

# Agenda Item #10.A.



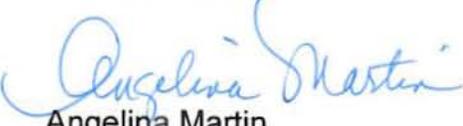
STATE AND CONSUMER SERVICES AGENCY • GOVERNOR EDMUND G. BROWN, JR.

**BOARD OF VOCATIONAL NURSING & PSYCHIATRIC TECHNICIANS**  
2535 Capitol Oaks Drive, Suite 205, Sacramento, CA 95833-2945  
Phone (916) 263-7800 Fax (916) 263-7855 Web www.bvnpt.ca.gov



DATE: October 21, 2011

TO: Board Members

FROM:   
Angelina Martin  
Enforcement Division Chief

SUBJECT: Proposed Regulatory Action to Implement Elements of the Consumer Protection Enforcement Initiative

## STATEMENT OF ISSUE

In 2009, various media articles reported that most Department of Consumer Affairs (DCA) health care boards were taking over three years to complete the investigations and take appropriate disciplinary actions against licensees. As a result, the State and Consumer Services Agency (SCSA) conducted an internal review of all the health care board's enforcement programs and the DCA Division of Investigations (DOI). The SCSA found that most of the health care boards face significant complaint investigation backlogs and processing delays. The DCA Director was charged with reforming the current enforcement process for the health care boards.

The DCA reviewed the existing enforcement process and found systemic problems that limit the boards' abilities to investigate and act on cases in a timely manner. These problems range from legal and procedural challenges to inadequate resources. In response, the DCA launched the Consumer Protection Enforcement Initiative (CPEI) to overhaul the enforcement process at the healing arts boards. Once fully implemented, the DCA expects the healing arts boards to reduce the average enforcement completion timeline to between 12-18 months.

On February 17, 2010, SB 1111 was introduced by Senator Negrete McLeod and sponsored by the DCA to establish the Consumer Health Protection Enforcement Act and make enforcement processes more efficient. However, on April 22, 2010, the bill failed to make it out of the Senate Business, Professions and Economic Development Committee. On April 26, 2010, the DCA reported that CPEI would continue to be the Department's highest priority and believes that many provisions of SB 1111 can be adopted as regulations.

## PROPOSED REGULATORY ACTION

At its September 16, 2010 Board Meeting, the Board approved draft proposed regulatory language to implement elements of CPEI and directed staff to prepare a rulemaking file for notice and comment. The notice of proposed regulations was published on March 25, 2011 and a public hearing was held on May 11, 2011.

Three written comments were received during the public comment period ending May 9, 2011 and one oral comment was received during the public hearing held on May 11, 2011. All comments were considered and the originally noticed text was modified.

Another 15 day public comment period to notice the modified text was held from September 6, 2011 through September 21, 2011. Comments were received by Tony Myers, President of the California Association of Psychiatric Technicians, at the September 9, 2011, Board Meeting. Mr. Myers expressed concern about the 30-day timeframe in the proposed regulatory language that would require licensees to report an arrest or disciplinary action taken against them by their employer. No other comments were received during the public comment period ending September 21, 2011.

At its September 9, 2011 Board Meeting, the Board approved the modified proposed regulatory language and directed staff to submit the rulemaking file to DCA and to the Office of Administrative Law (OAL) provided that no negative comments were received during the 15 day comment period ending September 21, 2011. The rulemaking file was submitted to the DCA for approval on October 25, 2011. Upon approval from DCA, the rulemaking file will be forwarded to the OAL.

# **Uniform Standards Regarding Substance-Abusing Healing Arts Licensees**

Senate Bill 1441 (Ridley-Thomas)

Implementation by  
Department of Consumer Affairs,  
Substance Abuse Coordination Committee



Brian J. Stiger, Director  
April 2011

**Substance Abuse Coordination Committee**

Brian Stiger, Chair  
**Director, Department of Consumer Affairs**

Elinore F. McCance-Katz, M.D., Ph. D.  
**CA Department of Alcohol & Drug Programs**

Janelle Wedge  
**Acupuncture Board**

Kim Madsen  
**California Board of Behavioral Sciences**

Robert Puleo  
**Board of Chiropractic Examiners**

Lori Hubble  
**Dental Hygiene Committee of California**

Richard De Cuir  
**Dental Board of California**

Linda Whitney  
**Medical Board of California**

Heather Martin  
**California Board of Occupational Therapy**

Mona Maggio  
**California State Board of Optometry**

Teresa Bello-Jones  
**Board of Vocational Nursing and  
Psychiatric Technicians**

Donald Krpan, D.O.  
**Osteopathic Medical Board of California**

Francine Davies  
**Naturopathic Medicine Committee**

Virginia Herold  
**California State Board of Pharmacy**

Steve Hartzell  
**Physical Therapy Board of California**

Elberta Portman  
**Physician Assistant Committee**

Jim Rathlesberger  
**Board of Podiatric Medicine**

Robert Kahane  
**Board of Psychology**

Louise Bailey  
**Board of Registered Nursing**

Stephanie Nunez  
**Respiratory Care Board of California**

Annemarie Del Mugnaio  
**Speech-Language Pathology & Audiology &  
Hearing Aid Dispenser Board**

Susan Geranen  
**Veterinary Medical Board**

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**#1 SENATE BILL 1441 REQUIREMENT**

Specific requirements for a clinical diagnostic evaluation of the licensee, including, but not limited to, required qualifications for the providers evaluating the licensee.

**#1 Uniform Standard**

If a healing arts board orders a licensee who is either in a diversion program or whose license is on probation due to a substance abuse problem to undergo a clinical diagnosis evaluation, the following applies:

1. The clinical diagnostic evaluation shall be conducted by a licensed practitioner who:
  - holds a valid, unrestricted license, which includes scope of practice to conduct a clinical diagnostic evaluation;
  - has three (3) years experience in providing evaluations of health professionals with substance abuse disorders; and,
  - is approved by the board.
2. The clinical diagnostic evaluation shall be conducted in accordance with acceptable professional standards for conducting substance abuse clinical diagnostic evaluations.
3. The clinical diagnostic evaluation report shall:
  - set forth, in the evaluator's opinion, whether the licensee has a substance abuse problem;
  - set forth, in the evaluator's opinion, whether the licensee is a threat to himself/herself or others; and,
  - set forth, in the evaluator's opinion, recommendations for substance abuse treatment, practice restrictions, or other recommendations related to the licensee's rehabilitation and safe practice.

The evaluator shall not have a financial relationship, personal relationship, or business relationship with the licensee within the last five years. The evaluator shall provide an objective, unbiased, and independent evaluation.

If the evaluator determines during the evaluation process that a licensee is a threat to himself/herself or others, the evaluator shall notify the board within 24 hours of such a determination.

For all evaluations, a final written report shall be provided to the board no later than ten (10) days from the date the evaluator is assigned the matter unless the evaluator requests additional information to complete the evaluation, not to exceed 30 days.

**#2 SENATE BILL 1441 REQUIREMENT**

Specific requirements for the temporary removal of the licensee from practice, in order to enable the licensee to undergo the clinical diagnostic evaluation described in subdivision (a) and any treatment recommended by the evaluator described in subdivision (a) and approved by the board, and specific criteria that the licensee must meet before being permitted to return to practice on a full-time or part-time basis.

**#2 Uniform Standard**

The following practice restrictions apply to each licensee who undergoes a clinical diagnostic evaluation:

1. The Board shall order the licensee to cease practice during the clinical diagnostic evaluation pending the results of the clinical diagnostic evaluation and review by the diversion program/board staff.
2. While awaiting the results of the clinical diagnostic evaluation required in Uniform Standard #1, the licensee shall be randomly drug tested at least two (2) times per week.

After reviewing the results of the clinical diagnostic evaluation, and the criteria below, a diversion or probation manager shall determine, whether or not the licensee is safe to return to either part-time or fulltime practice. However, no licensee shall be returned to practice until he or she has at least 30 days of negative drug tests.

- the license type;
- the licensee's history;
- the documented length of sobriety/time that has elapsed since substance use
- the scope and pattern of use;
- the treatment history;
- the licensee's medical history and current medical condition;
- the nature, duration and severity of substance abuse, and
- whether the licensee is a threat to himself/herself or the public.

**#3 SENATE BILL 1441 REQUIREMENT**

Specific requirements that govern the ability of the licensing board to communicate with the licensee's employer about the licensee's status or condition.

**#3 Uniform Standard**

If the licensee who is either in a board diversion program or whose license is on probation has an employer, the licensee shall provide to the board the names, physical addresses, mailing addresses, and telephone numbers of all employers and supervisors and shall give specific, written consent that the licensee authorizes the board and the employers and supervisors to communicate regarding the licensee's work status, performance, and monitoring.

