

# Agenda Item #11.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  
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DATE: August 16, 2012  
TO: Board Members  
FROM:   
Marilyn Kimble  
Enforcement Program Manager  
SUBJECT: Proposed Regulatory Action to Implement SB 1441, Uniform Standards for Substance-Abusing Licensees and Revision of Disciplinary Guidelines

## STATEMENT OF ISSUES

The Board is mandated to protect consumers from licensees who practice in an unsafe, incompetent, or impaired manner. In accordance with Business and Professions (B&P) Code, sections 2841.1 and 4501.1, protection of the public shall be the Board's highest priority in exercising its licensing, regulatory, and disciplinary functions.

B&P Code section 315 (Senate Bill 1441, Chapter 548, Statutes of 2008) established a Substance Abuse Coordination Committee (SACC) to develop uniform standards to be used by healing arts boards in dealing with substance-abusing licensees within each board's jurisdiction. All healing arts boards are required to use the standards that were developed.

Government Code section 11425.50(e) states 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). Accordingly, the Board's Disciplinary Guidelines (Guidelines) are established in regulation.

In order to implement the uniform standards adopted by the SACC, they must be incorporated into existing regulations through revision of the Board's Guidelines.

Additionally, the Board's Guidelines were last revised effective October 29, 2008 and it has become necessary to clean up other sections of the Guidelines (see Attachments A and B).

## BACKGROUND AND SUBJECT REVIEW

The SACC was required to establish uniform and specific standards in sixteen areas by January 1, 2010.

The SACC was comprised of the Executive Officers (EO) of all healing arts boards, the Director of the Department of Consumer Affairs (DCA) and the State Medical Director of the Department of Drug and Alcohol Programs. The Board's EO was a member of the SACC

and attended several meetings throughout the year. Additionally, a work group was established to assist the SACC. Marilyn Kimble, Probation Monitor, participated as a member of the work group and also attended several group and SACC meetings throughout the year.

On November 16, 2009, the SACC adopted sixteen uniform standards to be used by all healing arts boards.

The DCA Director encouraged the boards to promptly implement those standards that do not require legislation or regulatory changes. He also requested that the boards develop proposed statutory and/or regulatory changes, as needed, to fully implement the standards.

Accordingly, Board staff worked on proposed amendments to the vocational nursing (VN) and psychiatric technician (PT) regulations regarding its Guidelines to include the uniform standards and to clean up other sections of the Guidelines. In the meantime, the Board was advised that the DCA established a SACC Subcommittee to review standard #4 relative to required drug testing. A review of this standard was deemed necessary due to numerous concerns expressed during the public meetings regarding the frequency of testing required by this standard.

A draft of proposed regulatory language to implement the uniform standards was developed by the Board and presented at its May 19, 2010 Board Meeting. However, no action was taken by the Board pending the outcome of the SACC's review of standard #4 and possible revisions to that standard.

The SACC subcommittee met on August 4, 2010 and March 9, 2011. Public comment was received during these meetings. The subcommittee adopted revisions to Uniform Standard #4 which include a new testing frequency schedule, exceptions, other drug standards, petitions for reinstatement and outcomes. On April 11, 2011, the SACC adopted the Subcommittee's recommendations (see Attachment C).

At the February 25, 2011 Board Meeting, the Board directed staff to prepare a rulemaking file and authorized the Executive Officer to make changes consistent with the intent of standard #4 relative to required drug testing.

On July 22, 2011, the Notice of Proposed Changes was published in the California Regulatory Notice Register (see Attachment D). A copy of the Notice was mailed to all interested parties on the Board's mailing list. The proposed language was mailed to those individuals who requested a copy.

On September 6, 2011, a public hearing was held at the Engineers' Board Hearing Room, 2535 Capitol Oaks Drive (Third Floor), Sacramento, California 95833. Only one comment was received during the hearing from Ann Lyles, Consultant for the California Association of Psychiatric Technicians, who indicated that the proposed regulations appear to be straightforward and clear. Additionally, written comments were received from Bonnie Castillo, Director of Government Relations for the California Nurses Association on September 6, 2011 (see Attachment F).

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At the September 9, 2011 Board Meeting, the Board tabled this item to the November 10, 2011 Board Meeting to allow Board staff to properly consider the comments received by Ms. Castillo. The comments were considered and no changes to the proposed regulatory language were recommended.

On October 27, 2011, the Legislative Counsel Bureau (LCB) issued an opinion on the adoption of the Uniform Standards by the healing arts boards (see Attachment G). In response to questions from Senator Curren D. Price, Jr., the LCB opined that the SACC was required to formally promulgate the Uniform Standards as regulations pursuant to the Administrative Procedures Act and that the healing arts boards are required to implement such standards. This opinion was provided to the Board on November 8, 2011.

At the November 9, 2011 Board Meeting, the Board tabled its consideration and possible action on the proposed regulations to allow time for the DCA to issue a response to the LCB's opinion or for any new information to emerge. On January 26, 2012, the Board received information from the DCA that there was no indication that an SACC meeting will be called to pursue regulations.

At the February 24, 2012 Board Meeting, the Board tabled its consideration and possible action on the proposed regulations to allow time for any new information and for the DCA to issue a response. In response to the LCB's opinion, on February 29, 2012, the Office of the Attorney General (OAG) issued an informal legal opinion (see Attachment H). The OAG opined that B&P Code section 315 does not itself trigger the need to issue the Uniform Standards as regulations; the SACC's adoption of the Uniform Standards does not need to undergo the formal rulemaking process under the Administrative Procedures Act; the healing arts boards must implement the Uniform Standards; and, if the Uniform Standards must be adopted as regulations, the individual healing arts boards would issue the regulations to implement the Uniform Standards.

On April 5, 2012, after reviewing the LCB and OAG opinions, the DCA issued its opinion to advise the healing arts boards of its opinion regarding raised questions (see Attachment I). The DCA concurred with the LCB and the OAG that the healing arts boards do not have discretion to modify the content of the specific terms or conditions of probation that make up the Uniform Standards; and, unless the Uniform Standards specifically so provide, all of the Uniform Standards must be applied to cases involving substance-abusing licensees. The DCA agreed with the OAG that the SACC does not have authority to adopt the Uniform Standards as regulations. The authority to promulgate the regulations necessary to implement the Uniform Standards lies with the individual healing arts boards. The DCA recommended that the healing arts boards move forward as soon as possible to implement the mandate of B&P Code section 315 as it relates to Uniform Standards.

At the May 11, 2012 Board meeting, Enforcement Division Chief Karen Newquist briefed the Board regarding a May 8, 2012 meeting between DCA Legal Counsel (Counsel) and Board staff.

At this meeting, Counsel and Board staff reviewed the Board's proposed regulations for conformance to the DCA's April 5, 2012 opinion and requirements of the Uniform Standards. Additionally, Counsel provided three options that the DCA approved for use in determining whether a licensee is a substance-abusing licensee. The options were:

Option 1: Using a rebuttable presumption. If the charge involves alcohol or drugs, it will be assumed that the licensee is in fact a substance-abusing licensee and he then bears the burden of proving that he is NOT a substance-abusing licensee at the hearing.

Option 2: Imposing probationary terms that include the Uniform Standards when the charges involve drugs and/or alcohol, but making them contingent on the outcome of an ordered clinical diagnostic evaluation to determine whether or not the individual is a substance-abusing licensee.

Option 3: The Board bears the burden of proving (via facts, layperson and expert testimony, etc.) at a hearing that the individual is a substance-abusing licensee.

At the conclusion of the meeting, Counsel and Board staff agreed that the Board's proposed regulations utilized Option 1 and were not in conflict with either the DCA's opinion or the Uniform Standards.

At the May 11, 2012 Board meeting, the Board approved the proposed regulations and directed staff to submit the rulemaking file to the DCA and the Office of Administrative Law (OAL) for final approval.

On June 6, 2012, the rulemaking file was submitted to the DCA. On July 19, 2012, the DCA recommended changes to the proposed regulatory language (see Attachment J) and granted a 90-day extension to October 17, 2012, for submission of the final rulemaking file to the OAL. On July 30, 2012, the Board noticed the modified text. The 15-day comment period regarding the modified text ended on August 14, 2012. Comments related to the proposed changes were received from Bonnie Castillo, Director, Government Relations, California Nurses Association (see Attachment K). Ms. Castillo's comments were in support of the proposed regulations.

#### **Recommendations:**

1. The Board approve the regulatory proposal as modified on July 30, 2012, to amend Division 25 of Title 16, California Code of Regulations, to amend sections 2524 (VN Regulations) and 2579.10 (PT Regulations).
2. Direct staff to submit the rulemaking file to the DCA and to the Office of Administrative Law (OAL) for final approval; and
3. Authorize the Executive Officer to make non-substantive changes as are required by the Director of the DCA and the OAL.

Attachment A Proposed Regulatory Language for Implementation of Uniform Standards and Revision of Disciplinary Guidelines  
Attachment B Proposed Revised Disciplinary Guidelines  
Attachment C Uniform Standards Regarding Substance-Abusing Healing Arts Licensees (dated April 2011)  
Attachment D Notice of Proposed Changes

Attachment E Initial Statement of Reason  
Attachment F Written Comments Received  
Attachment G Legislative Counsel Bureau Opinion, October 27, 2011  
Attachment H Office of the Attorney General Informal Legal Opinion, February 29, 2012  
Attachment I Department of Consumer Affairs Opinion, April 5, 2012  
Attachment J Proposed Regulatory Language for Implementation of Uniform Standards  
and Revision of Disciplinary Guidelines – Modified Text  
Attachment K Written Comments Received Regarding Modified Text



# Agenda Item #11.A. – Attachment A

## Board of Vocational Nursing and Psychiatric Technicians

### SPECIFIC LANGUAGE

#### Vocational Nursing Regulations

California Code of Regulations, Title 16, Division 25, Chapter 1, Article 4, is amended to read:

2524. Disciplinary Guidelines and Uniform Standards Related to Substance Abuse.

In reaching a decision on a disciplinary action under the Administrative Procedure Act (Government Code Section 11400 et seq.) the Board shall ~~ide~~ utilize the disciplinary guidelines entitled “Disciplinary Guidelines and Uniform Standards Related to Substance Abuse” (Rev. 6/19/076/20/11), which are hereby incorporated by reference. The Disciplinary Guidelines apply to all disciplinary matters; the Uniform Standards apply to a substance abusing licensee.

- (a) Notwithstanding subsection (b), a deviation from these the guideline Disciplinary Guidelines, including the standard conditions of probation, is appropriate where the Board, in its sole discretion, determines that the facts of the particular case warrant such a deviation – for example: the presence of mitigating or aggravating factors; the age of the case; evidentiary problems.
- (b) If the conduct found to be a violation involves the use of drugs and/or alcohol, the licensee shall be presumed to be a substance abusing licensee for purposes of Section 315 of the Business and Professions Code. If the licensee does not rebut that presumption, then the Uniform Standards for a substance abusing licensee shall apply unless the licensee establishes that, in his or her particular case, appropriate public protection can be provided with modification or omission of a specific standard as a term of probation.
- (c) Notwithstanding the Disciplinary Guidelines, any proposed decision issued in accordance with the procedures set forth in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code that contains any finding of fact that the licensee engaged in any act of sexual contact as defined in subdivision (c) of section 729 of the Business and Professions 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, shall contain an order revoking the license. The proposed decision shall not contain an order staying the revocation of the license.

Note: Authority cited: Section 2854, Business and Professions Code; and Section 11425.50(e), Government Code. Reference: Sections 315, 315.2, 315.4, 729, 2875, 2876 and 2878, Business and Professions Code; Section 44010, Education Code; and Sections 11400.20, 11425.50(e), and 11500, Government Code.

# Board of Vocational Nursing and Psychiatric Technicians

## SPECIFIC LANGUAGE

### Psychiatric Technician Regulations

California Code of Regulations, Title 16, Division 25, Chapter 2, Article 4, is amended to read:

#### 2579.10. Disciplinary Guidelines and Uniform Standards Related to Substance Abuse.

In reaching a decision on a disciplinary action under the Administrative Procedure Act (Government Code Section 11400 et seq.) the Board shall ~~ide~~ utilize the disciplinary guidelines entitled “Disciplinary Guidelines and Uniform Standards Related to Substance Abuse” (Rev. ~~6/19/076/20/11~~), which are hereby incorporated by reference. The Disciplinary Guidelines apply to all disciplinary matters; the Uniform Standards apply to a substance abusing licensee.

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Note: Authority cited: Section 4504, Business and Professions Code; and Section 11425.50(e), Government Code. Reference: Sections 315, 315.2, 315.4, 729, 4520 and 4521, Business and Professions Code; Section 44010, Education Code; and Sections 11400.20, 11425.50(e), and 11500, Government Code.

State of California  
Board of Vocational Nursing  
and Psychiatric Technicians

DISCIPLINARY GUIDELINES  
AND  
UNIFORM STANDARDS RELATED  
TO SUBSTANCE ABUSE

Revised ~~June 19, 2007~~ June 20, 2011  
(*Regulations Effective ~~October 29, 2008~~[insert date]*)



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## **INTRODUCTION**

*Business and Professions Code sections 2841.1 and 4501.1 mandate that protection of the public shall be the highest priority for the Board of Vocational Nursing and Psychiatric Technicians (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.*

*To facilitate uniformity of disciplinary orders and to ensure that its disciplinary policies are known, the Board adopted these Disciplinary Guidelines and Uniform Standards Related to Substance Abuse.*

### **Disciplinary Guidelines**

*The ~~guidelines~~Disciplinary 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.*

*While recognizing the concept that administrative law judges must be free to exercise their discretion, the Board requests that ~~these~~the guidelinesDisciplinary Guidelines be followed to the extent possible and that any departures be noted and explained in the Proposed Decision.*

*The Board requests that matters in extenuation and mitigation, as well as those in aggravation, be fully considered and noted in the Proposed Decision. Of primary importance is the effect ~~the respondent's~~ Respondent's conduct had or could have had on the health, safety, and welfare of California consumers.*

## Uniform Standards Related to Substance Abuse

Pursuant to Business and Professions Code section 315, the Department of Consumer Affairs (Department) Substance Abuse Coordination Committee formulated Uniform Standards Regarding Substance-Abusing Healing Arts Licensees (rev. 4/2011). The Board's Uniform Standards not otherwise incorporated into the Standard Conditions are found in Conditions of Probation 25, 26, 27, 28, 29, and 30. The Uniform Standards apply when dealing with substance-abusing licensees.

