawenda moved to accept the proposed response as amended. Fred Dubick seconded. The Board voted unanimously (9-0) to pass the motion.

| Member | Aye | No | Abstention |
|---------------|-----|----|------------|
| Dr. Arredondo | X | | |
| Ms. Johnson | X | | |
| Mr. Kim | X | | |
| Dr. Lawenda | X | | |
| Ms. Burke | X | | |
| Dr. Chawla | X | | |
| Dr. Dubick | X | | |
| Dr. Kawaguchi | X | | |
| Mr. Kysella | X | | |

Staff was instructed to move forward with this rulemaking package.

D. Discussion and Possible Action to Draft Language and Commence a Rulemaking to Add and Amend Regulations Pertaining to DCA's Consumer Protection

Senate Bill (SB) 1111 was introduced in 2010 but failed in the Senate Business, Professions and Economic Development Committee on April 19, 2010. The goal of SB 1111 was to provide health boards with the necessary tools to implement the Consumer Protection Enforcement Initiative (CPEI) and streamline the enforcement and disciplinary processes. When this bill failed, DCA identified nine provisions from SB 1111 that could be implemented via regulation to meet DCA's goal of completing cases in 12-18 months. Staff was able to find the statutory authority to implement eight of the nine provisions and worked with DCA and legal counsel to draft proposed language. Initially the Board decided to initiate a rulemaking package that contained the CPEI regulations along with the Uniform Standards Related to Substance Abuse and the Disciplinary Guidelines (Guidelines).

On April 11, 2011 the Board voted to separate the Guidelines from the CPEI regulations in order to better focus on the Guidelines. The rulemaking package would have been too massive and difficult to develop if the two sets of regulations would have remained together. In late 2010 and early 2011, the CPEI regulations were a priority for DCA, but now that there is a new administration, it has been left to the boards to decide what CPEI provisions are appropriate for implementation. DCA believes the regulations would be helpful, but are not deeming them mandatory. Ms. Leiva noted that this issue was brought up in question(s) from the Sunset Review Report. Also she has heard through the grapevine that SB 1111 may be introduced again.

Staff is requesting the Board do the following:

- 1) Review the nine provisions to determine which ones would be the most appropriate for the Board's use;
- 2) Review, discuss, and make changes to the proposed language of the chosen provisions for implementation and vote to initiate a rulemaking if the language is to the Board's satisfaction;

3) If all or some of the provisions are rejected, discuss why they are not necessary at this time.

Dr. Goldstein, the Board's former Board President and guest, suggested giving the provisions a fair amount of thought as to how to proceed. He advised that once the decision is made to move forward with a regulation package, the clock starts ticking so if a provision is deemed to be an immediate priority, it may be wise to hold off on the regulation process time clock.

Ms. Johnson asked why this needs to be done right now. Ms. Leiva explained that this is one of the topics of interest to the Legislature in the Sunset Review process and the Board must explain why these regulations were not implemented. Also, at the prior Board meeting Ms. Leiva was asked to provide a better explanation as to why these regulations need to be implemented, instead of responding that it's because other DCA boards are doing it. To facilitate the discussion, the Board is being presented with how the Board does things now, how each SB1111 provision will change the Board's current processes, followed by discussion by the Board considering if the provisions are necessary? Mr. Kysella contended that he is not sure there is enough time this afternoon to give these due diligence and discussion. Additionally, with SB 1111 possibly being introduced again, it would make sense to table this to February and perhaps by that time we will know if there is actually legislation making this superfluous. Ms. Johnson concurred.

Legal counsel, Don Chang responded to the question with a historical context of how this issue came about. The CPEI regulation proposals (which came about two years ago) were in result to negative criticism against the Nursing Board and their enforcement processes. The legislature strongly supported the CPEI regulations. Mr. Chang noted that for a board which is currently undergoing Sunset Review, one of the questions the legislature will ask is where the Board is in the CPEI regulatory process. Mr. Chang advised that the Board be prepared with a very adequate response as to where the Board is currently, what the Board intends to do and why.

Mr. Kysella suggested that this issue would be perfect for a committee to work on. Additionally he voiced his opinion that it should be a reasonable explanation to the Legislature to say "our committee is working on this, these are tough issues," especially in the context of stating that we are proposing legislation to double our workload by taking on the opticians.