**#4 SENATE BILL 1441 REQUIREMENT**

Standards governing all aspects of required testing, including, but not limited to, frequency of testing, randomness, method of notice to the licensee, number of hours between the provision of notice and the test, standards for specimen collectors, procedures used by specimen collectors, the permissible locations of testing, whether the collection process must be observed by the collector, backup testing requirements when the licensee is on vacation or otherwise unavailable for local testing, requirements for the laboratory that analyzes the specimens, and the required maximum timeframe from the test to the receipt of the result of the test.

**#4 Uniform Standard**

The following standards shall govern all aspects of testing required to determine abstention from alcohol and drugs for any person whose license is placed on probation or in a diversion program due to substance use:

**TESTING FREQUENCY SCHEDULE**

A board may order a licensee to drug test at any time. Additionally, each licensee shall be tested RANDOMLY in accordance with the schedule below:

Level	Segments of Probation/Diversion	Minimum Range of Number of Random Tests
I	Year 1	52-104 per year
II*	Year 2+	36-104 per year

\*The minimum range of 36-104 tests identified in level II, is for the second year of probation or diversion, and each year thereafter, up to five (5) years. Thereafter, administration of one (1) time per month if there have been no positive drug tests in the previous five (5) consecutive years of probation or diversion.

Nothing precludes a board from increasing the number of random tests for any reason. Any board who finds or has suspicion that a licensee has committed a violation of a board's testing program or who has committed a Major Violation, as identified in Uniform Standard 10, may reestablish the testing cycle by placing that licensee at the beginning of level I, in addition to any other disciplinary action that may be pursued.

**EXCEPTIONS TO TESTING FREQUENCY SCHEDULE**

I. PREVIOUS TESTING/SOBRIETY

In cases where a board has evidence that a licensee has participated in a treatment or monitoring program requiring random testing, prior to being subject to testing by the board, the board may give consideration to that testing in altering the testing

frequency schedule so that it is equivalent to this standard.

#### II. VIOLATION(S) OUTSIDE OF EMPLOYMENT

An individual whose license is placed on probation for a single conviction or incident or two convictions or incidents, spanning greater than seven years from each other, where those violations did not occur at work or while on the licensee's way to work, where alcohol or drugs were a contributing factor, may bypass level I and participate in level II of the testing frequency schedule.

#### III. NOT EMPLOYED IN HEALTH CARE FIELD

A board may reduce testing frequency to a minimum of 12 times per year for any person who is not practicing OR working in any health care field. If a reduced testing frequency schedule is established for this reason, and if a licensee wants to return to practice or work in a health care field, the licensee shall notify and secure the approval of the licensee's board. Prior to returning to any health care employment, the licensee shall be subject to level I testing frequency for at least 60 days. At such time the person returns to employment (in a health care field), if the licensee has not previously met the level I frequency standard, the licensee shall be subject to completing a full year at level I of the testing frequency schedule, otherwise level II testing shall be in effect.

#### IV. TOLLING

A board may postpone all testing for any person whose probation or diversion is placed in a tolling status if the overall length of the probationary or diversion period is also tolled. A licensee shall notify the board upon the licensee's return to California and shall be subject to testing as provided in this standard. If the licensee returns to employment in a health care field, and has not previously met the level I frequency standard, the licensee shall be subject to completing a full year at level I of the testing frequency schedule, otherwise level II testing shall be in effect.

#### V. SUBSTANCE USE DISORDER NOT DIAGNOSED

In cases where no current substance use disorder diagnosis is made, a lesser period of monitoring and toxicology screening may be adopted by the board, but not to be less than 24 times per year.

### **OTHER DRUG STANDARDS**

Drug testing may be required on any day, including weekends and holidays.

The scheduling of drug tests shall be done on a random basis, preferably by a computer program, so that a licensee can make no reasonable assumption of when he/she will be tested again. Boards should be prepared to report data to support back-to-back testing as well as, numerous different intervals of testing.

Licensees shall be required to make daily contact to determine if drug testing is required.

Licensees shall be drug tested on the date of notification as directed by the board.

Specimen collectors must either be certified by the Drug and Alcohol Testing Industry Association or have completed the training required to serve as a collector for the U.S. Department of Transportation.

Specimen collectors shall adhere to the current U.S. Department of Transportation Specimen Collection Guidelines.

Testing locations shall comply with the Urine Specimen Collection Guidelines published by the U.S. Department of Transportation, regardless of the type of test administered.

Collection of specimens shall be observed.

Prior to vacation or absence, alternative drug testing location(s) must be approved by the board.

Laboratories shall be certified and accredited by the U.S. Department of Health and Human Services.

A collection site must submit a specimen to the laboratory within one (1) business day of receipt. A chain of custody shall be used on all specimens. The laboratory shall process results and provide legally defensible test results within seven (7) days of receipt of the specimen. The appropriate board will be notified of non-negative test results within one (1) business day and will be notified of negative test results within seven (7) business days.

A board may use other testing methods in place of, or to supplement biological fluid testing, if the alternate testing method is appropriate.

#### **PETITIONS FOR REINSTATEMENT**

Nothing herein shall limit a board's authority to reduce or eliminate the standards specified herein pursuant to a petition for reinstatement or reduction of penalty filed pursuant to Government Code section 11522 or statutes applicable to the board that contains different provisions for reinstatement or reduction of penalty.

#### **OUTCOMES AND AMENDMENTS**

For purposes of measuring outcomes and effectiveness, each board shall collect and report historical and post implementation data as follows:

##### **Historical Data - Two Years Prior to Implementation of Standard**

Each board should collect the following historical data (as available), for a period of two years, prior to implementation of this standard, for each person subject to testing for banned substances, who has 1) tested positive for a banned substance, 2) failed to

appear or call in, for testing on more than three occasions, 3) failed to pay testing costs, or 4) a person who has given a dilute or invalid specimen.

**Post Implementation Data- Three Years**

Each board should collect the following data annually, for a period of three years, for every probationer and diversion participant subject to testing for banned substances, following the implementation of this standard.

**Data Collection**

The data to be collected shall be reported to the Department of Consumer Affairs and the Legislature, upon request, and shall include, but may not be limited to:

Probationer/Diversion Participant Unique Identifier  
License Type  
Probation/Diversion Effective Date  
General Range of Testing Frequency by/for Each Probationer/Diversion Participant  
Dates Testing Requested  
Dates Tested  
Identify the Entity that Performed Each Test  
Dates Tested Positive  
Dates Contractor (if applicable) was informed of Positive Test  
Dates Board was informed of Positive Test  
Dates of Questionable Tests (e.g. dilute, high levels)  
Date Contractor Notified Board of Questionable Test  
Identify Substances Detected or Questionably Detected  
Dates Failed to Appear  
Date Contractor Notified Board of Failed to Appear  
Dates Failed to Call In for Testing  
Date Contractor Notified Board of Failed to Call In for Testing  
Dates Failed to Pay for Testing  
Date(s) Removed/Suspended from Practice (identify which)  
Final Outcome and Effective Date (if applicable)

**#5 SENATE BILL 1441 REQUIREMENT**

Standards governing all aspects of group meeting attendance requirements, including, but not limited to, required qualifications for group meeting facilitators, frequency of required meeting attendance, and methods of documenting and reporting attendance or nonattendance by licensees.

**#5 Uniform Standard**

If a board requires a licensee to participate in group support meetings, the following shall apply:

When determining the frequency of required group meeting attendance, the board shall give consideration to the following:

- the licensee's history;
- the documented length of sobriety/time that has elapsed since substance use;
- the recommendation of the clinical evaluator;
- the scope and pattern of use;
- the licensee's treatment history; and,
- the nature, duration, and severity of substance abuse.

**Group Meeting Facilitator Qualifications and Requirements:**

1. The meeting facilitator must have a minimum of three (3) years experience in the treatment and rehabilitation of substance abuse, and shall be licensed or certified by the state or other nationally certified organizations.
2. The meeting facilitator must not have a financial relationship, personal relationship, or business relationship with the licensee within the last year.
3. The group meeting facilitator shall provide to the board a signed document showing the licensee's name, the group name, the date and location of the meeting, the licensee's attendance, and the licensee's level of participation and progress.
4. The facilitator shall report any unexcused absence within 24 hours.

**#6 SENATE BILL 1441 REQUIREMENT**

Standards used in determining whether inpatient, outpatient, or other type of treatment is necessary.

**#6 Uniform Standard**

In determining whether inpatient, outpatient, or other type of treatment is necessary, the board shall consider the following criteria:

- recommendation of the clinical diagnostic evaluation pursuant to Uniform Standard #1;
- license type;
- licensee's history;
- documented length of sobriety/time that has elapsed since substance abuse;
- scope and pattern of substance use;
- licensee's treatment history;
- licensee's medical history and current medical condition;
- nature, duration, and severity of substance abuse, and
- threat to himself/herself or the public.