If the conduct found to be a violation involves the use of drugs and/or alcohol, the licensee shall be presumed to be a substance abusing licensee. If the licensee does not rebut that presumption, then Conditions of Probation 25, 26 and 27 shall be imposed unless the licensee establishes that, in his or her particular case, appropriate public protection can be provided with modification or omission of a specific standard as a term of probation.

Conditions of Probation 28, 29, and 30 shall be considered where the licensee is found to be a substance abuser, and, if the nature and circumstances of the particular case warrant, shall be imposed as probation conditions.

The Board may impose more restrictive conditions, if necessary, to protect the public.

# REGULATORY AUTHORITY

California Code of Regulations  
Title 16, Division 25

Section 2524 (VN) & Section 2579.10 (PT):

Disciplinary Guidelines and Uniform Standards Related to Substance Abuse.

*In reaching a decision on a disciplinary action under the Administrative Procedure Act (Government Code section 11400 et seq.) the Board shall ~~consider~~ utilize the disciplinary guidelines entitled “Disciplinary Guidelines and Uniform Standards Related to Substance Abuse” (Rev. ~~6/19/07~~6/20/11), which are hereby incorporated by reference. The Uniform Standards apply to a substance abusing licensee.*

- (a) Notwithstanding subsection (b), ~~a~~ deviation from these guidelines—the Disciplinary Guidelines, including the standard conditions of probation, is appropriate where the Board, in its sole discretion, determines that the facts of the particular case warrant such a deviation - for example: the presence of mitigating or aggravating factors; the age of the case; evidentiary problems.*
- (b) If the conduct found to be a violation involves the use of drugs and/or alcohol, the licensee shall be presumed to be a substance-abusing licensee for purposes of section 315 of the Code. If the licensee does not rebut that presumption, then the Uniform Standards for a substance abusing licensee shall apply unless the licensee establishes that, in his or her particular case, appropriate public protection can be provided with modification or omission of a specific standard as a term of probation.*
- (c) Notwithstanding the Disciplinary Guidelines, any proposed decision issued in accordance with the procedures set forth in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code that contains any finding of fact that the licensee engaged in any act of sexual contact as defined in subdivision (c) of section 729 of the Business and Professions 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, shall contain an order revoking the license. The proposed decision shall not contain an order staying the revocation of the license.*

## ***FACTORS TO BE CONSIDERED***

***In determining whether revocation, suspension or probation should be imposed in a given disciplinary action, the following factors should be considered:***

- *Nature and severity of the act(s), offense(s), or crime(s) under consideration.*
- *Actual or potential harm to the public.*
- *Actual or potential harm to any patient.*
- *Overall disciplinary record.*
- *Overall criminal actions taken by any federal, state or local agency or court.*
- *Prior warnings on record or prior remediation.*
- *Number and/or variety of current violations.*
- *~~Mitigation~~ Mitigating or aggravating evidence.*
- *In case of a criminal conviction, compliance with terms of sentence and/or court-ordered probation.*
- *Time passed since the act(s) or offense(s) occurred.*
- *If applicable, evidence of proceedings to dismiss a conviction pursuant to Penal Code section 1203.4.*
- *Cooperation with the Board and other law enforcement or regulatory agencies.*
- *Other rehabilitation evidence.*

# ***SUMMARY LISTS OF THE STANDARD & AND OPTIONAL CONDITIONS OF PROBATION***

## ***Standard Conditions of Probation (1 – 14):***

The Standard Conditions of Probation (1-14) are those conditions of probation which will generally appear in all cases involving probation as standard terms and conditions.

1. *Obey All Laws*
2. *Compliance with Probation Program*
3. *Submit Written Reports*
4. *Notification of Address and Telephone Number Change(s)*
5. *Notification of Residency or Practice Outside of State*
6. *Meetings ~~With~~with Board Representative(s)*
7. *Notification to Employer(s)*
8. *Employment Requirements and Limitations*
9. *Supervision Requirements*
10. *Completion of Educational Course(s)*
11. *Maintenance of Valid License*
12. *Cost Recovery Requirements*
13. *License Surrender*
14. *Violation of Probation*

## ***Optional Conditions of Probation (15 -- 25):***

The Optional Conditions of Probation (15-25) are those conditions of probation which address specific circumstances of the case.

- *If relevant to the violation, any of the ~~optional conditions~~ Optional Conditions may be included in the probation requirements.*
- *If the offense involves ~~alcohol and/or drug~~ substance abuse, including alcohol, Conditions-Optional Conditions 19- 23-22 are usually required (in addition to the Standard Conditions 1 - 14 and, if the licensee is found to be a substance-abuser, Uniform Standards Conditions 26-28). Optional Conditions 16-18, 23, and Conditions 29-31 are also recommended, if relevant.*
- *If ~~the respondent's~~ Respondent's license has been or will have been expired for over four (4) years by the time a decision is rendered, ~~the~~ Respondent shall be required to take and pass the licensure examination (Condition 24).*
- *If the case involves mental illness, Conditions 16-18 are recommended.*

15. *Suspension of License*
16. *Examination by a Physician*
17. *Psychiatric/Psychological Evaluation*
18. *Psychotherapy*
19. *Rehabilitation Program*
20. *~~Chemical Dependency~~ Addictive Behavior Support & Recovery Groups*
21. *Abstain from Controlled Substances*
22. *Abstain from Use of Alcohol and Products Containing Alcohol*
23. *Submit Biological Fluid Samples*
24. *Take and Pass Licensure Examination*
25. *Restrictions on Licensed Practice*

**SUMMARY LISTS OF**  
**UNIFORM STANDARDS – CONDITIONS OF**  
**PROBATION**

**Required Conditions of Probation (26 -- 28):**

The following Uniform Standards -- Conditions of Probation shall be imposed as probation conditions in cases where Respondent is placed on probation due to substance abuse.

- 26. Submit to Drug Testing
- 27. Positive Drug Test
- 28. Major and Minor Violations

**Optional Conditions of Probation (29 -- 31):**

The following Uniform Standards -- Conditions of Probation shall be considered and, if the circumstances of the case warrant, shall be imposed as probation conditions.

- 29. Clinical Diagnostic Evaluation
- 30. Group Meetings with Qualified Facilitator
- 31. Worksite Monitor

# DISCIPLINARY GUIDELINES

## STANDARD CONDITIONS OF PROBATION [1-14]

### 1. OBEY ALL LAWS

Respondent shall obey all federal, state and local laws at all times, including all statutes and regulations governing the license. Respondent shall submit, in writing, a full and detailed account of any and all violations of the law, including alleged violations, to the Board within ~~five~~(5) days of occurrence. This provision applies during any period of suspension or any other period of non-practice, in state or out of state.

To ensure compliance with this condition, ~~respondent~~Respondent shall submit fingerprints through the Department of Justice and Federal Bureau of Investigation within ~~thirty~~(30) days of the effective date of the ~~decision~~Decision, unless the Board determines that fingerprints were previously submitted by the ~~respondent~~Respondent to the Board.

Respondent shall also submit to the Board a recent 2" x 2" photograph of himself/herself within ~~thirty~~(30) days of the effective date of the ~~decision~~Decision.

If ~~respondent~~Respondent is under a criminal court order, including probation or parole, and the order is violated, it shall be deemed a violation of these probation conditions. Respondent shall submit proof of satisfactory completion of any criminal probation or parole that ends after the effective date of the Board's Decision. Respondent shall submit certified copies of court documents related to the expungement of any conviction(s) if not previously submitted.

### 2. COMPLIANCE WITH PROBATION PROGRAM

Respondent shall fully comply with the conditions of probation established by the Board and shall cooperate with representatives of the Board in its monitoring and investigation of ~~the respondent's~~Respondent's compliance with the Probation Program.

Upon successful completion of probation, ~~the respondent's~~Respondent's license will be fully restored.

### 3. SUBMIT WRITTEN REPORTS

Respondent shall submit or cause to be submitted, under penalty of perjury, any written reports, or declarations and verifications of actions as required by the Board or its representatives. These reports or declarations shall contain statements relative to ~~respondent's~~Respondent's compliance with all the conditions of the Board's Probation Program.

Respondent shall immediately execute all release of information forms as may be required by the Board or its representatives.

In the first report, ~~respondent~~Respondent shall provide a list of all states and territories where he/she has ever been licensed as a vocational/practical nurse, psychiatric technician, or registered nurse. Respondent shall provide information regarding the status of each license and any change in license status during the period of probation. Respondent shall inform the Board if he/she applies for or obtains a new nursing or psychiatric technician license during the period of probation.

Respondent shall provide a copy of the Board's ~~decision~~Decision to the regulatory agency in every state and territory in which he/she has applied for or holds a vocational/practical nurse, psychiatric technician, and/or registered nurse license.

### 4. NOTIFICATION OF ADDRESS AND TELEPHONE NUMBER CHANGE(S)

Respondent shall notify the Board, in writing, within ~~five~~(5) days of any change in address or telephone number(s).

Respondent's failure to claim mail sent by the Board may be deemed a violation of these probation conditions.

### 5. NOTIFICATION OF RESIDENCY OR PRACTICE OUTSIDE OF STATE

Respondent shall notify the Board, in writing, within ~~five~~(5) days, if he/she leaves California to reside or practice in another state. Periods of residency or practice outside of California shall not apply toward a reduction of this probation time period. If ~~respondent~~Respondent resides or practices outside of California, the period of probation shall be automatically extended for the same time period he/she resides or practices outside of California. ~~The respondent~~Respondent shall provide written notice to the Board within ~~five~~(5) days of any change of residency or practice.

Respondent shall notify the Board, in writing, within ~~five~~(5) days, upon his/her return to California.

**6. MEETINGS WITH BOARD REPRESENTATIVE(S)**

Respondent shall appear in person at meetings as directed by the Board or its designated representatives.

**7. NOTIFICATION TO EMPLOYER(S)**

When currently employed or applying for employment in any capacity in any health care profession, ~~respondent~~Respondent shall notify his/her employer of the probationary status of ~~respondent's~~Respondent's license. This notification to the ~~respondent's~~Respondent's current health care employer shall occur no later than the effective date of the Decision. The ~~respondent~~Respondent shall notify any prospective health care employer of his/her probationary status with the Board prior to accepting such employment. At a minimum, this notification shall be accomplished by providing the employer or prospective employer with a copy of the Board's Accusation or Statement of Issues and Disciplinary Decision.

Respondent shall provide to the Board the name(s), physical address(s), mailing address(s), and telephone number(s) of all health care employers and supervisors. Respondent shall complete the required consent forms and sign an agreement with his/her employer(s) and supervisor(s) authorizing the Board and the employer(s) and supervisor(s) to communicate regarding Respondent's work status, performance, and monitoring.

The Health Care Profession includes, but is not limited to: Licensed Vocational Nurse, Psychiatric Technician, Registered Nurse, Medical Assistant, Paramedic, Emergency Medical Technician, Certified Nursing Assistant, Home Health Aide, and all other ancillary technical health care positions.

Respondent shall cause each health care employer to submit to the Board all performance evaluations and any other employment related reports as required by the Board. Respondent shall notify the Board, in writing, of any difficulty in securing employer reports within ~~five~~(5) days of such an event.

Respondent shall notify the Board, in writing, within ~~five~~(5) days of any change in employment status. Respondent shall notify the Board, in writing, if he/she is terminated or separated, regardless of cause, from any nursing or health care related employment with a full explanation of the circumstances surrounding the termination or separation.

**8. EMPLOYMENT REQUIREMENTS AND LIMITATIONS**

Respondent shall work in his/her licensed capacity in the state of California. This practice shall consist of no less than ~~six (6)~~ continuous months and of no less than ~~twenty (20)~~ hours per week.

Respondent shall not work for a nurses' registry or in any private duty position, a temporary nurse placement agency, as a faculty member in an accredited or approved school of nursing, or as an instructor in a Board approved continuing education course except as approved, in writing, by the Board. Respondent shall work only on a regularly assigned, identified and predetermined work site(s) and shall not work in a float capacity except as approved, in writing, by the Board.

**9. SUPERVISION REQUIREMENTS**

Before commencing or continuing employment in any health care profession, ~~respondent~~Respondent shall obtain approval from the Board of the supervision provided to ~~the respondent~~Respondent while employed.

Respondent shall not function as a charge nurse (i.e., work in any healthcare setting as the person who oversees or directs licensed vocational nurses, psychiatric technicians, certified nursing assistants, or unlicensed assistive personnel) or supervising psychiatric technician during the period of probation, except as approved, in writing, by the Board.

**10. COMPLETION OF EDUCATIONAL COURSE(S)**

Respondent, at ~~his or her~~his/her own expense, shall enroll and successfully complete ~~a course(s)~~coursework substantially related to the violation(s) no later than the end of the first year of probation.

The coursework shall be in addition to that required for license renewal. The Board shall notify ~~the respondent~~Respondent of the course content and number of contact hours required. Within ~~thirty (30)~~ days of the Board's written notification of assigned coursework, ~~respondent~~Respondent shall submit a written plan to comply with this requirement. The Board shall approve such plan prior to enrollment in any course of study.