Dr. Arredondo asked the Board members who would be interested in working on the CPEI regulation proposals as a committee. Those who expressed interest were Drs. Chawla, Lawenda, and Dubick, Ms. Burke and Mr. Kysella.

Monica Johnson moved to create a committee of the five interested Members of the Board of Optometry to review the SB 1111 proposed regulation and report back to the full Board at the February 1, 2013 Board Meeting with their recommendations, and that the Board Members be prepared to provide guidance to staff at that time. Bill Kysella seconded. The Board voted unanimously (9-0) to pass the motion.

| Member | Aye | No | Abstention |
|---------------|-----|----|------------|
| Dr. Arredondo | X | | |
| Ms. Johnson | X | | |
| Mr. Kim | X | | |
| Dr. Lawenda | X | | |
| Ms. Burke | X | | |
| Dr. Chawla | X | | |
| Dr. Dubick | X | | |
| Dr. Kawaguchi | X | | |
| Mr. Kysella | X | | |

E. Discussion and Possible Action to Draft Language to Clarify the Fees for the Board's Retired License Statuses

Board sponsored SB 1215 (Emmerson) was signed by the Governor on September 17, 2012 and will be effective January 1, 2013. This bill adds a retired license status and a volunteer retired license status. However the fees must be set via regulation before the Board can collect monies. Staff requests the Board review and discuss the proposed language, and then approve the language and direct staff to initiate the rulemaking process.

Bill Kysella moved to adopt the proposed language and directed staff to initiate the rulemaking process. Glenn Kawaguchi seconded. The Board voted unanimously (9-0) to pass the motion.

| Member | Aye | No | Abstention |
|---------------|-----|----|------------|
| Dr. Arredondo | X | | |
| Ms. Johnson | X | | |
| Mr. Kim | X | | |
| Dr. Lawenda | X | | |
| Ms. Burke | X | | |
| Dr. Chawla | X | | |
| Dr. Dubick | X | | |
| Dr. Kawaguchi | X | | |
| Mr. Kysella | X | | |

F. Discussion and Possible Action to Draft Language for the Training of Optometric Assistants

SB 929 reclassified technicians to assistants and by doing so increased the scope of practice regarding the kind of testing procedures these individuals may perform (i.e. glaucoma testing, visual perception testing etc.). Due to this significant scope expansion of assistants, the Joint Legislative Sunset Review Committee (JLSRC) and the DCA requested that the Board expedite the adoption of clarifying regulations establishing training standards to ensure consumers were not placed at risk.

In an effort to comply with the JLSRC and DCA's recommendations, the Board submitted a budget change proposal (BCP) in 2003 to obtain spending authority to conduct an occupational analysis for assistants. The BCP was denied; therefore the occupational analysis was never conducted. Despite this set-back, the Executive Officer at the time presented proposed regulatory language, and the Board voted to approve it and initiate the rulemaking process. As the Board was addressing comments and the modified text periods, the rulemaking package expired on October 1, 2005. After this date, the Board did not discuss the rulemaking package again.

This Sunset Review period has brought the issue back to the Board. Since this is an old issue from a prior Sunset Review that was never completed by the Board, the Board must consider it now and follow the instruction of the JLSRC.

Staff requests the following:

- 1) Approve proposed regulation as it is now; or,
- 2) Take back to the Board to develop new language; or,
- 3) Discuss the possibility of conducting a full occupational analysis for assistants with the assistance of the Office of Professional Examination Services

Monica Johnson moved to direct staff to prepare a budget change proposal requesting funds to do an occupational analysis for optometric assistants. Alex Kim seconded. The Board voted unanimously (9-0) to pass the motion.

| Member | Aye | No | Abstention |
|--------|-----|----|------------|
|--------|-----|----|------------|

| | | | |
|----------------------|----------|--|--|
| Dr. Arredondo | X | | |
| Ms. Johnson | X | | |
| Mr. Kim | X | | |
| Dr. Lawenda | X | | |
| Ms. Burke | X | | |
| Dr. Chawla | X | | |
| Dr. Dubick | X | | |
| Dr. Kawaguchi | X | | |
| Mr. Kysella | X | | |

10. Legislation

A. Update on Legislation the Board is Following

Ms. Leiva provided a summary of the bills that staff have been monitoring which have now been signed by the Governor. All these bills will be effective on January 1, 2013.