**#7 SENATE BILL 1441 REQUIREMENT**

Worksite monitoring requirements and standards, including, but not limited to, required qualifications of worksite monitors, required methods of monitoring by worksite monitors, and required reporting by worksite monitors.

**#7 Uniform Standard**

A board may require the use of worksite monitors. If a board determines that a worksite monitor is necessary for a particular licensee, the worksite monitor shall meet the following requirements to be considered for approval by the board.

1. The worksite monitor shall not have financial, personal, or familial relationship with the licensee, or other relationship that could reasonably be expected to compromise the ability of the monitor to render impartial and unbiased reports to the board. If it is impractical for anyone but the licensee's employer to serve as the worksite monitor, this requirement may be waived by the board; however, under no circumstances shall a licensee's worksite monitor be an employee of the licensee.
2. The worksite monitor's license scope of practice shall include the scope of practice of the licensee that is being monitored, be another health care professional if no monitor with like practice is available, or, as approved by the board, be a person in a position of authority who is capable of monitoring the licensee at work.
3. If the worksite monitor is a licensed healthcare professional he or she shall have an active unrestricted license, with no disciplinary action within the last five (5) years.
4. The worksite monitor shall sign an affirmation that he or she has reviewed the terms and conditions of the licensee's disciplinary order and/or contract and agrees to monitor the licensee as set forth by the board.
5. The worksite monitor must adhere to the following required methods of monitoring the licensee:
  - a) Have face-to-face contact with the licensee in the work environment on a frequent basis as determined by the board, at least once per week.
  - b) Interview other staff in the office regarding the licensee's behavior, if applicable.
  - c) Review the licensee's work attendance.

Reporting by the worksite monitor to the board shall be as follows:

1. Any suspected substance abuse must be verbally reported to the board and the licensee's employer within one (1) business day of occurrence. If occurrence is not during the board's normal business hours the verbal report must be within one (1) hour of the next business day. A written report shall be submitted to the board within 48 hours of occurrence.
2. The worksite monitor shall complete and submit a written report monthly or as directed by the board. The report shall include:
  - the licensee's name;
  - license number;
  - worksite monitor's name and signature;
  - worksite monitor's license number;
  - worksite location(s);
  - dates licensee had face-to-face contact with monitor;
  - staff interviewed, if applicable;
  - attendance report;
  - any change in behavior and/or personal habits;
  - any indicators that can lead to suspected substance abuse.

The licensee shall complete the required consent forms and sign an agreement with the worksite monitor and the board to allow the board to communicate with the worksite monitor.

**#8 SENATE BILL 1441 REQUIREMENT**

Procedures to be followed when a licensee tests positive for a banned substance.

**#8 Uniform Standard**

When a licensee tests positive for a banned substance:

1. The board shall order the licensee to cease practice;
2. The board shall contact the licensee and instruct the licensee to leave work; and
3. The board shall notify the licensee's employer, if any, and worksite monitor, if any, that the licensee may not work.

Thereafter, the board should determine whether the positive drug test is in fact evidence of prohibited use. If so, proceed to Standard #9. If not, the board shall immediately lift the cease practice order.

In determining whether the positive test is evidence of prohibited use, the board should, as applicable:

1. Consult the specimen collector and the laboratory;
2. Communicate with the licensee and/or any physician who is treating the licensee; and
3. Communicate with any treatment provider, including group facilitator/s.

**#9 SENATE BILL 1441 REQUIREMENT**

Procedures to be followed when a licensee is confirmed to have ingested a banned substance.

**#9 Uniform Standard**

When a board confirms that a positive drug test is evidence of use of a prohibited substance, the licensee has committed a major violation, as defined in Uniform Standard #10 and the board shall impose the consequences set forth in Uniform Standard #10.

**#10 SENATE BILL 1441 REQUIREMENT**

Specific consequences for major and minor violations. In particular, the committee shall consider the use of a "deferred prosecution" stipulation described in Section 1000 of the Penal Code, in which the licensee admits to self-abuse of drugs or alcohol and surrenders his or her license. That agreement is deferred by the agency until or unless licensee commits a major violation, in which case it is revived and license is surrendered.

**#10 Uniform Standard**

**Major Violations** include, but are not limited to:

1. Failure to complete a board-ordered program;
2. Failure to undergo a required clinical diagnostic evaluation;
3. Multiple minor violations;
4. Treating patients while under the influence of drugs/alcohol;
5. Any drug/alcohol related act which would constitute a violation of the practice act or state/federal laws;
6. Failure to obtain biological testing for substance abuse;
7. Testing positive and confirmation for substance abuse pursuant to Uniform Standard #9;
8. Knowingly using, making, altering or possessing any object or product in such a way as to defraud a drug test designed to detect the presence of alcohol or a controlled substance.

**Consequences** for a major violation include, but are not limited to:

1. Licensee will be ordered to cease practice.
  - a) the licensee must undergo a new clinical diagnostic evaluation, and
  - b) the licensee must test negative for at least a month of continuous drug testing before being allowed to go back to work.
2. Termination of a contract/agreement.
3. Referral for disciplinary action, such as suspension, revocation, or other action as determined by the board.

**Minor Violations** include, but are not limited to:

1. Untimely receipt of required documentation;
2. Unexcused non-attendance at group meetings;
3. Failure to contact a monitor when required;
4. Any other violations that do not present an immediate threat to the violator or to the public.

**Consequences** for minor violations include, but are not limited to:

1. Removal from practice;
2. Practice limitations;
3. Required supervision;
4. Increased documentation;
5. Issuance of citation and fine or a warning notice;
6. Required re-evaluation/testing;
7. Other action as determined by the board.

**#11 SENATE BILL 1441 REQUIREMENT**

Criteria that a licensee must meet in order to petition for return to practice on a full time basis.

**#11 Uniform Standard**

**“Petition” as used in this standard is an informal request as opposed to a “Petition for Modification” under the Administrative Procedure Act.**

The licensee shall meet the following criteria before submitting a request (petition) to return to full time practice:

1. Demonstrated sustained compliance with current recovery program.
2. Demonstrated the ability to practice safely as evidenced by current work site reports, evaluations, and any other information relating to the licensee’s substance abuse.
3. Negative drug screening reports for at least six (6) months, two (2) positive worksite monitor reports, and complete compliance with other terms and conditions of the program.

**#12 SENATE BILL 1441 REQUIREMENT**

Criteria that a licensee must meet in order to petition for reinstatement of a full and unrestricted license.

**#12 Uniform Standard**

**“Petition for Reinstatement” as used in this standard is an informal request (petition) as opposed to a “Petition for Reinstatement” under the Administrative Procedure Act.**

The licensee must meet the following criteria to request (petition) for a full and unrestricted license.

1. Demonstrated sustained compliance with the terms of the disciplinary order, if applicable.
2. Demonstrated successful completion of recovery program, if required.
3. Demonstrated a consistent and sustained participation in activities that promote and support their recovery including, but not limited to, ongoing support meetings, therapy, counseling, relapse prevention plan, and community activities.
4. Demonstrated that he or she is able to practice safely.
5. Continuous sobriety for three (3) to five (5) years.

**#13 SENATE BILL 1441 REQUIREMENT**

If a board uses a private-sector vendor that provides diversion services, (1) standards for immediate reporting by the vendor to the board of any and all noncompliance with process for providers or contractors that provide diversion services, including, but not limited to, specimen collectors, group meeting facilitators, and worksite monitors; (3) standards requiring the vendor to disapprove and discontinue the use of providers or contractors that fail to provide effective or timely diversion services; and (4) standards for a licensee's termination from the program and referral to enforcement.

**#13 Uniform Standard**

1. A vendor must report to the board any major violation, as defined in Uniform Standard #10, within one (1) business day. A vendor must report to the board any minor violation, as defined in Uniform Standard #10, within five (5) business days.
2. A vendor's approval process for providers or contractors that provide diversion services, including, but not limited to, specimen collectors, group meeting facilitators, and worksite monitors is as follows:

(a) Specimen Collectors:

- (1) The provider or subcontractor shall possess all the materials, equipment, and technical expertise necessary in order to test every licensee for which he or she is responsible on any day of the week.
- (2) The provider or subcontractor shall be able to scientifically test for urine, blood, and hair specimens for the detection of alcohol, illegal, and controlled substances.
- (3) The provider or subcontractor must provide collection sites that are located in areas throughout California.
- (4) The provider or subcontractor must have an automated 24-hour toll-free telephone system and/or a secure on-line computer database that allows the participant to check in daily for drug testing.
- (5) The provider or subcontractor must have or be subcontracted with operating collection sites that are engaged in the business of collecting urine, blood, and hair follicle specimens for the testing of drugs and alcohol within the State of California.
- (6) The provider or subcontractor must have a secure, HIPAA compliant, website or computer system to allow staff access to drug test results and compliance reporting information that is available 24 hours a day.