Upon successful completion of the coursework, ~~respondent~~Respondent shall submit "original" completion certificates to the Board within ~~thirty (30)~~ days of course completion.

**11. MAINTENANCE OF VALID LICENSE**

Respondent shall, at all times, maintain an active current license with the Board, including any period of suspension.

If an initial license must be issued (Statement of Issues) or a license is reinstated, probation shall not commence until a license is issued by the Board. Respondent must complete the licensure process within ~~two~~(2) years from the effective date of the Board's ~~decision~~Decision.

Should ~~respondent~~Respondent's license expire, by operation of law or otherwise, upon renewal or reinstatement, ~~respondent's~~Respondent's license shall be subject to any and all conditions of this probation not ~~previously~~ satisfied.

**12. COST RECOVERY REQUIREMENTS**

Respondent shall pay to the Board costs associated with its investigation and enforcement pursuant to Business and Professions Code section 125.3 in the amount of \$ \_\_\_\_.

Respondent shall be permitted to pay these costs in a payment plan approved by the Board with payments to be completed no later than three months prior to the end of the probation period. The filing of bankruptcy by ~~respondent~~Respondent shall not relieve ~~respondent~~Respondent of his/her responsibility to reimburse the Board for its investigation and prosecution costs. Failure to make payments in accordance with any formal agreement entered into with the Board or pursuant to any Decision by the Board shall be considered a violation of probation.

If ~~respondent~~Respondent has not complied with this condition during the probationary period, and ~~respondent~~Respondent presents sufficient documentation of his/her good faith effort to comply with this condition, and if no other conditions have been violated, the Board or its representatives may, upon written request from ~~the respondent~~Respondent, extend the probation period up to one year, without further hearing, in order to comply with this condition. During the extension, all original conditions of probation will apply.

Except as provided above, the Board shall not renew or reinstate the license of any respondent who has failed to pay all the costs as directed in a Decision.

### 13. LICENSE SURRENDER

During probation, if ~~respondent~~Respondent ceases practicing due to retirement, health reasons, or is otherwise unable to satisfy the conditions of probation, ~~respondent~~Respondent may surrender his/her license to the Board. The Board reserves the right to evaluate ~~respondent's~~Respondent's request and to exercise its discretion whether to grant the request without further hearing. Upon formal acceptance of the tendered license, ~~respondent~~Respondent will no longer be subject to the conditions of probation.

Surrender of ~~respondent's~~Respondent's license shall be considered a disciplinary action and shall become a part of ~~respondent's~~Respondent's license history with the Board. A licensee who surrenders his/her license may petition the Board for reinstatement no sooner than the following minimum periods from the effective date of the disciplinary ~~decision~~Decision for the surrender:

- ~~Three~~(3) years for reinstatement of a license surrendered for any reason other than a mental or physical illness; or
- ~~One~~(1) year for a license surrendered for a mental or physical illness.

### 14. VIOLATION OF PROBATION

If ~~respondent~~Respondent violates the conditions of his/her probation, the Board, after giving ~~respondent~~Respondent notice and an opportunity to be heard, may set aside the stay order and impose the stayed discipline (denial/revocation/suspension) of ~~respondent's~~Respondent's license. If during probation, an ~~accusation~~Accusation or ~~petition to revoke probation~~Petition to Revoke Probation has been filed against ~~respondent's~~Respondent's license or the Attorney General's Office has been requested to prepare an ~~accusation~~Accusation or ~~petition to revoke probation~~Petition to Revoke Probation against ~~respondent's~~Respondent's license, the probationary period shall automatically be extended and shall not expire until the ~~accusation~~Accusation or ~~petition~~Petition has been acted upon by the Board.

## OPTIONAL CONDITIONS OF PROBATION [15-25]

### 15. SUSPENSION OF LICENSE

Respondent is suspended from practice as a vocational nurse/psychiatric technician for \_\_\_\_\_ month(s) (period not to exceed one year) beginning on the effective date of this ~~decision~~Decision.

During suspension, all probation conditions are in full force and effect except those relating to actual practice. The period of suspension will not apply to the reduction of this probationary period. The probation shall be automatically extended for the same time period as the length of suspension.

### 16. EXAMINATION BY A PHYSICIAN

Within ~~sixty (60)~~ days of the effective date of the Decision, ~~respondent~~Respondent shall submit to a physical examination by a physician of his/her choice who meets minimum criteria established by the Board. The physician must be licensed in California and Board certified in Family Practice, Internal Medicine or a related specialty. The purpose of this examination shall be to determine ability to perform all professional duties with safety to self and to the public. Respondent shall provide the examining physician with a copy of the Board's Disciplinary Order prior to the examination. The cost of such examination shall be paid by the ~~respondent~~Respondent.

Respondent shall cause the physician to submit to the Board a written medical report in a format acceptable to the Board. This report shall be submitted within ~~ninety (90)~~ days of the effective date of the Decision. If the examining physician finds that ~~respondent~~Respondent is not physically fit to practice or can only practice with restrictions, the examining physician shall notify the Board verbally within 24 hours and in writing within five (5) working days. The Board shall notify ~~the respondent~~Respondent in writing of the examining physician's determination of unfitness to practice and shall order ~~the respondent~~Respondent to cease or restrict licensed activities as a condition of probation.

Respondent shall comply with ~~this condition~~any order to cease or restrict his/her practice until the Board is satisfied of ~~respondent's~~Respondent's fitness to practice safely and has so notified ~~the respondent~~Respondent in writing. Respondent shall document compliance in the manner required by the Board.

## 17. PSYCHIATRIC/PSYCHOLOGICAL EVALUATION

Within ~~sixty (60)~~ days of the effective date of the Decision, ~~respondent~~Respondent shall submit to a psychiatric/psychological evaluation. The evaluation shall be performed by a psychiatrist licensed in California and Board certified in psychiatry, or by a clinical psychologist licensed in California. This evaluation shall be for the purpose of determining ~~respondent's~~Respondent's current mental, psychological, and emotional fitness to perform all professional duties with safety to self and to the public. Respondent shall provide the evaluator with a copy of the Board's Disciplinary Order prior to the evaluation. The cost of such evaluation shall be paid by ~~the respondent~~Respondent.

Respondent shall cause the evaluator to submit to the Board a written report concerning ~~respondent's~~Respondent's status and progress as well as such other information as may be requested by the Board. This report shall be submitted in a format acceptable to the Board within ~~ninety (90)~~ days from the effective date of the Decision.

If the evaluator finds that ~~respondent~~Respondent is not psychologically fit to practice safely, or can only practice with restrictions, the evaluator shall notify the Board verbally within 24 hours and in writing within five (5) working days. The Board shall notify ~~the respondent~~Respondent in writing of the evaluator's determination of unfitness to practice and shall order ~~the respondent~~Respondent to cease or restrict licensed activities as a condition of probation. Respondent shall comply with ~~this condition~~any order to cease or restrict his/her practice until the Board is satisfied of ~~respondent's~~Respondent's fitness to practice safely and has so notified ~~the respondent~~Respondent in writing. Respondent shall document compliance in the manner required by the Board.

If the evaluator finds that psychotherapy is required, ~~respondent~~Respondent shall participate in a therapeutic program at the Board's discretion. The cost of such therapy shall be paid by ~~the respondent~~Respondent.

## 18. PSYCHOTHERAPY

Within ~~sixty (60)~~ days of the effective date of the Decision, ~~respondent~~Respondent shall submit to the Board the name of one or more proposed therapists for prior approval. Respondent shall participate in ongoing psychotherapy with a California licensed or legally registered mental health professional who has been approved by the Board. Respondent shall provide the therapist with a copy of the Board's Disciplinary Order no later than the first therapy session. Therapy sessions shall be at least once a week unless otherwise determined by the Board. Respondent shall continue in such therapy at the Board's discretion. The cost of such therapy shall be paid by the ~~respondent~~Respondent.

Respondent shall cause the therapist to submit to the Board a written report concerning ~~respondent's~~Respondent's psychotherapy status and progress as well as such other information as may be requested by the Board. The initial psychotherapy report shall be submitted in a format acceptable to the Board within ~~ninety (90)~~ days from the effective date of the Decision. Respondent shall cause the therapist to submit quarterly written reports to the Board concerning Respondent's fitness to practice, progress in treatment, and to provide such other information as may be required by the Board.

If the therapist finds that ~~respondent~~Respondent is not psychologically fit to practice safely, or can only practice with restrictions, the therapist shall notify the Board verbally within 24 hours and in writing within ~~five (5)~~ working days. The Board shall notify ~~respondent~~Respondent in writing of the therapist's determination of unfitness to practice and shall order ~~the respondent~~Respondent to cease or restrict licensed activities as a condition of probation. Respondent shall comply with ~~this condition~~any order to cease or restrict his/her practice until the Board is satisfied of ~~respondent's~~Respondent's fitness to practice safely and has so notified ~~the respondent~~Respondent in writing. Respondent shall document compliance with this condition in the manner required by the Board.

## 19. REHABILITATION PROGRAM

Within ~~thirty (30)~~ days of the effective date of the Decision, ~~respondent~~Respondent shall enter a rehabilitation and monitoring program specified by the Board. Respondent shall successfully complete such treatment contract as may be recommended by the program and approved by the Board. Respondent shall submit written verification of successful completion of such treatment in a format acceptable to the Board within ~~thirty (30)~~ days of completion.

Components of the treatment contract shall be relevant to the violation and to the ~~respondent's~~Respondent's current status in recovery or rehabilitation. The components may include, but are not limited to: restrictions on practice and work setting, random bodily fluid testing, abstention from drugs and alcohol or other identified types of addictive behavior, use of work site monitors, participation in ~~chemical dependency~~addictive behavior rehabilitation programs or groups, psychotherapy, counseling, psychiatric evaluations, and other appropriate rehabilitation or monitoring programs. The cost for participation in this program shall be paid by ~~the respondent~~Respondent.

20. **CHEMICAL DEPENDENCY ADDICTIVE BEHAVIOR SUPPORT & RECOVERY GROUPS**

Within five (5) days of the effective date of the Decision, ~~respondent~~ Respondent shall begin attendance at a ~~chemical dependency~~ addictive behavior support group (e.g. Alcoholics Anonymous, Narcotics Anonymous, Nurse Support Group, Al-Anon, Gamblers Anonymous). Verified documentation of attendance shall be submitted by the ~~respondent~~ Respondent with each written report as required by the Board. Respondent shall continue attendance in such a group for the duration of probation.

21. **ABSTAIN FROM CONTROLLED SUBSTANCES**

Respondent shall completely abstain from the personal use or possession of controlled substances, as defined in the California Uniform Controlled Substances Act, and dangerous drugs as defined in Section 4021 and 4022 of the Business and Professions Code, except when lawfully prescribed by a licensed practitioner for a bona fide illness.

22. **ABSTAIN FROM USE OF ALCOHOL AND PRODUCTS CONTAINING ALCOHOL**

Respondent shall completely abstain from the use of alcoholic beverages and products containing alcohol.

23. **SUBMIT BIOLOGICAL FLUID SAMPLES**

Respondent shall immediately submit to biological fluid testing, at respondent's cost, upon request by the Board or its designee. There will be no confidentiality in test results; positive test results will be immediately reported to the Board and the respondent's current employer.

24. **TAKE AND PASS LICENSURE EXAMINATION**

**(Statement of Issues)**

Prior to commencing practice, Respondent shall take and pass the licensure exam currently required of new applicants within ~~two~~ (2) years from the effective date of the Board's ~~decision~~ Decision. Respondent shall pay the established examination fees.

This probationary period shall not commence until ~~respondent~~ Respondent has successfully passed the licensure examination and a license is issued by the Board.

**(Reinstatement of License)**

Prior to resuming practice, ~~respondent~~Respondent shall take and pass the licensure exam currently required of new applicants within ~~two (2)~~ years from the effective date of the Board's ~~decision~~Decision. Respondent shall pay the established examination fees.

This probationary period shall not commence until ~~the respondent~~Respondent has successfully passed the licensure examination and a license is issued by the Board.

**(Current License)**

Prior to resuming or continuing practice, ~~respondent~~Respondent shall take and pass the licensure exam currently required of new applicants within ~~two (2)~~ years from the effective date of the Board's ~~decision~~Decision. Respondent shall pay the established examination fees.

This probationary period shall not commence until ~~respondent~~Respondent has successfully passed the licensure examination and notice has been mailed to ~~the respondent~~Respondent by the Board.

**25. RESTRICTIONS ON LICENSED PRACTICE**

Respondent shall practice only with a specified client population, in a specified practice setting, and/or engage in limited medical procedures. These restrictions shall be specifically defined in the Decision and be appropriate to the violation. Respondent shall be required to document compliance in the manner required by the Board.

**UNIFORM STANDARDS**  
**FOR SUBSTANCE ABUSING LICENSEES**

**UNIFORM STANDARDS – REQUIRED**  
**CONDITIONS OF PROBATION [26 -- 28]**

**26. SUBMIT TO DRUG TESTING**

Respondent shall immediately submit to random, observed and directed drug testing, at Respondent's cost, upon request by the Board or its designee. Respondent shall be subject to the frequency of testing specified in Standard 4 of the Substance Abuse Coordination Committee's Uniform Standards Regarding Substance-Abusing Healing Arts Licensees (April 2011) established by the Substance Abuse Coordination Committee. Respondent shall make daily contact as directed by the Board to determine if he/she must submit to drug testing. Respondent shall submit his/her specimen on the same day that he/she is notified that a test is required. All alternative collection sites due to vacation or travel outside of California must be approved by the Board prior to the vacation or travel.

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.

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 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 7 days of receipt of the specimen. The Board shall be notified of non-negative test results within 1 business day and shall be notified of negative test results within 7 business days.