Assembly Bill 761 (Hernandez) – CLIA Testing

This bill would allow optometrists to perform certain diagnostic tests in the office, rather than ordering them from a lab. They can also become a lab director. Licensees will obtain a Clinical Laboratory Certificate for Waived Testing from the Department of Public Health. The Board's responsibility is to ensure that licensees are aware of what must be done to obtain the CLIA Testing. Information is posted on the Board's website.

Assembly Bill 1588 (Atkins) – Reservist Licensees: Fees and Continuing Education

This bill would require boards under the DCA, with certain exceptions, to waive the renewal fees, continuing education requirements, and other renewal requirements as determined by the Board, if any are applicable, of any licensee who is called to active duty as a member of the United States Armed Forces or the California National Guard if certain requirements are met. The Board will need to consider at a future meeting if regulations will be needed to implement this legislation further.

Assembly Bill 1896 (Chesbro) – Tribal Health Programs: Health Practitioners

This bill conforms state law to a federal law that permits health practitioners who are employed by tribal health programs to be exempt, if licensed in any state, from the licensing requirements of the state in which the tribal health program performs specified services. No action is needed by the Board other than to monitor and ensure this bill is serving the public well.

Assembly Bill 1904 (Block) – Professions and Vocations, Military Spouses, Expedited Licensure

This bill requires boards under the DCA to expedite the licensure process for military spouses and domestic partners of military members on active duty in California. The Board will need to consider at a future meeting if regulations will be needed to implement this legislation further.

Senate Bill 951 (Hernandez) & Assembly Bill 1453 (Monning) – Essential Health Benefits

These bills are related to the California Health Benefit Exchange starting in 2014. It will establish pediatric vision essential benefits which will be based on the largest vision plan for federal workers. No action is needed by the Board. This is only for informational purposes.

Senate Bill 1215 (Emmerson) – Retired Licenses Statuses and Temporary Practice Defined

The next steps for retired licenses are to establish fees (via regulation), develop applications and fact sheets, and issue these licenses. For temporary practice the next steps are to ensure licensees are aware of this change in law. For both of these changes in law, the Board wrote an article in its winter 2012 newsletter, which is still being designed by the DCA's Publications unit.

B. Discussion and Possible Action on Possible Proposals for Legislation for

2013-2014

Ms. Leiva provided an overview of the legislative process.

To meet the legislature's deadlines, the Board must complete development of its legislative packages by the end of December, and begin searching for an author the first week of January. Part of that package includes the bill's language, and that must be submitted to the Legislature's counsel for drafting by the last day of January. The last day to officially introduce a bill is around February 24, 2013.

The 2013-2014 Legislative proposals are as follows:

1) *Transfer of Registered Dispensing Optician (RDO) program from the Medical Board of California to the California State Board of Optometry*

The Board made a recommendation to transfer the RDO program in its Sunset Report. The Medical Board made the same recommendation in its Sunset Report. Ms. Maggio voiced her support for the transition of the RDO program at the Medical Board's October 2012 Board meeting. Also at that meeting, the members of the Medical Board agreed that the RDO program does not belong under the Medical Board's jurisdiction.

Dr. Lawenda inquired if there has ever been any consideration of developing an opticianry board versus having the RDO's come under the Board's jurisdiction. Ms. Maggio explained this would be up to the Legislature and this option was not discussed.

Dr. Arredondo voiced his opinion that the only appropriate place for the RDO program is with the Board of Optometry. Dr. Lawenda contended that in 1938 there existed an issue arising out of the relationship between optometry and opticianry. This problem that arose initiated the Legislature placing RDO jurisdiction with the Medical Board.

Former Board President, Lee Goldstein, O.D. provided a background on this issue for the Members. The question of RDO jurisdiction evolved out of discussions regarding the Lenscrafters issue and lawsuit and based on the fact that the Medical Board is interested in divesting itself of this program. Last January – February the Board met with Assembly woman (Atkins) who was carrying the Lenscrafters legislation. The Lenscrafters issue was discussed as well as the fact that corporate practices of side-by-side optometry and opticianry, which comply with the law, are increasing rather than decreasing, probably relative to the total number of practice opportunities and how this type of practice should be regulated. Nothing specific arose from the discussion except for the idea that perhaps it is the Department of Managed Health Care (DMHC) who should be responsible for overseeing opticians. A few months later, Dr. Goldstein, Ms. Maggio, five individuals from the AG's Office, and seven individuals from the DMHC met together to discuss how the various optometric and opticianry organizations exist under the DMHC. From this discussion, the Board learned that the DMHC only regulates plans and not doctors.