- (7) The provider or subcontractor shall employ or contract with toxicologists that are licensed physicians and have knowledge of substance abuse disorders and the appropriate medical training to interpret and evaluate laboratory drug test results, medical histories, and any other information relevant to biomedical information.
- (8) A toxicology screen will not be considered negative if a positive result is obtained while practicing, even if the practitioner holds a valid prescription for the substance.
- (9) Must undergo training as specified in Uniform Standard #4 (6).

(b) Group Meeting Facilitators:

A group meeting facilitator for any support group meeting:

- (1) must have a minimum of three (3) years experience in the treatment and rehabilitation of substance abuse;
- (2) must be licensed or certified by the state or other nationally certified organization;
- (3) must not have a financial relationship, personal relationship, or business relationship with the licensee within the last year;
- (4) shall report any unexcused absence within 24 hours to the board, and,
- (5) shall provide to the board a signed document showing the licensee's name, the group name, the date and location of the meeting, the licensee's attendance, and the licensee's level of participation and progress.

(c) Work Site Monitors:

The worksite monitor must meet the following qualifications:

- (1) Shall not have financial, personal, or familial relationship with the licensee, or other relationship that could reasonably be expected to compromise the ability of the monitor to render impartial and unbiased reports to the board. If it is impractical for anyone but the licensee's employer to serve as the worksite monitor, this requirement may be waived by the board; however, under no circumstances shall a licensee's worksite monitor be an employee of the licensee.
- (2) The monitor's licensure scope of practice shall include the scope of practice of the licensee that is being monitored, be another health care professional if no

monitor with like practice is available, or, as approved by the board, be a person in a position of authority who is capable of monitoring the licensee at work.

- (3) Shall have an active unrestricted license, with no disciplinary action within the last five (5) years.
  - (4) Shall sign an affirmation that he or she has reviewed the terms and conditions of the licensee's disciplinary order and/or contract and agrees to monitor the licensee as set forth by the board.
2. The worksite monitor must adhere to the following required methods of monitoring the licensee:
    - a) Have face-to-face contact with the licensee in the work environment on a frequent basis as determined by the board, at least once per week.
    - b) Interview other staff in the office regarding the licensee's behavior, if applicable.
    - c) Review the licensee's work attendance.
  3. Any suspected substance abuse must be verbally reported to the contractor, the board, and the licensee's employer within one (1) business day of occurrence. If occurrence is not during the board's normal business hours the verbal report must be within one (1) hour of the next business day. A written report shall be submitted to the board within 48 hours of occurrence.
  4. The worksite monitor shall complete and submit a written report monthly or as directed by the board. The report shall include:
    - the licensee's name;
    - license number;
    - worksite monitor's name and signature;
    - worksite monitor's license number;
    - worksite location(s);
    - dates licensee had face-to-face contact with monitor;
    - staff interviewed, if applicable;
    - attendance report;
    - any change in behavior and/or personal habits;

- any indicators that can lead to suspected substance abuse.

(d) Treatment Providers

Treatment facility staff and services must have:

- (1) Licensure and/or accreditation by appropriate regulatory agencies;
- (2) Sufficient resources available to adequately evaluate the physical and mental needs of the client, provide for safe detoxification, and manage any medical emergency;
- (3) Professional staff who are competent and experienced members of the clinical staff;
- (4) Treatment planning involving a multidisciplinary approach and specific aftercare plans;
- (5) Means to provide treatment/progress documentation to the provider.

(e) General Vendor Requirements

The vendor shall disapprove and discontinue the use of providers or contractors that fail to provide effective or timely diversion services as follows:

- (1) The vendor is fully responsible for the acts and omissions of its subcontractors and of persons either directly or indirectly employed by any of them. No subcontract shall relieve the vendor of its responsibilities and obligations. All state policies, guidelines, and requirements apply to all subcontractors.
- (2) If a subcontractor fails to provide effective or timely services as listed above, but not limited to any other subcontracted services, the vendor will terminate services of said contractor within 30 business days of notification of failure to provide adequate services.
- (3) The vendor shall notify the appropriate board within five (5) business days of termination of said subcontractor.

**#14 SENATE BILL 1441 REQUIREMENT**

If a board uses a private-sector vendor that provides diversion services, the extent to which licensee participation in that program shall be kept confidential from the public.

**#14 Uniform Standard**

The board shall disclose the following information to the public for licensees who are participating in a board monitoring/diversion program regardless of whether the licensee is a self-referral or a board referral. However, the disclosure shall not contain information that the restrictions are a result of the licensee's participation in a diversion program.

- Licensee's name;
- Whether the licensee's practice is restricted, or the license is on inactive status;
- A detailed description of any restriction imposed.

**#15 SENATE BILL 1441 REQUIREMENT**

If a board uses a private-sector vendor that provides diversion services, a schedule for external independent audits of the vendor's performance in adhering to the standards adopted by the committee.

**#15 Uniform Standard**

1. If a board uses a private-sector vendor to provide monitoring services for its licensees, an external independent audit must be conducted at least once every three (3) years by a qualified, independent reviewer or review team from outside the department with no real or apparent conflict of interest with the vendor providing the monitoring services. In addition, the reviewer shall not be a part of or under the control of the board. The independent reviewer or review team must consist of individuals who are competent in the professional practice of internal auditing and assessment processes and qualified to perform audits of monitoring programs.
2. The audit must assess the vendor's performance in adhering to the uniform standards established by the board. The reviewer must provide a report of their findings to the board by June 30 of each three (3) year cycle. The report shall identify any material inadequacies, deficiencies, irregularities, or other non-compliance with the terms of the vendor's monitoring services that would interfere with the board's mandate of public protection.
3. The board and the department shall respond to the findings in the audit report.

**#16 SENATE BILL 1441 Requirement**

Measurable criteria and standards to determine whether each board's method of dealing with substance-abusing licensees protects patients from harm and is effective in assisting its licensees in recovering from substance abuse in the long term.

**#16 Uniform Standard**

Each board shall report the following information on a yearly basis to the Department of Consumer Affairs and the Legislature as it relates to licensees with substance abuse problems who are either in a board probation and/or diversion program.

- Number of intakes into a diversion program
- Number of probationers whose conduct was related to a substance abuse problem
- Number of referrals for treatment programs
- Number of relapses (break in sobriety)
- Number of cease practice orders/license in-activations
- Number of suspensions
- Number terminated from program for noncompliance
- Number of successful completions based on uniform standards
- Number of major violations; nature of violation and action taken
- Number of licensees who successfully returned to practice
- Number of patients harmed while in diversion

The above information shall be further broken down for each licensing category, specific substance abuse problem (i.e. cocaine, alcohol, Demerol etc.), whether the licensee is in a diversion program and/or probation program.

If the data indicates that licensees in specific licensing categories or with specific substance abuse problems have either a higher or lower probability of success, that information shall be taken into account when determining the success of a program. It may also be used to determine the risk factor when a board is determining whether a license should be revoked or placed on probation.

The board shall use the following criteria to determine if its program protects patients from harm and is effective in assisting its licensees in recovering from substance abuse in the long term.

- At least 100 percent of licensees who either entered a diversion program or whose license was placed on probation as a result of a substance abuse problem successfully completed either the program or the probation, or had their license to practice revoked or surrendered on a timely basis based on noncompliance of those programs.
- At least 75 percent of licensees who successfully completed a diversion program or probation did not have any substantiated complaints related to substance abuse for at least five (5) years after completion.

# Agenda Item #10.B. – Attachment D

## TITLE 16. BOARD OF VOCATIONAL NURSING AND PSYCHIATRIC TECHNICIANS

NOTICE IS HEREBY GIVEN that the Board of Vocational Nursing and Psychiatric Technicians (Board) is proposing to take the action described in the Informative Digest. Any person interested may present statements or arguments orally or in writing relevant to the action proposed at a hearing to be held:

**Date: September 6, 2011**

Time: 10:00 a.m.

Board for Professional Engineers & Land Surveyors  
2535 Capitol Oaks Drive, 3<sup>rd</sup> Floor Conference Room  
Sacramento, California 95833

Written comments, including those sent by mail, facsimile, or e-mail to the addresses listed under Contact Person in this Notice, must be received by the Board at its office not later than 5:00 P.M. on **September 5, 2011**, or must be received by the Board at the hearing. The Board, upon its own motion or at the instance of any interested party, may thereafter adopt the proposals substantially as described below or may modify such proposals if such modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified proposal will be available for fifteen (15) days prior to its adoption from the person designated in this Notice as the contact person and will be mailed to those persons who submit written or oral testimony related to this proposal or who have requested notification of any changes to the proposal.