There will be no confidentiality in test results. Positive test results will be immediately reported to the Board, Respondent's employer and worksite monitor, if any.

**27. POSITIVE DRUG TEST**

When the Board confirms that a positive drug test is evidence of use of a prohibited substance, Respondent has committed a major violation and the Board shall impose the consequences set forth in Major and Minor Violations.

A positive result for a banned substance will result in Respondent being ordered to cease practice and subject his/her license to further disciplinary action.

**28. MAJOR AND MINOR VIOLATIONS**

Major Violations include, but are not limited to, the following:

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 state or federal law;
6. Failure to obtain biological testing for substance abuse;
7. Testing positive for a banned substance; and
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 Respondent commits a major violation, the Board shall order Respondent 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, the following:

1. Failure to submit required documentation in a timely manner;
2. Unexcused non-attendance at required meetings;
3. Failure to contact a monitor when required; and
4. Any other violations that do not present an immediate threat to the licensee or to the public.

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

## UNIFORM STANDARDS – OPTIONAL CONDITIONS OF PROBATION [29 -- 31]

### 29. CLINICAL DIAGNOSTIC EVALUATION

Within 30 days of the effective date of the Decision and at any time upon order of the Board, Respondent shall undergo a clinical diagnostic evaluation. Respondent shall provide the evaluator with a copy of the Board's Decision prior to the clinical diagnostic evaluation being performed. The clinical diagnostic evaluation shall be conducted in accordance with acceptable professional standards for conducting substance abuse clinical diagnostic evaluations. The evaluator shall not have a financial, personal, or business relationship with the licensee with the last 5 years.

The clinical diagnostic evaluation report shall set forth whether the licensee has a substance abuse problem, is a threat to himself/herself or others, and provide recommendations for substance abuse treatment, practice restrictions, or other recommendations related to the licensee's rehabilitation and safe practice. 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.

Any time Respondent is ordered to undergo a clinical diagnostic evaluation, Respondent shall cease practice for a minimum of 30 days pending the results of the evaluation. During such time, Respondent shall submit to random drug testing at a minimum of 2 times per week.

Respondent shall 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 to the evaluator by the Board.

Respondent shall not return to practice until the Board determines that he/she is able to safely practice either full-time or part-time and has had at least 30 days of negative drug test results. In deciding what, if any work limitations will be placed on a license, the Board will consider the factors set forth in SACC Standard No. 6. Respondent shall comply with any restrictions or recommendations made as a result of the clinical diagnostic evaluation. If a license is restricted to less than full-time practice, before requesting a modification to work full time, Respondent shall meet the criteria found in SACC Standard No. 11.

Failure to undergo a clinical diagnostic evaluation when ordered to do so shall subject Respondent's license to further disciplinary action.

**30. GROUP MEETINGS WITH QUALIFIED FACILITATOR**

Upon recommendation of the clinical evaluator and/or determination by the Board, Respondent shall participate in group support meetings led by a facilitator who meets the following qualifications and requirements:

The meeting facilitator must have a minimum of 3 years experience in the treatment and rehabilitation of substance abuse and shall be licensed or certified by the State or other nationally certified organization(s).

The meeting facilitator must not have a financial, personal, or business relationship with Respondent in the last 5 years.

The meeting facilitator shall provide to the Board a signed document showing Respondent's name, the group name, the dates and location of the meetings, Respondent's attendance, and Respondent's level of participation and progress.

The meeting facilitator shall report within 24 hours any unexcused absence to the Board.

**31. WORKSITE MONITOR**

Respondent shall submit the name of a proposed worksite monitor within 30 days of the effective date of the Decision. Respondent shall complete any required consent forms and sign an agreement with the worksite monitor and the Board regarding Respondent and the worksite monitor's requirements and reporting responsibilities as specified in Standard 7 of the Uniform Standards Regarding Substance-Abusing Healing Arts Licensees (April 2011) established by the Substance Abuse Coordination Committee. If the worksite monitor terminates the agreement with Respondent and/or the Board, Respondent shall not practice until another worksite monitor is approved in writing by the Board.

(Revised 6/19/07~~6/20/11~~; Effective [insert date])

**BVNPT: VIOLATIONS & RECOMMENDED DISCIPLINARY ACTIONS (Revised June 19, 2007 [June 20, 2011]; Effective October 29, 2008 [date])**

| Disciplinary Violations  | VN<br>Program<br>B&P Code | PT<br>Program<br>B&P Code | Maximum<br>Discipline | Intermediate Discipline  | Minimum Discipline  |
|--|---------------------------|---------------------------|-----------------------|--|---|
| 1. <b>Unprofessional Conduct</b>   | 2878(a)                   | 4521(a)                   | Revocation            | Revoc. Stayed: 3 Years Probation<br>Standard Conditions 1-14<br>*Other Conditions                              | Revoc. Stayed: 2 Years Probation<br>Standard Conditions 1-14  |
| 2. <b>Incompetence and/or Gross Negligence</b>                               | 2878(a)(1)                | 4521(a)(1)                | Revocation            | Revoc. Stayed: 3 Years Probation<br>Standard Conditions 1-14<br>*Other Conditions                              | Revoc. Stayed: 2 Years Probation<br>Standard Conditions 1-14  |
| 3. <b>Conviction of Practicing Medicine</b>                                  | 2878(a)(2)                | 4521(a)(2)                | Revocation            | ---  | Revoc. Stayed: 3 Years Probation<br>Standard Conditions 1-14<br>*Restricted Practice 2524                       |
| 4. <b>False or Misleading Advertising</b>                                    | 2878(a)(3)                | 4521(a)(3)                | Revocation            | Revoc. Stayed: 3 Years Probation<br>Standard Conditions 1-14   | Revoc. Stayed: 2 Years Probation<br>Standard Conditions 1-14  |
| 5. <b>Excessive Force, Mistreatment or Abuse of Any Patient</b>              | 2878(a)(4)                | 4521(i)                   | Revocation            | Revoc. Stayed: 3 Years Probation<br>Standard Conditions 1-14<br>*Restricted Practice 2524<br>*Other Conditions | Revoc. Stayed: 2 Years Probation<br>Standard Conditions 1-14<br>* Restricted Practice 2524<br>*Other Conditions |
| 6. <b>Failure to Maintain Confidentiality of Patient Medical Information</b> | 2878(a)(5)                | 4521(k)                   | Revocation            | Revoc. Stayed: 3 Years Probation<br>Standard Conditions 1-14   | Revoc. Stayed: 2 Years Probation<br>Standard Conditions 1-14  |
| 7. <b>Failure to Report Commission of Act Prohibited by Section</b>          | 2878(a)(6)                | 4521(l)                   | Revocation            | Revoc. Stayed: 3 Years<br>Standard Conditions 1-14   | Revoc. Stayed: 2 Years Probation<br>Standard Conditions 1-14  |

**BVNPT: VIOLATIONS & RECOMMENDED DISCIPLINARY ACTIONS (Revised June 19,2007[June 20, 2011]; Effective October 29,2008[date])**

| <b>Disciplinary Violations</b>   | <b>VN Program<br/>B&amp;P Code</b> | <b>PT Program<br/>B&amp;P Code</b> | <b>Maximum<br/>Discipline</b>   | <b>Intermediate Discipline</b>  | <b>Minimum Discipline</b>  |
|--|------------------------------------|------------------------------------|---------------------------------|---|--|
| <b>8. Procuring a License by Fraud or Misrepresentation</b>                            | 2878(b)                            | 4521(b)                            | ---                             | ---   | Revocation   |
| <b>9. Assisting With Criminal Abortion</b>   | 2878(c)                            | 4521(c)                            | Revocation                      | ---   | Revoc.Stayed: 3 Years Probation<br>Standard Conditions 1-14                      |
| <b>10. Violating Terms of Licensing Chapter</b>  | 2878(d)                            | 4521(d)                            | Revocation                      | ---   | Revoc.Stayed: 3 Years Probation<br>Standard Conditions 1-14<br>*Other Conditions |
| <b>11. Making False Statement on Application for Initial License</b>                   | 2878(e)                            | 4521(e)                            | Revocation or Denial of License | ---   | Revoc.Stayed: 3 Years Probation<br>Standard Conditions 1-14<br>*Other Conditions |
| <b>12. CONVICTION Substantially Related to Functions of License (Non-Drug Related)</b> | 2878(f)                            | 4521(f)                            | Revocation or Denial of License | Revoc.Stayed: 3 Years Probation<br>Standard Conditions 1-14<br>*Restricted Practice <u>§24</u><br>*Other Conditions | Revoc.Stayed: 2 Years Probation<br>Standard Conditions 1-14<br>*Other Conditions |
| <b>13. Impersonating or Acting as Proxy for Applicant on Exams</b>                     | 2878(g)                            | 4521(g)                            | ---                             | ---   | Revocation or Denial of License  |
| <b>14. Impersonating a Licensee or Permitting Others to Use License</b>                | 2878(h)                            | 4521(h)                            | Revocation or Denial of License | ---   | Revoc.Stayed: 3 Years Probation<br>Standard Conditions 1-14<br>*Other Conditions |

**BVNPT: VIOLATIONS & RECOMMENDED DISCIPLINARY ACTIONS (Revised ~~June 19, 2007~~ [June 20, 2011]; Effective ~~October 29, 2008~~ [date])**

| Disciplinary Violations  | VN Program B&P Code | PT Program B&P Code | Maximum Discipline | Intermediate Discipline  | Minimum Discipline   |
|--|---------------------|---------------------|--------------------|--|--|
| <b>15. Assisting Physician to Violate Medical Practice Act</b>   | 2878(i)             | 4521(j)             | Revocation         | Revoc.Stayed: 3 Years Probation<br>Standard Conditions 1-14<br>*Restricted Practice <u>2524</u>  | Revoc.Stayed: 2 Years Probation<br>Standard Conditions 1-14  |
| <b>16. Commission of Any Act Involving Dishonesty</b>  | 2878(j)             | 4521(n)             | Revocation         | Revoc.Stayed: 3 Years Probation<br>Standard Conditions 1-14<br>*Restricted Practice <u>2524</u>  | Revoc.Stayed: 2 Years Probation<br>Standard Conditions 1-14  |
| <b>17. Sexual Misconduct Related to Practice</b>   | 2878(k)             | 4521(m)             | Revocation         | Revoc.Stayed: 3 Years Probation<br>Standard Conditions 1-14<br>*Restricted Practice <u>2524</u>  | Revoc.Stayed: 2 Years Probation<br>Standard Conditions 1-14  |
| <b><u>18. Sexual Misconduct Related to Practice</u></b>  | <u>2878(k)</u>      | <u>4521(m)</u>      | ---                | ---  | <u>Revocation (Required by 16 C.C.R. §2524(c) [VN] and 16 C.C.R. §2579.10(c) [PT])</u>   |
| <b><u>1819. Knowing Failure to Follow Infection Control Guidelines</u></b>   | 2878(l)             | 4521(o)             | Revocation         | Revoc.Stayed: 3 Years Probation<br>Standard Conditions 1-14<br>*Restricted Practice <u>2524</u>  | Revoc.Stayed: 2 Years Probation<br>Standard Conditions 1-14  |
| <b><u>1920. Failure to Report Known Violations</u></b>   | 2878.1              | 4521.2              | Revocation         | Revoc.Stayed: 3 Years Probation<br>Standard Conditions 1-14  | Revoc.Stayed: 2 Years Probation<br>Standard Conditions 1-14  |
| <b><u>2021. Illegal Possession, Prescribing, Self-Administration of Controlled Substances or Dangerous Drugs</u></b> | 2878.5(a)           | 4521(a)(4)          | Revocation         | Revoc.Stayed: 3 Years Probation<br>Standard Conditions 1-14<br>Support Groups 20<br>Abstain from Drugs 21<br>Abstain from Alcohol 22<br><u>Drug Screens 23</u><br><u>Drug Screens 25</u><br><u>Positive Drug Tests 26</u><br><u>Major/Minor Violations 27</u><br>*Other Conditions | Revoc.Stayed: 2 Years Probation<br>Standard Conditions 1-14<br>Support Groups 20<br>Abstain from Drugs 21<br>Abstain from Alcohol 22<br><u>Drug Screens 23</u><br><u>Drug Screens 25</u><br><u>Positive Drug Tests 26</u><br><u>Major/Minor Violations 27</u><br>*Other Conditions |

BVNPT: VIOLATIONS & RECOMMENDED DISCIPLINARY ACTIONS (Revised ~~June 19, 2007~~ [June 20, 2011]; Effective ~~October 29, 2008~~ [date])

| Disciplinary Violations  | VN Program<br>B&P Code | PT Program<br>B&P Code | Maximum<br>Discipline | Intermediate Discipline  | Minimum Discipline   |
|--|------------------------|------------------------|-----------------------|--|--|
| <del>2122.</del> <b>Illegal Use of Drugs/Alcohol Posing Danger to Public &amp; Impairs Ability to Practice</b> | 2878.5(b)              | 4521(a)(5)             | Revocation            | Revoc.Stayed: 3 Years Probation<br>Standard Conditions 1-14<br>Exam by Physician 16<br>Support/Recovery Groups 20<br>Abstain from Drugs 21<br>Abstain from Alcohol 22<br>Drug Screens <del>23</del><br>Restricted Practice <del>25</del> 24<br>Drug Screens 25<br>Positive Drug Tests 26<br>Major/Minor Violations 27<br>*Other Conditions | Revoc.Stayed: 2 Years Probation<br>Standard Conditions 1-14<br>Support/Recovery Groups 20<br>Abstain from Drugs 21<br>Abstain from Alcohol 22<br>Drug Screens <del>23</del><br>Drug Screens 25<br>Positive Drug Tests 26<br>Major/Minor Violations 27<br>*Other Conditions |
| <del>2223.</del> <b>CONVICTION of Drug or Alcohol Related Crimes</b>   | 2878.5(c)              | 4521(a)(6)             | Revocation            | Revoc.Stayed: 3 Years Probation<br>Standard Conditions 1-14<br>Support/Recovery Groups 20<br>Abstain from Drugs 21<br>Abstain from Alcohol 22<br>Drug Screens <del>23</del><br>Restricted Practice <del>25</del> 24<br>Drug Screens 25<br>Positive Drug Tests 26<br>Major/Minor Violations 27<br>*Other Conditions                         | Revoc.Stayed: 2 Years Probation<br>Standard Conditions 1-14<br>Support/Recovery Groups 20<br>Abstain from Drugs 21<br>Abstain from Alcohol 22<br>Drug Screens <del>23</del><br>Drug Screens 25<br>Positive Drug Tests 26<br>Major/Minor Violations 27<br>*Other Conditions |