Dr. Lawenda expressed a concern about what would happen if down the road opticianry wanted to increase its scope of practice and how this might affect the Board. Would the Board be open to the idea of having opticians sit on the Board? Dr. Arredondo asked and Members responded that opticians do not sit on the Medical Board. Ms. Maggio clarified that no radical changes are proposed, rather simply to move the regulation over, issue the licenses, educate, and enforce (just as the Board does for optometry). Ms. Maggio also asserted that staff is already doing the work because the Medical Board refers its RDO program callers to the California State Board of Optometry contending that we know more about opticianry than they do.

Professional Member, Madhu Chawla voiced her opinion that from a consumer protection standpoint this is where we would have the impact. She stated that regardless of what happened in 1938, it is now 2012 and she does not believe that we cannot work together but from a consumer protection standpoint, it makes more sense.

Ms. Leiva added that consumers are already suffering because complaints are submitted but not dealt with. Ms. Leiva spoke with a representative from the California Association of Dispensing Opticians (CADO) who informed her that they are frustrated. They do not get the attention needed, and have trouble scheduling meetings to talk about the issues with the Medical Board. People have come to the association explaining that they submitted a complaint to the Medical Board and then received a letter stating there were not enough resources to assist them with their complaint.

Mr. Kysella inquired and Ms. Leiva explained that the Medical Board's budget allotted to the RDO program, as well as their single staff member working on the program, would be transferred to the Board. Ms. Leiva also pointed out that the RDO program has about 4,000 licensees, and that's half of this Board's licensee population. This Board has 13 staff that deals with 8,000 optometrists, and the Medical Board only has one person dealing with 4,000 licensees. Mr. Kysella contended that this sounds like a resource problem. He suggested that whoever takes charge of the RDO program will need to hire about six people very quickly to prevent its own program(s) from failing while its resources are being drained away. He believes that the Board should mainly focus on its own issues and ensure there are resources for that before attempting to take on another program.

Ms. Leiva shared that CADO submitted a letter of opposition to the idea of transferring the RDO program from the Medical Board to the Board of Optometry. She also noted that there were errors in the letter, and that should be kept in consideration by the Board. All sides need to work on educating each other.

Ms. Burke and Ms. Johnson stated they are inclined to put the needs of the consumer first with regards to this issue. Ms. Burke stated the RDO program has great synergy with what we do and this legislation has her support. Ms. Johnson suggested that along with moving forward, the Board consider adding additional resources down the road in terms of dollars and people. Dr. Dubick and Dr. Chawla agreed.

Ms. Maggio cautioned that she believes more research is needed and that more information should be brought before the Board. She also shared that a lot of the opposition against this proposal deals with the competition between RDO's and optometrists in the marketplace. There was a video by 60 Minutes where Luxottica is interviewed and the President of Luxottica does not state that optometrists are their main competition, rather it's the big box stores like Costco. She also requested a status on the Lenscrafters' lawsuit.

Contract Lobbyist for Lenscrafters – EYEXAM, Kathryn Austin-Scott provided an update for Ms. Maggio. The National Association of Optometrists and Opticians (NAOO) appealed to the US Supreme Court. Briefs were filed by the Plaintiffs (such as the NAOO) in mid November 2012. The state declined to file a brief in response. In late November the state was asked by the US Supreme Court to file a brief and was given an additional 30 days to file. Early to mid February, the status of the case should be known. Ms. Austin-Scott also voiced the concerns of opticians (NAOO) she represents which are as follows:

- A move is premature to what is determined by the lawsuit. Should the Board be moving forward with legislation to regulate that industry when the outcome of the litigation is not yet known?
- Assuring that moving forward with legislation does not preclude conversations about consumer protection

- Acknowledgment that there exists tension between optometrists and opticians since they are natural competitors

Additionally, Ms. Scott questioned whether this would be a priority of the Board's time and resources since during the Sunset Report, mention was made of other goals.

Ms. Johnson asserted that she would still like to see the Board move forward on this as consumers are currently receiving no protection. Ms. Scott explained the Board's right to move forward with emergency regulations. Mr. Kysella concurred and supports moving forward.