### **AUTHORITY AND REFERENCE**

Pursuant to the authority vested by sections 2854 and 4504 of the Business and Professions (B&P) Code and section 11425.50(e) of the Government Code; and to implement, interpret or make specific sections 315, 315.2, 315.4, 475, 729, 2875, 2876, 2878, 4520, and 4521 of said Code, as well as sections 11400.20, 11400.25.50(e) and 11500 of the Government Code and section 44010 of the Education Code, the Board is considering changes to Division 25 of Title 16 of the California Code of Regulations (CCR).

### **INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW**

The Board's highest priority is protection of California consumers. B&P Code sections 2841.1 of the Vocational Nursing (VN) Practice Act and 4501.1 of the Psychiatric Technician (PT) law mandate that the protection of the public shall be the highest priority of the Board in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.

The Board is authorized to investigate the criminal conviction history of applicants and licensees, subsequent arrests, allegations of unprofessional conduct, and unsafe or incompetent practice by licensed vocational nurses and psychiatric technicians. The Board is authorized to discipline licensees and applicants who may jeopardize the health, safety and welfare of the consumer.

B&P Code section 2854 (VN) and section 4504 (PT) authorize the Board to adopt, amend, or repeal, such rules and regulations as may be reasonably necessary to enable it to carry into effect the provisions of the Vocational Nursing Practice Act and the Psychiatric Technicians Law.

Government Code Section 11425.50(e) requires that a penalty in an administrative disciplinary action may not be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule subject to Chapter 3.5 (commencing with Section 11340) unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with Section 11340).

The Board established its Disciplinary Guidelines to facilitate uniformity of disciplinary orders and to ensure that its disciplinary policies are known. The Guidelines are intended for use by individuals involved in disciplinary proceedings against vocational nurse and psychiatric technician licensees or applicants, including administrative law judges and attorneys, as well as the Board members who review proposed decisions and stipulations and have ultimate authority to make final decisions.

### **SPECIFIC CHANGES AND FACTUAL BASIS/RATIONALE:**

#### **Amend Sections 2524 (VN) and 2579.10 (PT)**

B&P Code section 315 (Senate Bill 1441, Chapter 548, Statutes of 2008) established a Substance Abuse Coordination Committee (SACC) to develop uniform standards for substance-abusing healing arts licensees. In April 2011, the SACC adopted sixteen uniform standards for use by all healing arts boards.

This proposal would amend Section 2524 (VN) and 2579.10 (PT) to incorporate by reference the new guidelines entitled "Disciplinary Guidelines and Uniform Standards Related to Substance Abuse" (Rev. 6/20/11) to implement the Uniform Standards Regarding Substance-Abusing Healing Arts Licensees. The proposed amendments will update and clarify the Board's recommended disciplinary orders and conditions of probation and include non-substantive, technical changes for grammatical and general clean up.

### **FISCAL IMPACT ESTIMATES**

Fiscal Impact on Public Agencies including Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State: None.

Nondiscretionary Costs/Savings to Local Agencies: None

Local Mandate: None

Cost to Any Local Agency or School District for Which Government Code Sections 17500 – 17630 Require Reimbursement: None

Business Impact: The Board has made an initial determination that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

Impact on Jobs/New Businesses: The Board has determined that this proposed regulatory action will not have a significant impact on the creation of jobs or new businesses or the elimination of jobs or existing businesses or the expansion of businesses in the State of California. By way of its impact on the available workforce, the proposed regulatory action only affects relatively few individual licensees who may be unable to practice safely due to substance abuse, who are sex offenders or who have otherwise violated the Board's laws. It will require individuals found to be substance-abusing to comply with evaluation and testing requirements.

Cost Impact on Representative Private Person or Business: The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. This proposal will only have an impact on licensees or applicants disciplined by the Board.

Effect on Housing Costs: None

### **EFFECT ON SMALL BUSINESS**

The Board has determined that the proposed regulations will not affect small businesses. The regulatory proposal affects licensed vocational nurses, licensed psychiatric technicians, and applicants for licensure.

## **CONSIDERATION OF ALTERNATIVES**

The Board must determine that no reasonable alternative it considered to the regulation or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposal described in this Notice.

Any interested person may present statements or arguments orally or in writing relevant to the above determinations at the above-mentioned hearing.

## **INITIAL STATEMENT OF REASONS AND INFORMATION**

The Board has prepared an initial statement of the reasons for the proposed action and has available all the information upon which the proposal is based.

## **TEXT OF PROPOSAL**

Copies of the exact language of the proposed regulations, any document incorporated by reference, the initial statement of reasons, and all of the information upon which the proposal is based, may be obtained at the hearing or prior to the hearing upon request from the Board at 2535 Capitol Oaks Drive, Suite 205, Sacramento, California 95833 or on the Board's website listed below.

## **AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE**

All the information upon which the proposed regulations are based is contained in the rulemaking file which is available for public inspection by contacting the person named below.

You may obtain a copy of the final statement of reasons once it has been prepared, by making a written request to the contact person named below or by accessing the website listed below.

## **CONTACT PERSON**

Inquiries or comments concerning the proposed rulemaking action may be addressed to:

Name: Linda Ruyters, Administrative Analyst  
Address: 2535 Capitol Oaks Drive, Suite 205  
Sacramento, CA 95833  
Telephone No: (916) 263-7845  
Fax No: (916) 263-7859  
E-Mail Address: [linda.ruyters@dca.ca.gov](mailto:linda.ruyters@dca.ca.gov)

The backup contact person is:

Name: Marilyn Kimble, Enforcement Program Manager  
Address: 2535 Capitol Oaks Drive, Suite 205  
Sacramento, CA 95833  
Telephone No: (916) 263-2042  
Fax No: (916) 263-7857  
E-mail Address: [marilyn.kimble@dca.ca.gov](mailto:marilyn.kimble@dca.ca.gov)

**Website Access:** Materials regarding this proposal can be found at [www.bvnpt.ca.gov](http://www.bvnpt.ca.gov)

# Agenda Item #10.B. – Attachment E

## Board of Vocational Nursing and Psychiatric Technicians

### INITIAL STATEMENT OF REASONS

**Hearing Date:** September 6, 2011

**Subject Matter of Proposed Regulations:**

Disciplinary Guidelines and Uniform Standards Related to Substance Abuse

**Sections Affected:**

Vocational Nursing (VN): Amend Title 16, C.C.R., Section 2524  
Psychiatric Technician (PT): Amend Title 16, C.C.R., Section 2579.10

**Introduction**

The Board of Vocational Nursing and Psychiatric Technician's (Board) highest priority is protection of California consumers. Business and Professions (B&P) Code sections 2841.1 (VN) and 4501.1 (PT) mandate that the protection of the public shall be the highest priority of the Board in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.

The Board is authorized to investigate the criminal conviction history of applicants and licensees, subsequent arrests, allegations of unprofessional conduct, and unsafe or incompetent practice by licensed vocational nurses and psychiatric technicians. The Board is authorized to investigate and discipline licensees and applicants who may jeopardize the health, safety and welfare of the consumer.

In September 2008, Senate Bill 1441 (Chapter 548, Statutes of 2008) was enacted to establish within the Department of Consumer Affairs a Substance Abuse Coordination Committee (SACC). The SACC was charged with the task of developing uniform standards in sixteen specific areas for use in dealing with substance-abusing healing arts licensees. In April 2011, the SACC adopted sixteen uniform standards for use by all healing arts boards.

Pursuant to Government Code Section 11425.50(e), a penalty in an administrative disciplinary action may not be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule unless it has been adopted as a regulation.

**Specific Purpose**

The Board's Disciplinary Guidelines (Guidelines), were last revised June 19, 2007, and were incorporated by reference as regulations effective October 29, 2008. In keeping with its mandate and strategic plan to protect the public interest, the Guidelines need to be amended to reflect current law and practice relative to recommended discipline for administrative disciplinary actions. In addition to the Guidelines, Uniform Standards (Standards) are incorporated into the document for substance-abusing licensees and to provide consistency and clarity when disciplining substance abusing licensees.

This proposal will amend Sections 2524 (VN) and 2579.10 (PT) to incorporate by reference the “Disciplinary Guidelines and Uniform Standards Related to Substance Abuse” as revised on June 20, 2011. Changes to the Guidelines and Standards are explained in detail in the Factual Basis below.

Amendments to Sections 2524 (a) and 2579.10 (a) are made to clarify that aggravating factors may provide a basis for deviating from the disciplinary guidelines and better explain the factors considered when disciplining a licensee.