BVNPT: VIOLATIONS & RECOMMENDED DISCIPLINARY ACTIONS (Revised June 19, 2007 [June 20, 2011]; Effective October 29, 2008 [date])

| Disciplinary Violations   | VN Program B&P Code | PT Program B&P Code | Maximum Discipline | Intermediate Discipline  | Minimum Discipline  |
|---|---------------------|---------------------|--------------------|--|---|
| <p><b>2324. Confinement or Committal for Addiction</b></p>  | <p>2878.5(d)</p>    | <p>4521(a)(7)</p>   | <p>Revocation</p>  | <p>Revoc.Stayed: 3 Years Probation<br/>           Standard Conditions 1-14<br/>           Exam by Physician 16<br/>           Support/Recovery Groups 20<br/>           Abstain from Drugs 21<br/>           Abstain from Alcohol 22<br/> <del>Drug Screens 23</del><br/> <u>Drug Testing 25</u><br/> <u>Positive Drug Tests 26</u><br/> <u>Major/Minor Violations 27</u><br/>           *Psychiatric/Psychological Evaluation 17<br/>           *Psychotherapy 18<br/>           *Drug/Alcohol Rehab. 19<br/>           *Rehab Program 19<br/>           *Restricted Practice <del>25</del>24<br/>           *Diagnostic Evaluation 28<br/>           *Qualified Group Meetings 29<br/>           *Worksite Monitor 30<br/>           *Other Conditions</p> | <p>Revoc.Stayed: 2 Years Probation<br/>           Standard Conditions 1-14<br/>           Support Groups 20<br/>           Abstain from Drugs 21<br/>           Abstain from Alcohol 22<br/> <del>Drug Screens 23</del><br/> <u>Drug Testing 25</u><br/> <u>Positive Drug Tests 26</u><br/> <u>Major/Minor Violations 27</u><br/>           *Other Conditions</p> |
| <p><b>2425. Falsify, Make Incorrect, Inconsistent or Unintelligible Entries Pertaining to Drugs</b></p> | <p>2878.5(e)</p>    | <p>4521(a)(8)</p>   | <p>---</p>         | <p>Revoc.Stayed: 3 Years Probation<br/>           Standard Conditions 1-14<br/> <del>Drug Screens 23</del><br/> <u>*Drug Testing 25</u><br/> <u>*Positive Drug Tests 26</u><br/> <u>*Major/Minor Violations 27</u><br/>           *Other Conditions</p>  | <p>Revoc.Stayed: 2 Years Probation<br/>           Standard Conditions 1-14<br/>           *Other Conditions</p>   |

**BVNPT- VIOLATIONS & RECOMMENDED DISCIPLINARY ACTIONS (Revised ~~June 19,2007~~[June 20, 2011]; Effective ~~October 29,2008~~[date])**

| <b>Disciplinary Violations</b>  | <b>VN Program<br/>B&amp;P Code</b>              | <b>PT Program<br/>B&amp;P Code</b>              | <b>Maximum<br/>Discipline</b> | <b>Intermediate Discipline</b>   | <b>Minimum Discipline</b>  |
|---|---|---|-------------------------------|--|--|
| <b>2526. Disciplinary Action by Another State, Agency or Licensing Board</b>                  | 2878.8  | 4521.6(a)                                       | Revocation                    | Revoc.Stayed: 3 Years Probation<br>Standard Conditions 1-14<br>*Other Conditions | Revoc.Stayed: 2 Years Probation<br>Standard Conditions 1-14                      |
| <b>2627. Failure to Report Child, Elder or Dependent Adult Abuse (Unprofessional Conduct)</b> | 2878(a)<br>CCR 16<br>2520.1<br>2520.2<br>2520.3 | 4521(a)<br>CCR 16<br>2577.2<br>2577.3<br>2577.4 | Revocation                    | Revoc.Stayed: 3 Years Probation<br>Standard Conditions 1-14<br>*Other Conditions | Revoc.Stayed: 2 Years Probation<br>Standard Conditions 1-14<br>*Other Conditions |

**Important Notes:**

- Conditions of Probation 1 through 14 are standard conditions of probation. The Board requests these standard conditions of probation be imposed on all disciplinary cases resulting in probation.
- Conditions of Probation 15 through 24 are optional conditions of probation, which address specific circumstances of a case.
- Conditions of Probation 25 through 27 must be imposed as conditions of probation for all substance-abusing licensees.
- Conditions of Probation 28 through 30 must be considered for all substance-abusing licensees and, if the circumstances of the case warrant, shall be imposed as probation conditions.

If individual circumstances exist which justify omissions or deviations from these guidelines, the Board requests that this information be duly noted in the Proposed Decision issued by the Administrative Law Judge hearing the case. This will help the Board to better evaluate the Proposed Decision and to make an official Decision which accurately reflects the facts of each specific disciplinary matter.

\* ~~Optional~~Other Conditions of Probation may be added based upon the underlying cause of discipline.

**(Revised ~~6/19/07~~6/20/11; Effective [insert date])**

# 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**

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**Board of Psychology**

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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 #11.A. – 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 #11.A. – 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 be licensed 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)



# Agenda Item #11.A. – Attachment F



CALIFORNIA  
NURSES  
ASSOCIATION



NATIONAL NURSES  
ORGANIZING COMMITTEE

A Voice for Nurses. A Vision for Healthcare.  
www.calnurses.org / www.nnoc.net

Linda Ruyters, Administrative Analyst  
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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

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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.

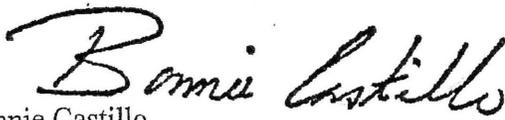
We also have concerns over requirements for worksite monitors to report "suspected substance abuse" to the board and employer. This creates a subjective process of suspicion of abuse, and

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 typed name and title.

Bonnie Castillo  
Director, Government Relations



# Agenda Item #11.A. – Attachment G



LEGISLATIVE  
COUNSEL  
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A GRADUATE OF THE CALIFORNIA STATE BAR  
OF THE CALIFORNIA JUDICIAL SYSTEM

LEGISLATIVE COUNSEL BUREAU

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SACRAMENTO, CALIFORNIA 95834

October 27, 2011

Honorable Curren D. Price Jr.  
Room 2053, State Capitol

## HEALING ARTS BOARDS: ADOPTION OF UNIFORM STANDARDS - #1124437

Dear Senator Price:

You have asked two questions with regard to the adoption of uniform standards by the Substance Abuse Coordination Committee pursuant to Section 315 of the Business and Professions Code. You have asked whether the Substance Abuse Coordination Committee is required to adopt the uniform standards pursuant to the rulemaking procedures under the Administrative Procedure Act (Ch 3.5 (commencing with Sec. 11340), Pt. 1, Div. 3, Title 2, Gov. C.). You have also asked, if the uniform standards are properly adopted by the Substance Abuse Coordination Committee, whether the healing arts boards are required to implement them.

By way of background, Section 315 of the Business and Professions Code<sup>1</sup> provides as follows:

"315. (a) For the purpose of determining uniform standards that will be used by healing arts boards in dealing with substance-abusing licensees, there is established in the Department of Consumer Affairs the Substance Abuse Coordination Committee. The committee shall be comprised of the executive officers of the department's healing arts boards established pursuant to Division 2 (commencing with Section 500), the State Board of Chiropractic Examiners, the Osteopathic Medical Board of California, and a designee of the State Department of Alcohol and Drug Programs. The Director of Consumer Affairs shall chair the committee and may invite individuals or stakeholders who have particular expertise in the area of substance abuse to advise the committee.

<sup>1</sup> All further section references are to the Business and Professions Code, unless otherwise referenced.

"(b) The committee shall be subject to the Bagley-Keene Open Meeting Act (Article 9 (commencing with Section 11120) of Division 3 of Title 2 of the Government Code).

"(c) By January 1, 2010, the committee shall formulate uniform and specific standards in each of the following areas that each healing arts board shall use in dealing with substance-abusing licensees, whether or not a board chooses to have a formal diversion program:

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

"(2) 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 paragraph (1) and any treatment recommended by the evaluator described in paragraph (1) 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.

"(3) Specific requirements that govern the ability of the licensing board to communicate with the licensee's employer about the licensee's status and condition.

"(4) 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.

"(5) 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.

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

"(7) 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.

"(8) Procedures to be followed when a licensee tests positive for a banned substance.

"(9) Procedures to be followed when a licensee is confirmed to have ingested a banned substance.

"(10) Specific consequences for major violations and minor violations. In particular, the committee shall consider the use of a deferred prosecution stipulation similar to the 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 unless or until the licensee commits a major violation, in which case it is revived and the license is surrendered.

"(11) Criteria that a licensee must meet in order to petition for return to practice on a full-time basis.

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

"(13) If a board uses a private-sector vendor that provides diversion services, standards for immediate reporting by the vendor to the board of any and all noncompliance with any term of the diversion contract or probation; standards for the 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; standards requiring the vendor to disapprove and discontinue the use of providers or contractors that fail to provide effective or timely diversion services; and standards for a licensee's termination from the program and referral to enforcement.

"(14) 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.

"(15) 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.

"(16) 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." (Emphasis added.)

Thus, the Legislature has established in the Department of Consumer Affairs (hereafter department) the Substance Abuse Coordination Committee (subd. (a), Sec. 315, hereafter committee). The committee is comprised of the executive officers of each healing arts board within the department,<sup>2</sup> the State Board of Chiropractic Examiners, and the

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<sup>2</sup>The department's healing arts boards are those boards established under Division 2 (commencing with Section 500) to license and regulate practitioners of the healing arts. Those boards include, among others, the Dental Board of California, the Medical Board of California, the Veterinary Medical Board, and the Board of Registered Nursing.

Osteopathic Medical Board of California (hereafter, collectively, healing arts boards), and a designee of the State Department of Alcohol and Drug Programs (Ibid.). The Director of Consumer Affairs chairs the committee and is authorized to invite individuals or stakeholders who have particular expertise in the area of substance abuse to advise the committee (Ibid.).

The committee is required to formulate uniform and specific standards in each of 16 areas provided by the Legislature, but otherwise has discretion to adopt the uniform standards each healing arts board shall use in dealing with substance-abusing licensees (subd. (c), Sec. 315). The committee adopted its initial set of uniform standards in April 2010, and revised those initial standards as recently as April 2011.<sup>7</sup> Although the committee has adopted the uniform standards pursuant to its own procedures, it has yet to adopt those standards pursuant to the rulemaking procedures of the Administrative Procedure Act (Ch. 3.5 (commencing with Sec. 11340), Pt. 1, Div. 3, Title 2, Gov. C.; hereafter APA).

You have asked whether the committee is required to adopt the uniform standards pursuant to the rulemaking procedures of the APA.

The APA establishes basic minimum procedural requirements for the adoption, amendment, or repeal of administrative regulations by state agencies (subd. (a), Sec. 11346, Gov. C.). The APA is applicable to the exercise of any quasi-legislative power conferred by any statute (Ibid.). Quasi-legislative powers consist of the authority to make rules and regulations having the force and effect of law (*California Advocates for Nursing Home Reform v. Bonta* (2003) 106 Cal.App.4th 498, 517; hereafter *California Advocates*). The APA may not be superseded or modified by any subsequent legislation except to the extent that the legislation does so expressly (subd. (a), Sec. 11346, Gov. C.).

The term "regulation" is defined for purposes of the APA to mean "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure" (Sec. 11342.600, Gov. C.; emphasis added). The APA provides that a state agency shall not issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation under the APA, unless properly adopted under the procedures set forth in the APA, and the Office of Administrative Law is empowered to determine whether any such guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule is a regulation under the APA (Sec. 11340.5, Gov. C.).

In *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571 (hereafter *Tidewater*), the California Supreme Court found as follows:

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<sup>7</sup> See [http://www.dca.ca.gov/about\\_dca/sacc/index.shtml](http://www.dca.ca.gov/about_dca/sacc/index.shtml) (as of September 20, 2011).

"A regulation subject to the APA thus has two principal identifying characteristics. (See *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497 [272 Cal.Rptr. 886] [describing two-part test of the Office of Administrative Law].) First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. (*Roth v. Department of Veterans Affairs* (1980) 110 Cal.App.3d 622, 630 [167 Cal.Rptr. 552].) Second, the rule must 'implement, interpret, or make specific the law enforced or administered by [the agency], or ... govern [the agency's] procedure.' (Gov. Code, § 11342, subd. (g).)"

If a policy or procedure falls within the definition of a "regulation" within the meaning of the APA, the adopting agency must comply with the procedures for formalizing the regulation, which include public notice and approval by the Office of Administrative Law (*County of Butte v. Emergency Medical Services Authority* (2010) 187 Cal.App.4th 1175, 1200). The Office of Administrative Law is required to review all regulations adopted pursuant to the APA and to make its determinations according to specified standards that include, among other things, assessing the necessity for the regulation and the regulation's consistency with the agency's statutory obligation to implement a statute (subd. (a), Sec. 11349.1, Gov. C.).