Dr. Kawaguchi agreed consumer protection is paramount but questioned if the Board of Optometry is the correct entity to regulate RDOs. Dr. Kawaguchi would be interested in hearing how the RDOs feel about ensuring consumer protection. Members and staff concluded that public comment is the means by which this type of information will become better understood. Members, staff and guests continued to discuss and voice opinions about moving forward, or not moving forward with legislation. Dr. Arredondo requested a motion to direct Board staff to continue with the proposal's concept and research the issue further.

Dr. Dubick moved to continue with this legislative concept. Donna Burke seconded. The Board voted: 6-Aye, 2-No, and 0-Abstentions to pass the motion.

| Member | Aye | No | Abstention |
|---------------|-----|----|------------|
| Dr. Arredondo | X | | |
| Ms. Johnson | X | | |
| Mr. Kim | X | | |
| Dr. Lawenda | | X | |
| Ms. Burke | X | | |
| Dr. Chawla | X | | |
| Dr. Dubick | X | | |
| Dr. Kawaguchi | | X | |
| Mr. Kysella | X | | |

2) *Omnibus Bill: Optometrist License Name*

Omnibus Bills are primarily non-controversial and are intended to clarify language and strengthen the law. A problem has been identified that can cause confusion. Throughout the Optometry Practice Act, the name of an optometrist's license is used many different ways. For example, BPC section 3024 refers to an optometrist license as a license. Other names include: Optometry License, Certificate of Registration to Practice Optometry, and Optometrist Certificate of Registration. Also, the official optometry license provided to licensees reads: "John Doe is hereby granted this certificate as a licensed optometrist."

This is confusing, especially since the Board also has certifications (TPA, TPG, etc.) in addition to an optometrist license. An example of the confusion was presented by the Board's Deputy Attorney General when she brought to the Board's attention that the name of an optometrist's license is used in different ways in various pleadings. Staff is requesting to clean up the language in our Practice Act and have everything read "optometrist license and certifications."

Monica Johnson moved to direct staff to pursue an Omnibus Bill to clarify optometrist license names. Donna Burke seconded. The Board voted unanimously (9-0) to pass the motion.

| Member | Aye | No | Abstention |
|---------------|-----|----|------------|
| Dr. Arredondo | X | | |
| Ms. Johnson | X | | |
| Mr. Kim | X | | |
| Dr. Lawenda | X | | |
| Ms. Burke | X | | |
| Dr. Chawla | X | | |
| Dr. Dubick | X | | |
| Dr. Kawaguchi | X | | |
| Mr. Kysella | X | | |

11. Public Comment for Items Not on the Agenda

Board members and staff discussed possible future meeting dates. Upcoming meetings were decided upon as follows:

- February 1, 2013 at Western University of Health Sciences School of Optometry
- May 10, 2013, Location TBD
- August 16, 2013, Location TBD
- November 1, 2013, Location TBD
- January 10, 2014, Location TBD

12. Suggestions for Future Agenda Items

Ms. Johnson requested that Board counsel provide a presentation that clarifies when Board members are required to recuse themselves from a vote.

Dr. Kawaguchi requested the Board research and consider supporting the development of legislation which would require that kids receive an eye examination prior to beginning kindergarten. Ms. Leiva advised that the California Optometric Association (COA) prepared such a bill and it just needs to be introduced. Members and staff agreed that an update on the COA bill should be provided. Dr. Goldstein suggested and Members agreed that the Board of Optometry should sponsor such a bill as it just looks better coming from a consumer standpoint.

SCCO Professor and Associate Dean, Clinical Education, Harue Marsden asked Board Members to discuss, decide, and clarify if a student who fails the injectables component of the NBEO Part III, yet passes every other part, should be required to retake and pass this component. Dr. Arredondo advised that this issue will be brought up to the Education Committee for research and discussion.

13. Adjournment

Monica Johnson moved to adjourn the meeting. Alex Kim seconded. The Board voted unanimously (9-0) to pass the motion.

| Member | Aye | No | Abstention |
|---------------|-----|----|------------|
| Dr. Arredondo | X | | |
| Ms. Johnson | X | | |
| Mr. Kim | X | | |
| Dr. Lawenda | X | | |
| Ms. Burke | X | | |
| Dr. Chawla | X | | |
| Dr. Dubick | X | | |
| Dr. Kawaguchi | X | | |
| Mr. Kysella | X | | |

Alexander Kim, Board Secretary

Date