Amendments to Sections 2524 (b) and 2579.10 (b) are made to create a rebuttable presumption that a licensee is a substance-abusing licensee for purposes of section 315 if the conduct found to be a violation of the Board’s laws involves the use of drugs, alcohol, or both. It further provides that if the licensee is a substance abuser, the Uniform Standards Related to Substance Abuse (Standards) apply unless the licensee establishes that, in his or her particular case, public protection can be satisfied with a modification or omission of a specific standard. The purpose of this provision is to explain when the Standards apply.

Amendments to Sections 2524 (c) and 2579.10 (c) are made to require that a proposed decision issued pursuant to the adjudicative provisions of the Administrative Procedure Act, wherein a licensee is found to have engaged in any act of sexual misconduct, as specified, must contain an order revoking the license. It further provides that the order of revocation may not be stayed. The purpose of this provision is to establish what the board believes is the appropriate consequence for a licensee who has engaged in a specified act of sexual misconduct. It is necessary to protect the public by prohibiting such licensees from holding a license.

### **Factual Basis**

The Board established its Guidelines to facilitate uniformity of disciplinary orders and to ensure that its disciplinary policies are known. The Guidelines are intended for use by individuals involved in disciplinary proceedings against vocational nurse and psychiatric technician licensees or applicants, including administrative law judges and attorneys, as well as the Board members who review proposed decisions and stipulations and have ultimate authority to make final decisions.

This proposal will incorporate by reference the Board’s Guidelines (as revised 6/2011) into Section 2524 (VN) and 2579.10 (PT). As explained in detail below, the Guidelines document has been expanded to apply Uniform Standards (Standards) to the Board’s disciplined licensees. These standards were derived from the SACC’s Uniform Standards Regarding Substance-Abusing Healing Arts Licensees (April 2011). The proposed amendments to the Guidelines and Standards will also update and clarify the Board’s recommended disciplinary orders and conditions of probation and include non-substantive, technical changes for grammatical and clean up purposes. The following describes those changes in detail and provides a rationale for the proposed amendments.

### **Amend the Cover, Table of Contents, and Introduction (pages i-ii)**

These amendments are needed to update and clarify the intent of the Guidelines and to accurately reflect the proposed changes which include the Standards that apply to healing arts licensees.

### *Amend Regulatory Authority (page iii)*

The specific purpose of this amendment is to reference the regulatory authority as it will appear once these regulations are amended. The effective dates will be inserted into the Guidelines once the regulations are officially amended. As noted above, the proposed amendments to the regulations add the presence of aggravating factors as a reason for deviation from the Guidelines and define what the Board will presume to be a substance-abusing licensee for purposes of section 315 of the B&P Code. The proposed amendments also specify that, if a licensee is found to have had sexual contact with a patient or has been convicted of a sex offense as defined, a proposed decision must contain an order to revoke a license and may not contain an order staying the revocation.

The proposal specifies that the Uniform Standards apply to a substance-abusing licensee. A licensee shall be presumed to be a substance-abuser if his/her misconduct involves the use of drugs and/or alcohol. The proposal specifies that, if the licensee does not rebut the presumption, the Uniform Standards shall apply unless the licensee establishes that appropriate public protection can be provided with modification or omission of a specific standard as a term of probation.

The proposal would also require an Administrative Law Judge (ALJ) to issue a proposed decision revoking a license without an order to stay the revocation when the licensee is found to have engaged in any act of sexual contact as defined in subdivision (c) of section 729 of the B&P Code, with a patient, or has committed an act or been convicted of a sex offense as defined in Section 44010 of the Education Code. Due to the seriousness of sex offenses and sexual misconduct and the potential threat to consumers that sexual offenders pose, the Board has determined that revocation of a license is the appropriate disciplinary action in any disciplinary matter where there is a finding that the licensee engaged in sexual contact with a patient or was convicted of a sex offense. The regulatory proposal ensures that ALJs render proposed decisions consistent with the Board's determination in these matters.

### *Amend Factors To Be Considered (page iv)*

The specific purpose of this amendment is to update the factors that should be considered in determining whether discipline should be imposed. This proposed amendment adds aggravating evidence as a factor and is needed to accurately reflect the proposed changes to the regulation.

### *Amend Summary Lists of Standard and Optional Conditions of Probation (pages v - vi)*

The Summary Lists of Standard and Optional Conditions of Probation were updated to accurately reflect the conditions listed on pages 1-11 of the proposed Guidelines. This proposed amendment clarifies that standard conditions of probation 1-14 generally appear in all cases involving probation and that optional conditions of probation 15-25 address specific circumstances of a case. Non-substantive, technical changes were also made for clean up.

### *Add Summary Lists of Uniform Standards – Conditions of Probation (page vii)*

The Summary Lists of Uniform Standards – Conditions of Probation were added to reflect the Standards accurately summarize the conditions listed on pages 12-15 of the proposed Uniform Standards Related to Substance Abuse. This proposed amendment specifies that Uniform Standards 26-28 must be imposed as conditions of probation for substance-abusing licensees and Uniform Standards 29-31 must be considered and, if warranted, must be imposed as probation conditions.

### *Amend Standard Conditions of Probation (pages 1-6)*

**1. Obey all Laws**

The specific purpose of this amendment is to clarify the respondent's responsibility to obey all laws at all times including any period of suspension, when not practicing, whether or not the licensee is in- or out-of-state. This amendment also clarifies that a respondent is required to submit proof of satisfactory completion of any criminal probation or parole ending after the effective date of the Board's Decision. It also specifies that a respondent must submit certified copies of court documents related to the expungement of any conviction if not previously submitted to the Board. Non-substantive, technical changes were also made for clean up.

It is the responsibility of all licensees to be lawful. The Board must ensure that the respondent clearly understands that all violations of any law must be reported to the Board and that the respondent must comply with criminal penalties while on probation. Documented proof of compliance is needed and this amendment clarifies that the licensee is responsible for submitting proof of completion of criminal probation or parole and/or expungement of any conviction.

**2. Compliance with Probation Program**

Non-substantive changes were made to this condition for grammatical and clean up purposes.

**3. Submit Written Reports**

Non-substantive changes were made to this condition for grammatical and clean up purposes.

**4. Notification of Address and Telephone Number Change(s)**

Non-substantive changes were made to this condition for grammatical and clean up purposes.

**5. Notification of Residency or Practice Outside of State**

Non-substantive changes were made to this condition for grammatical and clean up purposes.

**6. Meetings with Board Representative(s)**

No changes were made to this condition.

**7. Notification to Employer(s)**

The specific purpose of this amendment is to clarify the licensee's responsibility to provide the name, physical address, mailing address, and telephone number of all health care employers or supervisors. This proposed amendment specifies that the respondent must complete required consent forms and sign an agreement with his/her employer and supervisor to authorize the Board and the employer/supervisor to communicate regarding the respondent's work status, performance, and monitoring. This proposal also complies with the SACC's Uniform Standard No. 3.

It is the responsibility of the respondent to inform the Board of his/her employment status. The Board must have the ability to contact the respondent's employer at any time to determine if the respondent is complying with the conditions of probation and that the respondent is practicing safely. This amendment will clarify the respondent's responsibility in obtaining employer involvement in order to comply with the probation program. Although this amendment complies with SB 1441 regarding substance-abusing licensees, the Board inserted the proposed language in

this standard condition of probation rather than under the Uniform Standards section on pages 12-13 to clarify that this applies to all licensees on probation, not just substance-abusing licensees. It is anticipated that this provision will be helpful in monitoring all probationers, not just the substance-abusing ones.

**8. Employment Requirements and Limitations**

Non-substantive changes were made to this condition for grammatical and clean up purposes.

**9. Supervision Requirements**

Non-substantive changes were made to this condition for grammatical and clean up purposes.

**10. Completion of Educational Course(s)**

Non-substantive changes were made to this condition for grammatical and clean up purposes.

**11. Maintenance of Valid License**

Non-substantive changes were made to this condition for grammatical and clean up purposes.

**12. Cost Recovery Requirements**

Non-substantive changes were made to this condition for grammatical and clean up purposes.

**13. License Surrender**

Non-substantive changes were made to this condition for grammatical and clean up purposes.

**14. Violation of Probation**

Non-substantive changes were made to this condition for grammatical and clean up purposes.

**Amend Optional Conditions of Probation (pages 7-13)**

**15. Suspension of License**

Non-substantive changes were made to this condition for grammatical and clean up purposes.

**16. Examination by a Physician**

The specific purpose of this amendment is to clarify that the physician who conducts the examination of the licensee must notify the Board verbally within 24 hours if the licensee is not physically fit to practice safely. This proposed amendment also clarifies that the licensee must comply with any order to cease or restrict his/her practice until the Board is satisfied that the licensee is safe to return to practice and the licensee has been notified in writing by the Board. Non-substantive changes were also made to this condition for grammatical and clean up purposes.

This proposal will enhance consumer protections because it ensures that notice is quickly provided to the Board regarding a licensee who may pose a serious threat to consumers if the evaluator determines that the licensee is physically unfit to practice safely. It also clarifies that the licensee must comply with any order to cease or restrict practice.