Applying these principles to the question presented, the uniform standards are subject to the rulemaking procedures of the APA if the following criteria are met: (1) Section 315 does not expressly preclude application of the APA, (2) the committee is a state agency under the APA, (3) the uniform standards are regulations subject to the APA, and (4) no exemption applies under the APA.

With respect to the first criterion, Section 315 is silent on the application of the APA. Thus, Section 315 does not expressly preclude application of the APA, and the APA will apply to any regulation adopted under Section 315.

We turn next to the second criterion, and whether the committee is an "agency" for purposes of the APA. The word "agency" is defined, for purposes of the APA, by several separate provisions of law. For purposes of the rulemaking procedures of the APA, "agency" is defined to mean a state agency (Sec. 11342.520, Gov. C.). That reference to state agency is defined elsewhere in the Government Code to include every state office, officer, department, division, bureau, board, and commission (subd. (a), Sec. 11000, Gov. C.). The APA does not apply to an agency in the judicial or legislative branch of the state government (subd. (a), Sec. 11340.9, Gov. C.).

Along those lines, the APA is applicable to the exercise of any quasi-legislative power conferred by any statute (subd. (a), Sec. 11346, Gov. C.). Quasi-legislative powers consist of the authority to make rules and regulations having the force and effect of law (*California Advocates*, supra, at p. 517). Thus, for purposes of our analysis, we think that an "agency" means any state office, officer, department, division, bureau, board, or commission that exercises quasi-legislative powers.

Here, the committee is a state office comprised of executive officers of the healing arts boards and the Director of Consumer Affairs. Although the Legislature has set forth 16 areas in which the committee is required to adopt standards, the committee itself is required to exercise quasi-legislative powers and adopt uniform standards within those areas. Those standards shall have the force and effect of law, since the healing arts boards, as discussed more extensively below, are required to use the standards in dealing with substance-abusing licensees and the standards are required to govern matters such as when a licensee is temporarily removed from practice or subject to drug testing or work monitoring (paras. (2), (4), and (7), subd. (c), Sec. 315). Accordingly, we think the committee is an agency to which the APA applies.

As to the third criterion, two elements must be met for the uniform standards at issue to be a regulation: they must apply generally and they must implement, interpret, or make specific a law enforced or administered by the agency or that governs its procedures (*Tidewater*, supra, at p. 571; Sec. 11342.600, Gov. C.). Section 315 requires the committee to formulate uniform and specific standards in specified areas that each healing arts board within the department shall use when dealing with substance-abusing licensees, whether or not the board chooses to have a formal diversion program. The uniform standards will not be limited in application to particular instances or individuals but, instead, will apply generally to those licensees. Further, under this statutory scheme, the uniform standards will implement Section 315 and will be enforced and administered by, and will govern the procedures of, each healing arts board that is a member of the committee. Thus, the uniform standards are, in our view, a regulation under the APA.

Lastly, we turn to the fourth criterion, and whether the regulation is exempt from the APA. Certain policies and procedures are expressly exempted by statute from the requirement that they be adopted as regulations pursuant to the APA. In that regard, Section 11340.9 of the Government Code provides as follows:

"11340.9. This chapter does not apply to any of the following:

"(a) An agency in the judicial or legislative branch of the state government.

"(b) A legal ruling of counsel issued by the Franchise Tax Board or State Board of Equalization.

"(c) A form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation on any requirement that a regulation be adopted pursuant to this chapter when one is needed to implement the law under which the form is issued.

"(d) A regulation that relates only to the internal management of the state agency.

"(e) A regulation that establishes criteria or guidelines to be used by the staff of an agency in performing an audit, investigation, examination, or inspection, settling a commercial dispute, negotiating a commercial

arrangement, or in the defense, prosecution, or settlement of a case, if disclosure of the criteria or guidelines would do any of the following:

"(1) Enable a law violator to avoid detection.

"(2) Facilitate disregard of requirements imposed by law.

"(3) Give clearly improper advantage to a person who is in an adverse position to the state.

"(f) A regulation that embodies the only legally tenable interpretation of a provision of law.

"(g) A regulation that establishes or fixes rates, prices, or tariffs.

"(h) A regulation that relates to the use of public works, including streets and highways, when the effect of the regulation is indicated to the public by means of signs or signals or when the regulation determines uniform standards and specifications for official traffic control devices pursuant to Section 21400 of the Vehicle Code.

"(i) A regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state."

None of the exemptions contained in the APA can be reasonably construed to apply to the committee or the uniform standards to be used by the healing arts boards. In addition, we are aware of no other applicable exemption.

Thus, because all four of the criteria are met, it is our opinion that the Substance Abuse Coordination Committee is required to adopt the uniform standards pursuant to the rulemaking procedures under the Administrative Procedure Act (Ch. 3.5 (commencing with Sec. 11340), Pt. 1, Div. 3, Title 2, Gov. C.).

Having reached this conclusion, we next turn to whether the healing arts boards are required to use the uniform standards if those standards are properly adopted. In addressing that question, we apply certain established rules of statutory construction. To ascertain the meaning of a statute, we begin with the language in which the statute is framed (*Leroy T. v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 434, 438; *Visalia School Dist. v. Workers' Comp. Appeals Bd.* (1995) 40 Cal.App.4th 1211, 1220). Significance should be given to every word, and construction making some words surplusage is to be avoided (*Lambert Steel Co. v. Heller Financial, Inc.* (1993) 16 Cal.App.4th 1034, 1040). In addition, effect should be given to statutes according to the usual, ordinary import of the language employed in framing them (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388).

As set forth above, subdivision (c) of Section 315 provides that "the committee shall formulate uniform and specific standards in each of the following areas that each healing arts board shall use in dealing with substance-abusing licensees, whether or not a board chooses to have a formal diversion program" (emphasis added). Section 19 provides that "shall" is mandatory and "may" is permissive. The word "may" is ordinarily construed as permissive, whereas the word "shall" is ordinarily construed as mandatory (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443).

Here, in Section 315, the Legislature uses the term "shall" rather than "may" in providing that each healing arts board "shall use" the specific and uniform standards adopted by the committee when dealing with substance-abusing licensees. The Legislature uses the term "shall use" as compared to "shall consider," "may consider," or "may use." The Legislature's use of the term "shall" indicates that the healing arts boards are required to use the standards adopted by the committee rather than being provided the discretion to do so. Moreover, as employed in this context, the word "use" implies that the healing arts boards must implement and apply those standards rather than merely considering them. Finally, the use of the term "uniform" suggests that the Legislature intended each board to apply the same standards. If the healing arts boards were not required to use the standards as adopted by the committee, the standards employed by these boards would vary rather than being "uniform."

Notwithstanding the plain meaning of Section 315, one could argue that the enactment of Section 315.4 indicates that the Legislature intended that implementation of the uniform standards by the boards be discretionary. Section 315.4, which was added by Senate Bill No. 1172 of the 2009-10 Regular Session (Ch. 517, Stats. 2010; hereafter S.B. 1172), provides that a healing arts board "may adopt regulations authorizing the board to order a licensee on probation or in a diversion program to cease practice for major violations and when the board orders a licensee to undergo a clinical diagnostic evaluation pursuant to the uniform and specific standards adopted and authorized under Section 315." Section 315.4 could be read to imply that a healing arts board is not required to implement those uniform standards because the board was given discretion to adopt the regulations that would allow that board to implement the standards, if necessary.

It is a maxim of statutory construction that a statute is to be construed so as to harmonize its various parts within the legislative purpose of the statute as a whole (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 788). As discussed above, we believe that the plain meaning of Section 315 requires the healing arts boards to implement the uniform standards adopted by the committee. Thus, whether Section 315.4 indicates, to the contrary, that the Legislature intended the boards to have discretion in that regard depends upon whether there is a rational basis for harmonizing the two statutes.

In harmonizing Sections 315 and 315.4, we note that S.B. 1172 did not make any changes to Section 315, such as changing the term "shall" to "may" in subdivision (c) of Section 315 or deleting any subdivisions of Section 315. S.B. 1172 did not diminish the scope of the authority provided to the committee to adopt the uniform standards. In fact, the analysis of the Senate Committee on Business, Professions and Economic Development for S.B. 1172, dated April 19, 2010 (hereafter committee analysis), describes the purpose of S.B. 1172 and the enactment of Section 315.4, as follows:

"The Author points out that pursuant to SB 1441 (Ridley-Thomas, Chapter 548, Statutes of 2008), the DCA was required to adopt uniform guidelines on sixteen specific standards that would apply to substance abusing health care licensees, regardless of whether a board has a diversion program. Although most of the adopted guidelines do not need additional statutes for

implementation, there are a couple of changes that must be statutorily adopted to fully implement these standards. This bill seeks to provide the statutory authority to allow boards to order a licensee to cease practice if the licensee tests positive for any substance that is prohibited under the terms of the licensee's probation or diversion program, if a major violation is committed and while undergoing clinical diagnostic evaluation" (Committee analysis, at p. 4.)

The committee analysis further provides that the purpose of S.B. 1172 was to grant specific authority to implement those standards and "provide for the full implementation of the Uniform Standards" (committee analysis, at p. 11). The committee analysis at no time implies that the Legislature intended the Section 315 uniform standards to be revised or repealed by S.B. 1172 or that, in enacting Section 315.4, the Legislature intended that the implementation of the uniform standards be subject to the discretion of each healing arts board.

Thus, in our view, Section 315.4 may be reasonably construed in a manner that harmonizes it with Section 315. Specifically, we think that the intent of the Legislature in enacting Section 315.4 was not to make the uniform standards discretionary but to "provide for the full implementation of the Uniform Standards" by providing the authority to adopt regulations where the Legislature believed that further statutory authority was needed. Accordingly, we think implementation by the various healing arts boards of the uniform standards adopted under Section 315 is mandatory.<sup>4</sup>

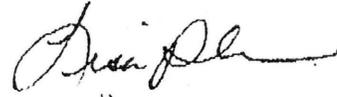
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<sup>4</sup> Although Section 108 and Division 2 (commencing with Section 500) authorize the healing arts boards to set standards and adopt regulations (see, for example, Secs. 1224, 1614, 2018, 2531.95, 2615, 2715, 2854, 2930, 3025, 3510, and 3546), it is an axiom of statutory construction that a particular or specific provision takes precedence over a conflicting general provision (Sec. 1859, C.C.P.; *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 420, app. dism., *Kubo v. Agricultural Relations Bd.* (1976) 429 U.S. 802; see also Sec. 3534, Civ. C.). Thus, in our view, the specific requirement under Section 315 that the uniform standards be adopted supersedes any general provision authorizing the boards to set standards and adopt regulations.

Thus, it is our opinion that, if the uniform standards are properly adopted by the Substance Abuse Coordination Committee, the healing arts boards are required to implement them.

Very truly yours,

Diane F. Boyer-Vine  
Legislative Counsel



By  
Lisa M. Plummer  
Deputy Legislative Counsel

LMP:syl

# Agenda Item #11.A. – Attachment H

State of California

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## Memorandum

To : Doreathea Johnson  
Deputy Director & Chief Counsel  
Department of Consumer Affairs  
Legal Affairs Division

Date: February 29, 2012  
Telephone: (916) 445-7480  
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From : Kathleen A. Lynch  
Deputy Attorney General  
Government Law Section  
Office of the Attorney General – Sacramento

Subject : Uniform Standards Related to Substance-Abusing Licensees (Bus. & Prof. Code,  
§§ 315 - 315.4)

### Executive Summary

#### Issues

You asked us to review Legislative Counsel's letter of October 27, 2011, which rendered certain opinions regarding the Substance Abuse Coordination Committee (SACC), which was created by Business and Professions Code section 315 to formulate uniform standards for use by the healing arts boards to deal with substance-abusing licensees. Legislative Counsel opined that:

- (1) SACC was required to formally promulgate the uniform standards as regulations pursuant to the Administrative Procedures Act (APA), and
- (2) the healing arts boards are required to use such standards under Business and Professions Code sections 315.

#### Summary of Responses

With respect to question (1), we see things differently from Legislative Counsel, in two respects.

First, we believe that SACC's adoption of uniform standards does not need to undergo the formal rule-making process under the APA. While other laws could potentially require the adoption of regulations when the standards are implemented by the boards (such as statutes governing particular boards or the APA's provisions applicable to disciplinary proceedings), we disagree that section 315 itself triggers the need to issue the uniform standards as regulations.

Second, even assuming the uniform standards must be adopted as regulations, we disagree with Legislative Counsel's apparent assumption that SACC would issue the regulations under section 315. The legislative histories of the relevant laws and statutory authorities of the

individual boards indicate that the boards would issue the regulations to implement the uniform standards.

As to question (2), we agree with Legislative Counsel that the healing arts boards must use the uniform standards under sections 315. A board cannot simply disregard a specific standard because it does not like the standard or because it believes that the standard is too cumbersome. However, some specific uniform standards themselves recognize a board's discretion whether to order a particular action in the first place. Thus, boards still retain authority to determine if they will undertake certain types of actions if permitted under a specific uniform standard.

### Statutory Background

In 2008, SACC was legislatively established within the Department of Consumer Affairs to create uniform standards to be used by the healing arts boards when addressing licensees with substance abuse problems. (Bus. & Prof. Code, § 315, subd. (a); Stats. 2008, ch. 548 (SB 1441).) By January 1, 2010, SACC was required to "formulate uniform and specific standards" in 16 identified areas "that each healing arts board shall use in dealing with substance-abusing licensees, whether or not a board chooses to have a formal diversion program." (*Id.* at § 315, subd. (c).) These 16 standards include requirements for: clinical diagnostic evaluation of licensees; the temporary removal of the licensee from practice for clinical diagnostic evaluation and any treatment, and criteria before being permitted to return to practice on a full-time or part-time basis; aspects of drug testing; whether inpatient, outpatient, or other type of treatment is necessary; worksite monitoring requirements and standards; consequences for major and minor violations; and criteria for a licensee to return to practice and petition for reinstatement of a full and unrestricted license. (*Ibid.*) SACC meetings to create these standards are subject to Bagley-Keene Act open meeting requirements. (*Id.* at subd. (b).)