## **17. Psychiatric/Psychological Evaluation**

The specific purpose of this proposed amendment is to clarify that the evaluator who conducts the psychiatric/psychological evaluation of the licensee must notify the Board verbally within 24 hours if the licensee is not psychologically fit to practice safely. This proposed amendment also clarifies that the licensee must comply with any order to cease or restrict his/her practice until the Board is satisfied that the licensee is safe to return to practice and the licensee has been notified in writing by the Board. Non-substantive changes were also made to this condition for grammatical and clean up purposes.

This proposal will enhance consumer protections because it ensures that notice is quickly provided to the Board regarding a licensee who may pose a serious threat to consumers if the evaluator determines that the licensee is not psychologically fit to practice safely. It also clarifies that the licensee must comply with any order to cease or restrict practice.

## **18. Psychotherapy**

The specific purpose of this amendment is to clarify that the therapist who provides psychotherapy to the licensee must notify the Board verbally within 24 hours if the licensee is not psychologically fit to practice safely. This proposed amendment also clarifies that the licensee must comply with any order to cease or restrict his/her practice until the Board is satisfied that the licensee is safe to return to practice and the licensee has been notified in writing by the Board. Non-substantive changes were also made to this condition for grammatical and clean up purposes.

This proposal will enhance consumer protections because it ensures that notice is quickly provided to the Board regarding a licensee who may pose a serious threat to consumers if the therapist determines that the licensee is not psychologically fit to practice safely. It also clarifies that the licensee must comply with any order to cease or restrict practice.

## **19. Rehabilitation Program**

The specific purpose of this amendment is to clarify that a rehabilitation treatment program may have components that include abstention from any identified type of addictive behavior. Non-substantive changes were also made to this condition for grammatical and clean up purposes.

## **20. Addictive Behavior Support Groups**

The specific purpose of this amendment is to clarify that this condition includes addictive behavior support groups and is not limited to support or recovery groups that only address chemical dependency. Non-substantive changes were also made to this condition for grammatical and clean up purposes.

## **21. Abstain from Controlled Substances**

No changes were made to this condition.

## **22. Abstain from Use of Alcohol and Products Containing Alcohol**

Non-substantive changes were made to this condition for grammatical and clean up purposes.

## **23. Submit Biological Fluid Samples**

No changes were made to this condition.

## **24. Take and Pass Licensure Examination**

Non-substantive changes were made to this condition for grammatical and clean up purposes.

## **25. Restrictions on Licensed Practice**

No changes were made to this condition.

## **Add Uniform Standards Related to Substance Abuse – Required Conditions of Probation (pages 12-13)**

## **26. Submit to Drug Testing**

The specific purpose of this proposed amendment is to comply with the SB 1441. The proposed amendment specifies that the licensee shall be subject to the frequency of testing established in No. 4 of the Uniform Standards.

Uniform Standard No. 4 established by the SACC (April 2011) includes a testing frequency schedule. The Uniform Standards require each licensee to be tested randomly as follows:

Level I – The range of random drug tests required for each licensee during the first year of probation is a minimum range of 52-104.

Level II – The range of random drug tests required for each licensee during the second year of probation and thereafter, up to 5 years, is a minimum range of 36-104.

The minimum number of tests provided will help to identify relapse and allow for licensees to be randomly tested. Nothing precludes the Board from increasing the number of random tests for any reason.

The Uniform Standards also provide five exceptions to the testing frequency schedule summarized as follows:

1. Previous Testing/Sobriety – In cases where a board has evidence that a licensee has participated in a treatment or monitoring program requiring random testing, prior to being subject to testing by the board, the board may give consideration to that testing in altering the testing frequency schedule so that it is equivalent to this standard.
2. Violation(s) Outside of Employment – An individual whose license is placed on probation for a single conviction or incident or two convictions or incidents, spanning greater than seven years from each other, where alcohol or drugs were a contributing factor and those violations did not occur at work or on the way to work, may bypass Level I of the testing frequency schedule.
3. Not Employed in Health Care Field – A board may reduce testing frequency to a minimum of 12 times per year for any person who is not practicing or working in any health care field. Prior to returning to any health care employment, the licensee shall be subject to Level I testing frequency for at least 60 days.
4. Tolling – A board may postpone all testing for any person whose probation is placed on tolling status if the overall probation period is also tolled.
5. Substance Use Disorder Not Diagnosed – In cases where no current substance use disorder is made, a lesser period of monitoring and toxicology screening may be adopted by the board, but not to be less than 24 times per year.

The exceptions provide the Board flexibility to determine testing frequency on a case by case basis. Further, the standard is broad enough to allow the Board to determine on a case-by-case basis if a licensee should be required to submit a specimen more quickly, e.g. before 10:00 a.m. or within 6 hours notice.

Many of the standards specific to testing collection and specimen handling are consistent with or based upon the guidelines established by the U.S. Department of Transportation. Requiring the certification of laboratories through the National Laboratories Certification program ensures consistent handling and processing of test results.

Requiring a licensee to submit a specimen on the same day as directed will eliminate the ability of a licensee to “flush” their system overnight. Further, the established certification of the laboratory will include creatine and pH levels, which can be a sign of a licensee “flushing” their system.

## **27. Positive Drug Test**

The specific purpose for this proposed amendment is to address the provisions of Nos. 8 and 9 of the SACC’s Uniform Standards. The proposed amendment specifies that, a licensee has committed a major violation if the Board confirms that a licensee tested positive for the use of a prohibited substance. The Board shall impose consequences set forth in the probation condition which defines Major and Minor Violations. A positive result for a banned substance will result in the Board ordering the licensee to cease practice.

Protection of the public is the Board’s highest priority in exercising its licensing, regulatory and disciplinary functions. In order to meet this mandate, it is appropriate for the licensee to cease practice if a major violation occurs, and refer the matter for further action.

## **28. Major and Minor Violations**

The specific purpose of this proposed amendment is to address SACC’s Uniform Standard No. 10. This proposed amendment defines major and minor violations as follows:

Major violations include, but are not limited to:

1. Failure to complete a Board-ordered program;
2. Failure to undergo a required clinical diagnostic evaluation;
3. Committing multiple minor violations of probation conditions;
4. Treating a patient while under the influence of drugs or alcohol;
5. Committing any drug or alcohol offense that is a violation of the Business and Professions Code, or other state or federal law;
6. Failure to submit to drug testing when ordered;
7. Testing positive for a banned substance;
8. Knowingly using, making, altering or possessing any object or product in such a way as to defraud a drug test designed to detect the presence of alcohol or a controlled substance.

If a licensee commits a major violation, the Board shall order the licensee to cease practice and refer the matter for disciplinary action or other action as determined by the Board.

Minor violations include, but are not limited to:

1. Failure to submit required documentation in a timely manner;

2. Unexcused attendance at required meetings;
3. Failure to contact a monitor as required;
4. Any other violations that do not present an immediate threat to the licensee or to the public.

If a licensee commits a minor violation, the Board shall determine what action is appropriate

Protection of the public is the Board's highest priority in exercising its licensing, regulatory and disciplinary functions. In order to meet this mandate, it is appropriate for the Board to order the licensee to cease practice, if a major violation occurs, and refer the matter for further action. It is also appropriate for the Board to determine the appropriate action for a minor violation. This proposed amendment clarifies the types of violations that fall within each category.

### **Add Uniform Standards Related to Substance Abuse – Optional Conditions of Probation (pages 14-15)**

#### **29. Clinical Diagnostic Evaluation**

The specific purpose of this proposed amendment is to address SACC's Uniform Standards Nos. 1, 2, 6 and 11. The proposed amendment specifies that, if a licensee is ordered to undergo a clinical diagnostic evaluation, the Board shall order the licensee to cease practice for a minimum of 30 days pending the results of the evaluation. The licensee shall submit to random drug testing during this time at a minimum of 2 times per week. The licensee shall also cause the evaluator to submit to the Board a written clinical diagnostic evaluation report within 10 days from the date the evaluation is complete unless an extension, not to exceed 30 days, is granted by the Board.

A clinical diagnostic evaluation would not be necessary in a situation where there is demonstrable immediate threat to the public safety and/or where violations are so egregious (e.g. crimes in addition to substance abuse, patient harm/death) that the Board would not allow the licensee to practice under any circumstances; thus, the Board would seek revocation instead of permitting rehabilitation or treatment.

This proposal will increase consumer protection by specifying requirements for a clinical diagnostic evaluation of a licensee and timeframes for completion of the evaluation; required qualifications for providers evaluating the licensee; ensuring that the Board is notified quickly if the licensee is a threat; setting forth minimum standards for clinical diagnostic evaluations; ensuring evaluations are conducted in accordance with applicable best practices while allowing the evaluator discretion; providing for a professional opinion as to whether the licensee has a substance abuse problem; and prohibiting personal, financial and business relationships between the evaluator and licensee ensuring objectivity in assessments. It also describes the factors it will consider in imposing conditions on practice and explains the requirements for a restricted practice to be lifted.

Obtaining expert recommendations for treatment and practice restrictions ensures that licensees who have undergone treatment and have taken steps towards recovery can safely return to practice.

#### **30. Group Meetings with Qualified Facilitator**

The specific purpose of this amendment is to address with the uniform standard No. 5 established by the SACC. The proposed amendment specifies that, if the Board requires a licensee to participate in facilitated group support meetings, the group must be led by a facilitator who has a minimum of 3 years experience in the treatment and rehabilitation of substance abuse and shall by license or certified by the State or other nationally certified organization(s). The facilitator must

not have a financial, personal, or business relationship with the licensee within the last 5 years. The meeting facilitator must provide a signed document showing the licensee's name, group name, dates and location of meetings, licensee's attendance, level of participation, and progress. Unexpected absences must be reported to the Board by the facilitator within 24 hours.

Specifying the requirements for facilitated group support meetings for the treatment of substance abuse ensures that licensees who have undergone treatment and have made steps towards recovery can safely practice. It also assists the Board in obtaining consistent and reasonably reliable information from monitors.

### **31. Worksite Monitor**

The specific purpose of this proposed amendment is to address SACC's Uniform Standard No. 7. The proposed amendment specifies that, if the Board determines that supervised practice is necessary for a particular licensee, the licensee must submit the name of the proposed monitor within 30 days of the effective date of the Board's decision. The licensee must complete any required forms and sign an agreement with the worksite monitor and the Board. If the worksite monitor terminates the agreement with the Board and/or licensee, the licensee shall not practice until another worksite monitor is approved in writing by the Board.

The monitor's role is to monitor a licensee who is chemically impaired and to ensure that the licensee is not abusing drugs and/or alcohol. The monitor is also responsible for reporting to the Board whether patient safety may be at risk and by identifying changes in the licensee's behavior that may be cause to suspect current substance abuse. Implementing this standard would provide ongoing documentation of the licensee's behavior to ensure public safety and provide immediate notification to the Board if a licensee is suspected of working under the influence of drugs and/or alcohol.

### **Amend Violations & Recommended Disciplinary Actions (pages 16-21)**

The specific purpose for this amendment is to update the table of Violations & Recommended Disciplinary Actions to accurately reflect the proposed changes to the Disciplinary Guidelines and Uniform Standards Related to Substance Abuse. The proposed amendments ensure that the table is consistent with the proposed changes to the regulations by this action (requiring revocation for sexual misconduct) and the Guidelines as modified.

### **Underlying Data**

- Senate Bill 1441 (Ridley-Thomas)
- SB 1172 (Negrete McLeod)
- Disciplinary Guidelines and Uniform Standards Related to Substance Abuse (As amended June 20, 2011)
- SACC's Uniform Standards Regarding Substance-Abusing Healing Arts Licensees (April 2011)
- Minutes of the February 25, 2011, Board Meeting and Board Meeting Report

### **Business Impact**

The regulation will not have a significant adverse economic impact on businesses.

### **Specific Technologies or Equipment**

These regulations do not mandate the use of special technologies or equipment.

### **Consideration of Alternatives**

No reasonable alternative to the regulations would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulations.

(7/12/11)



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Linda Ruyters, Administrative Analyst  
2535 Capitol Oaks Drive  
Suite 205  
Sacramento, California 95833

August 30, 2011

**Amend Title 16, Division 25, Chapter 1 Article 4  
Sections 2524 (VN) and 2579.10 (PT) – Disciplinary Guidelines and  
Uniform Standards Related to Substance Abuse**

Dear Ms. Ruyters:

On behalf of the membership of the California Nurse Association/National Nurses United (CNA), representing 85,000 nurses throughout California, we submit the following comments on the Uniform Standards Related to Substance Abuse.

CNA opposes these standards and asks that the Board reject the implementation of the proposed regulations for the following reasons:

SB 1441, Chapter 548; 208 was developed because of the Business and Professions Chair's concern regarding "the repeated failures of the MBC's Physician Diversion Program (PDP), and the immediate and grave risks to the public posed by physicians who continue to practice medicine despite their chemical dependency. "Out of that concern, however all healing arts boards are now required to adhere to the Uniform Standards on Substance Abuse that were developed by the Standard Abuse Coordinating Committee (SACC).

The resulting standards allow little if any flexibility in handling the substance abuse issues of their licensees. This uniformity does not consider the differences of each profession and how the various boards handle their licensees. We do not believe this uniformity is warranted and it does little to enhance the approach and/or treatment of those experiencing substance abuse issues. We submit substance abuse is an illness and no one would suggest that all patients with heart disease be treated the same, why is this approach taken in treating substance abuse? Finally, we believe the board should have the flexibility to determine what process and treatment works best given the situation while adhering to their primary objective which is public protection.

The following represent our specific concerns:

- A. We oppose the incorporation of the uniform standards by reference in regulations. Current regulations incorporate the board's current recommended guidelines for disciplinary orders and conditions of participation by reference. This is appropriate given that these are guidelines and recommendations, not mandates. Since the uniform standards would be "required mandatory consequences," incorporating them by reference

OAKLAND Headquarters  
2000 Franklin St.  
Oakland CA 94612  
Tel: 510/273-2200  
Fax: 510/663-1625

SACRAMENTO  
1107 9th St. Ste. 900  
Sacramento CA 95814  
Tel: 916/446-5021  
Fax: 916/446-6319

GLENDALE  
425 W. Broadway Ste. 111  
Glendale CA 91204  
Tel: 818/240-1900  
Fax: 818/240-8336

CHICAGO  
850 W. Jackson #750  
Chicago IL 60607  
Tel: 312/491-4902  
Fax: 312/491-9614

MAINE  
160 Capitol St. #1  
Augusta ME 04330  
Tel: 207/622-1057  
Fax: 207/623-4072

could leave licensees subject to future changes to the standards that do not have to be vetted through the regulatory process. Thus, to ensure fairness and due process for licensees, disciplinary mandates should be spelled out in regulations, not simply drafted in a document that could be subject to later changes with relatively little checks and balances in the process.

- B. Under drug testing standards, the board would be required to order a licensee who tests positive to cease practice. However, the cease practice would be ordered, and the employer of the licensee would be notified prior to the determination of whether or not the positive test is evidence of prohibited use. It should be clarified that the positive test in this section is actually a confirmed test, and we do not support the board issuing a cease practice without first having made a determination that the test is actually evidence of prohibited use. This raises issues of fairness and due process for licensees who may be ordered to cease practice over false positive results, or who may have their employers notified of a positive test even if it is later determined that the test does not constitute prohibited use.
- C. We strongly oppose the length of time and frequency of drug tests licensees will be ordered to undergo under the uniform standards. This test frequency is highly controversial, not based on any scientific evidence of effectiveness, and would be extremely costly for licensees considering that they would have to cover the cost. We believe the test frequency is arbitrary and we don't support them.  
  
The board should retain the authority to determine test frequency on a case by case basis so that the board has the discretion to order testing that is appropriate for a licensee, especially for those who are in diversion and who are not working, so that onerous and expensive testing requirements are not unnecessarily imposed.
- D. We are concerned with the proposed language regarding clinical diagnostic evaluation standards. According to these standards, a licensee who is required to undergo an evaluation must cease practice for a minimum of 30 days and test twice a week. But there is no flexibility with that timeframe, so if a licensee has a favorable evaluation, and the board determines that a licensee is safe to return to practice, the licensee would still have to complete 30 days of mandated cease practice. We think that once the board has determined a licensee can return to practice, that licensee should go back to work, not be forced to sit out an arbitrary number of days to complete the 30 day period mandated by these standards.
- E. With regards to worksite monitoring, we oppose the language that would allow another health care professional to serve as the monitor if the monitor is not familiar with the practice area of the licensee.

We also have concerns over requirements for worksite monitors to report "suspected substance abuse" to the board and employer. This creates a subjective process of suspicion of abuse, and

could leave probationers vulnerable to unfounded allegations of substance abuse that could kick off board action or disciplinary action by the employer.

Finally, the lack of board discretion in addressing the substance abuse issues likely to affect their licensees, and employing standards that preempt the authority of the board in determining what process and activities should be involved in bringing their licensees to sobriety while protecting the public, present issues we do not believe serve the public or the board well.

Thank you for the opportunity to respond to these regulations.

Respectfully,

A handwritten signature in cursive script that reads "Bonnie Castillo". The signature is written in black ink and is positioned above the printed name and title.

Bonnie Castillo  
Director, Government Relations