On March 3, 2009, SACC conducted its first public hearing, which included a discussion of an overview of the diversion programs, the importance of addressing substance abuse issues for health care professionals, and the impact of allowing health care professionals who are impaired to continue to practice. (Sen. Com. on Business, Professions, and Economic Development, Analysis of SB 1172 (2010-2011 Reg. Sess.), as amended April 12, 2010.) During this meeting, SACC members agreed to draft uniform guidelines for each of the standards, and during subsequent meetings, roundtable discussions were held on the draft uniform standards, including public comments. (*Ibid.*) In December 2009, the Department of Consumer Affairs adopted the uniform guidelines for each of the standards required by SB 1441. (*Ibid.*) These standards have subsequently been amended by SACC, and the current standards were issued in April of 2011.

According to the author of SB 1441 (Ridley-Thomas), the intent of the legislation was to protect the public by ensuring that, at a minimum, a set of best practices or standards were adopted by health-care-related boards to deal with practitioners with alcohol or drug problems. (Assem. Com. on Business and Professions, Analysis of SB 1441 (2008-2009 Reg. Sess.), as amended June 16, 2008.) The legislation was also meant to ensure uniformity among the

standards established throughout the healing arts licensing boards under the Department of Consumer Affairs. (*Ibid.*) Specifically, the author explains:

SB 1441 is not attempting to dictate to [the health-related boards] how to run their diversion programs, but instead sets parameters for these boards. The following is true to all of these boards' diversion programs: licensees suffer from alcohol or drug abuse problems, there is a potential threat to allowing licensees with substance abuse problems to continue to practice, actual harm is possible and, sadly, has happened. The failures of the Medical Board of California's (MBC) diversion program prove that there must be consistency when dealing with drug or alcohol issues of licensees.

(Assem. Com. on Business and Professions, Analysis of SB 1441 (2008-2009 Reg. Sess.), as amended June 16, 2008.)

In the view of its author, "[t]his bill allows the boards to continue a measure of self-governance; the standards for dealing with substance-abusing licensees determined by the commission set a floor, and boards are permitted to establish regulations above these levels." (*Ibid.*)

In 2010, additional legislation was enacted to further implement section 315. Specifically, it provided that the healing arts boards, as described in section 315 and with the exception of the Board of Registered Nursing, "may adopt regulations authorizing the board to order a licensee on probation or in a diversion program to cease practice for major violations and when the board orders a licensee to undergo a clinical diagnostic evaluation pursuant to the uniform and specific standards adopted and authorized under Section 315." (Bus. & Prof. Code, § 315.4, subd. (a); Stats. 2010, ch. 517 (SB 1172).) An order to cease practice does not require a formal hearing and does not constitute a disciplinary action. (*Id.* § 315.4 subds. (b), (c).)

According to the author of SB 1172 (Negrete McLoud), this subsequent statute was necessary "because current law does not give boards the authority to order a cease practice." (Sen. Com. on Business, Professions, and Economic Development, Analysis of SB 1172 (2010-2011 Reg. Sess.), as amended April 12, 2010.) The author explains:

Although most of the adopted guidelines do not need additional statutes for implementation, there are a few changes that must be statutorily adopted to fully implement these standards. [¶] This bill seeks to provide the statutory authority to allow boards to order a licensee to cease practice if the licensee tests positive for any substance that is prohibited under the terms of the licensee's probation or diversion program, if a major violation is committed and while undergoing clinical diagnostic evaluation. [¶] The ability of a board to order a licensee to cease practice under these circumstances provides a delicate balance to the inherent confidentiality of diversion programs. The protection of the public remains the top priority of boards when dealing with substance abusing licensees.

(Senate Third Reading, Analysis of SB 1172 (2010-2011 Reg. Sess.); as amended June 22, 2010.)

### Legal Analysis

**1a. Section 315 should be construed as not requiring that the uniform standards be adopted as regulations.**

Legislative Counsel opined that SACC must adopt the uniform standards as regulations under section 315, because (1) the standards meet the definition of regulations, (2) none of the express exemptions under Government Code section 11340.9 remove them from the APA rule-making process, and (3) section 315 contains no express language precluding application of the rulemaking provisions of the APA. (October 27, 2011 Letter, p. 5.) We have a different view on the threshold issue of whether the standards qualify as a regulation under section 315.

Under the APA, a regulation is defined as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." (Gov. Code, § 11342.600.) "No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless [it has been adopted in compliance with the APA]." (*Id.* § 11340.5, subd. (a).) This requirement cannot be superseded or modified by subsequent legislation, unless the statute does so expressly. (*Id.* § 11346, subd. (a).)

An agency standard subject to the APA has two identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. Second, the rule must "implement, interpret, or make specific the law enforced or administered by [the agency], or . . . govern [the agency's] procedure." (*Morning Star Co. v. State Bd. of Equalization* (2006) 38

Cal.4th 324, 333, quoting *Tidewater Marine Western, Inc. et al. v. Bradshaw* (1996) 14 Cal.4th 557, 571.)

Whether a particular standard or rule is a regulation requiring APA compliance depends on the facts of each case, considering the rule in question, and the applicable statutory scheme. Generally speaking, courts tend to readily find the need for such compliance. We understand that certain healing arts boards have already adopted regulations incorporating the uniform standards. (See, e.g., Cal. Code Regs., tit. 16, § 4147 [Board of Occupational Therapy].) This approach is understandable in light of the usually broad requirement that agency rules be adopted as regulations and, as noted below, may be required by other laws when they are implemented by the boards. Here, however, the wording and intent of section 315 indicate the Legislature did not intend that the initial act of formulating and adopting the uniform standards is within the purview of the formal APA rule-making process.

“The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law.” (*Bodell Const. Co. v. Trustees of California State University* (1998) 62 Cal.App.4th 1508, 1515.) In determining that intent, courts “first examine the words of the statute itself. Under the so-called ‘plain meaning’ rule, courts seek to give the words employed by the Legislature their usual and ordinary meaning. If the language of the statute is clear and unambiguous, there is no need for construction. However, the ‘plain meaning’ rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose. If the terms of the statute provide no definitive answer, then courts may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history.” (*Ibid.* [citations omitted].) Courts “must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.” (*Ibid.* [citation omitted].) “The legislative purpose will not be sacrificed to a literal construction of any part of the statute.” (*Ibid.*)

In *Paleski v. State Department of Health Services* (2006) 144 Cal.App.4th 713, the Court of Appeal applied these rules of statutory construction and found that the challenged agency criteria were not required to be adopted as regulations under the APA. (*Id.* at pp. 728-729.) In *Paleski*, plaintiff challenged an agency’s criteria for the prescription of certain drugs because the department had not promulgated them in compliance with the APA. (*Ibid.*) The statute, however, expressly authorized the criteria to be effectuated by publishing them in a manual. (*Ibid.*) According to the court, the “necessary effect” of this language was that the Legislature did not intend for the broader notice procedure of the APA to apply when the agency issued the criteria. (*Ibid.*)

Similar reasoning should apply here. Under the plain meaning of section 315, SACC was legislatively established to create uniform standards to be used by the healing arts boards when addressing licensees with substance abuse problems. (Bus. & Prof. Code, § 315, subd. (a).) The intent of the legislation was to protect the public and to ensure that minimum standards are met and to ensure uniformity among the standards established throughout the healing arts

licensing boards under the Department of Consumer affairs. (Assem. Com. on Business and Professions, Analysis of SB 1441 (2008-2009 Reg. Sess.), as amended June 16, 2008.) In formulating these uniform standards, SACC was subject to the Bagley-Keene Act, which requires noticed public meetings. Many roundtable discussions were held on the draft uniform standards, including public vetting and public comments. In that way, the affected community learned about the standards and had the opportunity to comment. This is a prime requirement and purpose of the APA rule-making process (see Gov. Code, § 11343 *et seq.*), but it has already been fulfilled by the procedures set forth in section 315. To now require SACC to repeat that process by promulgating the standards as regulations would make little sense and be duplicative.

Nor does the process for the formulation of the standards set forth in section 315 comport with the other purposes and procedures of the APA. During the APA rule-making process, an agency must provide various reasons, justifications, analyses, and supporting evidence for the proposed regulation. (Gov. Code, § 11346.2.) Those provisions and other provisions of the APA are intended to address the proliferation, content, and effect of regulations proposed by administrative agencies. (*Id.* §§ 11340, 11340.1.) Here, the agency is not proposing to adopt the uniform standards. The Legislature has required that the standards adopted by SACC, be uniform, and be used by the boards. Given this statutory mandate that they be implemented, subjecting the uniform standards to substantive review under the APA again makes little sense.<sup>1</sup>

**1b. The SACC would not be the rule-making entity, even if the uniform standards would have to be adopted as regulations.**

Even assuming that APA compliance was required under section 315, it is doubtful that SACC would carry the responsibility to adopt regulations. The second component of a regulation requires that the rule must “implement, interpret, or make specific the law enforced or administered by [the agency], or . . . govern [the agency’s] procedure.” (*Morning Star Co.*, *supra*, 38 Cal.4th at p. 333.) Here, SACC was mandated to create the uniform standards to be used by separate boards; the SACC’s creation of the uniform standards does not implement,

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<sup>1</sup> Even though the standards do not have to be promulgated as regulations by SACC under section 315, this does not mean that certain regulations would not arguably be required on the part of some or all of the boards under other statutory schemes, such as the laws applicable to a particular board or the APA’s provisions on quasi-adjudicatory proceedings. This type of analysis would require a fact specific, case-by-case study of each board’s practices and its regulatory scheme and may include consideration of: (1) whether a board’s statutory authority requires the adoption of regulations related to actions against substance-abusing licensees, (2) whether current regulations conflict with the standards, and (3) whether in an administrative adjudicative setting, the standards are considered “penalties” and thus must be adopted as regulations under section 11425.50, subdivision (e), of the Government Code.

interpret, or make any law more specific. (Bus. & Prof. Code, § 315, subds. (a), (c).) The only express statutory role of the SACC is to determine the uniform standards in the first place.<sup>2</sup>

The boards are then required to use and apply the standards and have much clearer authority to adopt regulations. “Each of the boards [within the Department of Consumer Affairs] exists as a separate unit, and has the function of setting standards, holding meetings, and setting dates thereof, preparing and conducting examinations, passing upon applicants, conducting investigations of violations of laws under its jurisdiction, issuing citations and hold hearings for the revocation of licenses, and the imposing of penalties following such hearings, in so far as these powers are given by statute to each respective board.” (Bus. & Prof. Code, § 108.)

The legislative history for section 315 also supports this conclusion. According to its author, section 315 was adopted to protect the public by ensuring that, at a minimum, a set of best practices or standards *were adopted by health care related boards to deal with practitioners with alcohol or drug problems*. (Assem. Com. on Business and Professions, Analysis of SB 1441 (2008-2009 Reg. Sess.), as amended June 16, 2008, emphasis added.)<sup>3</sup> Practically speaking, it would be difficult for the SACC (or the Department of Consumer Affairs) to draft regulations applicable to all boards, given that they are unique and deal with different subject areas, unless such regulations were adopted wholesale, on a one-size-fits-all basis. As explained below, while the healing arts boards must use the standards, they only have to use the ones that apply to their procedures.

Thus, while section 315 does not require regulations to initially adopt the standards, the boards (and not SACC) would more reasonably be tasked with this responsibility.

**2. The healing arts boards must use the uniform standards to the extent that they apply.**

The original language of section 315 is clear that the standards must be used. (Bus. & Prof. Code, § 315, subd. (a) [“uniform standards that will be used by healing arts boards”], subd. (b) [“uniform standards . . . that each healing arts board shall use in dealing with substance-abusing licenses”].) Legislative Counsel was asked to opine on whether subsequent legislation (Bus. & Prof. Code, § 315.4) somehow made these uniform standards discretionary. We agree with

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<sup>2</sup> The SACC is a committee formed by various executive officers of healing arts boards and other public officials formed within the Department of Consumer Affairs. (Bus. & Prof. Code, § 315, subds. (a).)

<sup>3</sup> As discussed shortly, the legislative history for follow-up legislation similarly explains that its purpose was to provide statutory authority for some healing arts boards to issue regulations to implement certain of the uniform standards. (Sen. Com. on Business, Professions, and Economic Development, Analysis of SB 1172 (2010-2011 Reg. Sess.), as amended April 12, 2010.)

Legislative Counsel's conclusion that section 315.4 did not make the uniform standards optional. (Oct. 27, 2011, Letter, p. 9.)

Section 315.4 was enacted two years after section 315, and provides that that the healing arts boards, as described in section 315 and with the exception of the Board of Registered Nursing, "may adopt regulations authorizing the board to order a licensee on probation or in a diversion program to cease practice for major violations and when the board orders a licensee to undergo a clinical diagnostic evaluation pursuant to the uniform and specific standards adopted and authorized under Section 315." (Bus. & Prof. Code, § 315.4, subd. (a); Stats. 2010, ch. 517, (SB 1172).) If a board adopts such regulations, there is nothing to indicate that use of uniform standards created under section 315 is optional. Such an interpretation would be contrary to the legislative intent. Section 314.5 was enacted for the limited purpose to give boards the authority to order a licensee to cease practice, as this was not provided for in section 315. (Sen. Com. on Business, Professions, and Economic Development, Analysis of SB 1172 (2010-2011 Reg. Sess.), as amended April 12, 2010.) By no means was the intent to transform the mandatory uniform standards of section 315 into optional suggestions. As the author explains:

Although most of the adopted guidelines do not need additional statutes for implementation, there are a few changes that must be statutorily adopted to fully implement these standards. [¶] This bill seeks to provide the statutory authority to allow boards to order a licensee to cease practice if the licensee tests positive for any substance that is prohibited under the terms of the licensee's probation or diversion program, if a major violation is committed and while undergoing clinical diagnostic evaluation.

(Senate Third Reading, Analysis of SB 1172 (2010-2011 Reg. Sess.), as amended June 22, 2010.)

In addition, some specific uniform standards themselves recognize a board's discretion whether to order a particular action in the first place. (See e.g. Uniform Standard # 1 ["If a healing arts board orders a licensee . . . to undergo a clinical diagnosis evaluation, the following applies: . . . [¶].) The standards must be applied, however, if a board undertakes a particular practice or orders an action covered by the standards. A determination regarding a board's specific application (or not) of certain uniform standards would have to be based on a fact specific, case-by-case review of each board and its regulatory scheme. However, once a board implements a procedure covered by the uniform standards, it cannot disregard the applicable uniform standard because it disagrees with the standard's substance.

### Conclusion

For the reasons stated above, in our view, section 315 can be read to preclude the necessity to adopt regulations when the uniform standards are issued initially. And even if regulations were required under section 315, SACC would not be tasked with this responsibility. We also

Doreathea Johnson  
February 29, 2012  
Page 9

believe that the healing arts boards must use the uniform standards where an agency undertakes an action covered by the standards.

Please feel free to contact me if you have any questions or would like to discuss the above.

:KAL

cc: Peter K. Southworth, Supervising Deputy Attorney General



# Agenda Item #11.A. – Attachment I



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## MEMORANDUM

**DATE** April 5, 2012

**TO** ALL HEALING ARTS BOARDS

**FROM**   
DOREATHEA JOHNSON  
Deputy Director, Legal Affairs  
Department of Consumer Affairs

**SUBJECT** Opinion Regarding Uniform Standards for Substance-Abusing Licensees (SB 1441)

This memo addresses a number of questions that have been raised concerning the discretion of healing arts boards, with respect to the Uniform Standards for Substance-Abusing Healing Arts Licensees ("Uniform Standards") that were formulated by the Substance Abuse Coordination Committee and mandated by Business and Professions Code section 315. Previously, there have been discussions and advice rendered, opining that the boards retain the discretion to modify the Uniform Standards. This opinion, largely influenced by the fact that the rulemaking process necessarily involves the exercise of a board's discretion, has been followed by a number of boards as they completed the regulatory process.

Two opinions, one issued by the Legislative Counsel Bureau ("Legislative Counsel") dated October 27, 2011, and an informal legal opinion, rendered by the Government Law Section of the Office of the Attorney General ("Attorney General"), dated February 29, 2012, have been issued and address the discretion of the boards, in adopting the Uniform Standards. This memo is to advise the healing arts boards of this office's opinion regarding the questions raised, after a review of these two opinions. A copy of each opinion is attached for your convenience.

Questions Presented

1. **Do the healing arts boards retain the discretion to modify the content of the specific terms or conditions of probation that make up the Uniform Standards?**

*Both Legislative Counsel and the Attorney General concluded that the healing arts boards do not have the discretion to modify the content of the specific terms or conditions of probation that make up the Uniform Standards. We concur with that conclusion.*

2. **Do the healing arts boards have the discretion to determine which of the Uniform Standards apply in a particular case?**

*Legislative Counsel opined that, unless the Uniform Standards specifically so provide, all of the Uniform Standards must be applied to cases involving substance-abusing licensees, as it was their belief that the Legislative intent was to "provide for the full implementation of the Uniform Standards." The Attorney General agreed with Legislative Counsel. Following our review and analysis of Business and Professions Code Section 315, we concur with both the Office of the Attorney General and the Legislative Counsel.*

3. **Is the Substance Abuse Coordination Committee (SACC) the entity with rulemaking authority over the uniform standards to be used by the healing arts boards?**

*The Legislative Counsel concluded that the SACC had the authority to promulgate regulations mandating that the boards implement the Uniform Standards. However, the Office of the Attorney General disagreed and concluded that the SACC was not vested with the authority to adopt regulations implementing the uniform standards. We agree with the Office of the Attorney General. It is our opinion that the authority to promulgate the regulations necessary to implement the Uniform Standards, lies with the individual boards that implement, interpret or make specific, the laws administered by those boards. As the SACC is limited to the creation or formulation of the uniform standards, but is not authorized to implement the laws of the healing arts boards, it does not have authority to adopt regulations to implement those standards. Consequently, we agree with the Attorney General's opinion that the SACC is not the rule-making entity with respect to the Uniform Standards, and therefore has no authority to adopt the Uniform Standards as regulations.*

It is our recommendation that healing arts boards move forward as soon as possible to implement the mandate of Business and Professions Code section 315, as it relates to

the Uniform Standards. Some of the standards are appropriate for inclusion in an agency's disciplinary guidelines, which necessarily will involve the regulatory process. Others are administrative in nature and not appropriate for inclusion in the disciplinary guidelines. For example, Uniform Standard No. 16 which sets forth reporting requirements would not be appropriate for inclusion in disciplinary guidelines.

Please work with your assigned legal counsel to determine how best to implement the Uniform Standards. This should include a discussion as to whether : (1) the Uniform Standards should be placed in a regulation separate from the disciplinary guidelines; (2) the implementing regulation should include a definition of (or criteria by which to determine) what constitutes a "substance-abusing licensee."

It is hopeful that the foregoing information addresses your concerns with respect to the implementation of the mandatory uniform standards.

#### Attachments

cc: Denise Brown, DCA Director  
Awet Kidane, DCA Chief Deputy Director  
DCA Legal Affairs Attorneys



# Agenda Item #11.A. – Attachment J

## Board of Vocational Nursing and Psychiatric Technicians

### MODIFIED TEXT

Changes to the originally proposed language are shown by double underline for new text and underline with strikeout for deleted text.

### Vocational Nursing Regulations

California Code of Regulations, Title 16, Division 25, Chapter 1, Article 4, is amended to read:

2524. Disciplinary Guidelines and Uniform Standards Related to Substance Abuse.

In reaching a decision on a disciplinary action under the Administrative Procedure Act (Government Code Section 11400 et seq.) the Board shall ~~consider~~ utilize the disciplinary guidelines entitled “Disciplinary Guidelines and Uniform Standards Related to Substance Abuse” (Rev. ~~6/19/07~~6/20/11), which are hereby incorporated by reference. The Disciplinary Guidelines apply to all disciplinary matters; the Uniform Standards apply to a substance abusing licensee.

- (a) ~~Notwithstanding~~ Subject to subsection (b), ~~a~~ deviation from ~~thesethe guideline~~Disciplinary Guidelines, including the standard conditions of probation, is appropriate where the Board, in its sole discretion, determines that the facts of the particular case warrant such a deviation – for example: the presence of mitigating or aggravating factors; the age of the case; evidentiary problems.
- (b) If the conduct found to be a violation involves the use of drugs and/or alcohol, the licensee shall be presumed to be a substance abusing licensee for purposes of Section 315 of the Business and Professions Code. If the licensee does not rebut that presumption, then the Uniform Standards for a substance abusing licensee shall apply unless the licensee establishes that, in his or her particular case, appropriate public protection can be provided with modification or omission of a specific standard as a term of probation.
- (c) Notwithstanding the Disciplinary Guidelines, any proposed decision issued in accordance with the procedures set forth in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code that contains any finding of fact that the licensee engaged in any act of sexual contact as defined in subdivision (c) of section 729 of the Business and Professions 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, shall contain an order revoking the license. The proposed decision shall not contain an order staying the revocation of the license.

Note: Authority cited: Section 2854, Business and Professions Code; and Section 11425.50(e), Government Code. Reference: Sections 315, 315.2, 315.4, 729, 2875, 2876 and 2878, Business and Professions Code; Section 44010, Education Code; and Sections 11400.20, 11425.50(e), and 11500, Government Code.

# Board of Vocational Nursing and Psychiatric Technicians

## MODIFIED LANGUAGE

Changes to the originally proposed language are shown by double underline for new text and underline with strikeout for deleted text.

### Psychiatric Technician Regulations

California Code of Regulations, Title 16, Division 25, Chapter 2, Article 4, is amended to read:

#### 2579.10. Disciplinary Guidelines and Uniform Standards Related to Substance Abuse.

In reaching a decision on a disciplinary action under the Administrative Procedure Act (Government Code Section 11400 et seq.) the Board shall ~~consider~~ utilize the disciplinary guidelines entitled “Disciplinary Guidelines and Uniform Standards Related to Substance Abuse” (Rev. 6/19/076/20/11), which are hereby incorporated by reference. The Disciplinary Guidelines apply to all disciplinary matters; the Uniform Standards apply to a substance abusing licensee.

- (a) Notwithstanding ~~Subject to~~ subsection (b), ~~Deviation from these~~ Disciplinary Guidelines, including the standard conditions of probation, is appropriate where the Board, in its sole discretion, determines that the facts of the particular case warrant such a deviation – for example: the presence of mitigating or aggravating factors; the age of the case; evidentiary problems.
- (b) If the conduct found to be a violation involves the use of drugs and/or alcohol, the licensee shall be presumed to be a substance abusing licensee for purposes of Section 315 of the Business and Professions Code. If the licensee does not rebut that presumption, then the Uniform Standards for a substance abusing licensee shall apply unless the licensee establishes that, in his or her particular case, appropriate public protection can be provided with modification or omission of a specific standard as a term of probation.
- (c) Notwithstanding the Disciplinary Guidelines, any proposed decision issued in accordance with the procedures set forth in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code that contains any finding of fact that the licensee engaged in any act of sexual contact as defined in subdivision (c) of section 729 of the Business and Professions 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, shall contain an order revoking the license. The proposed decision shall not contain an order staying the revocation of the license.

Note: Authority cited: Section 4504, Business and Professions Code; and Section 11425.50(e), Government Code. Reference: Sections 315, 315.2, 315.4, 729, 4520 and 4521, Business and Professions Code; Section 44010, Education Code; and Sections 11400.20, 11425.50(e), and 11500, Government Code.

# Agenda Item # 11.A. – Attachment K



CALIFORNIA  
NURSES  
ASSOCIATION



NATIONAL NURSES  
ORGANIZING COMMITTEE

A Voice for Nurses. A Vision for Healthcare.  
[www.calnurses.org](http://www.calnurses.org) / [www.nnoc.net](http://www.nnoc.net)

August 14, 2012

Linda Ruyters  
Administrative Analyst  
Board of Vocational Nursing and Psychiatric Technicians  
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Sacramento, California 95833  
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Dear Ms. Ruyters:

Thank you for the opportunity to comment on the modified text to Title 16, California Code of Regulations Sections 2524 and 2579.10 regarding disciplinary actions for Licensed Vocational Nurses and Licensed Psychiatric Technician, respectively. The California Nurses Association representing 86,000 registered nurses, has reviewed the modified text and all three of the documents that were added to the rulemaking record:

1. Legislative Council Bureau Opinion, October 27, 2011,
2. Office of the Attorney General Informal Legal Opinion, February 29, 2012, and
3. Department of Consumer Affairs Opinion, April 5, 2012.

The proposed regulations have been modified to reflect the opinion of Leg Council, the Office of the Attorney General and the opinion of the Department of Consumer Affairs that healing arts boards do not have the discretion to modify the content of the specific terms or conditions of probation that make up the Uniform Standards.

The proposed regulations were issued originally July 22, 2011 in Notice Register 2011 No. 29-Z. The Proposed Action on these regulations is now more than a year past the date when they were originally issued for comments. However, it is clear that the opinions being added to the rulemaking file directly impact the language as it was originally proposed and came following the September 6, 2011 45-day comment period.

Public comments on modified texts are only considered on *changes* made to the original proposed regulations and as such the California Nurses Association supports the BVNPT's modifications of the

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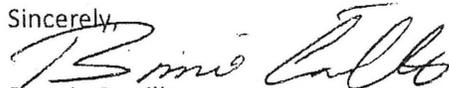
original proposed regulations since the regulations would have been found invalid without them. The BVNPT was required to delete the discretionary language that would have allowed it to consider modification or omission of a specific standard of probation for licensees presumed to be substance abusing for purposes of Section 315 of the Business and Professions Code and who did not rebut that presumption. The original language would have allowed a licensee to establish to the BVNPT's satisfaction that in his or her particular case, appropriate public protection could be provided with modification or omission of a specific standard as a term or probation. Clearly the opinions newly included in the rulemaking file prohibits such modifications by healing arts boards, including the BVNPT.

The BVNPT retains its sole discretion to determine whether mitigating or aggravating factors of a particular disciplinary action warrants deviation from the Disciplinary Guidelines, including the standard conditions of probation. This discretion applies only to the Disciplinary Guidelines portion and not to probation conditions under the Uniform Standards Related to Substance Abuse.

The language in Sections 2524 and 2579.10 are identical as they apply to Licensed Vocational Nurses and Psychiatric Technician, respectively. CNA recognizes the necessity for these modification and for adding the three opinions to the rulemaking file. CNA believes that the conditions for probation are punitive rather than aimed at rehabilitation and effective monitoring but we realize that current law and the interpretation given the law through the Attorney General's office, leaves no room for the discretionary decision making that CNA believes is central to the role of professional boards when dealing with impaired licensees.

Thank you again, for the opportunity to review these proposed modifications to the regulations addressing Disciplinary Guidelines and Uniform Standards Related to Substance Abuse.

Sincerely,



Bonnie Castillo

Director, Government Relations