

Board of Vocational Nursing and Psychiatric Technicians

INITIAL STATEMENT OF REASONS

Hearing Date: September 6, 2011

Subject Matter of Proposed Regulations:

Disciplinary Guidelines and Uniform Standards Related to Substance Abuse

Sections Affected:

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

Introduction

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

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

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

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

Specific Purpose

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

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

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

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

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

Factual Basis

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

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

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

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

Amend Regulatory Authority (page iii)

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

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

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

Amend Factors To Be Considered (page iv)

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

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

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

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

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

Amend Standard Conditions of Probation (pages 1-6)

1. Obey all Laws

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

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

2. Compliance with Probation Program

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

3. Submit Written Reports

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

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

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

5. Notification of Residency or Practice Outside of State

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

6. Meetings with Board Representative(s)

No changes were made to this condition.

7. Notification to Employer(s)

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

It is the responsibility of the respondent to inform the Board of his/her employment status. The Board must have the ability to contact the respondent's employer at any time to determine if the respondent is complying with the conditions of probation and that the respondent is practicing safely. This amendment will clarify the respondent's responsibility in obtaining employer involvement in order to comply with the probation program. Although this amendment complies with SB 1441 regarding substance-abusing licensees, the Board inserted the proposed language in this standard condition of probation rather than under the Uniform Standards section on pages 12-13 to clarify that this applies to all licensees on probation, not just substance-abusing licensees. It is anticipated that this provision will be helpful in monitoring all probationers, not just the substance-abusing ones.

8. Employment Requirements and Limitations

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

9. Supervision Requirements

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

10. Completion of Educational Course(s)

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

11. Maintenance of Valid License

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

12. Cost Recovery Requirements

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

13. License Surrender

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

14. Violation of Probation

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

Amend Optional Conditions of Probation (pages 7-13)

15. Suspension of License

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

16. Examination by a Physician

The specific purpose of this amendment is to clarify that the physician who conducts the examination of the licensee must notify the Board verbally within 24 hours if the licensee is not physically fit to practice safely. This proposed amendment also clarifies that the licensee must

comply with any order to cease or restrict his/her practice until the Board is satisfied that the licensee is safe to return to practice and the licensee has been notified in writing by the Board. Non-substantive changes were also made to this condition for grammatical and clean up purposes.

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

17. Psychiatric/Psychological Evaluation

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

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

18. Psychotherapy

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

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

19. Rehabilitation Program

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

20. Addictive Behavior Support Groups

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

21. Abstain from Controlled Substances

No changes were made to this condition.

22. Abstain from Use of Alcohol and Products Containing Alcohol

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

23. Submit Biological Fluid Samples

No changes were made to this condition.

24. Take and Pass Licensure Examination

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

25. Restrictions on Licensed Practice

No changes were made to this condition.

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

26. Submit to Drug Testing

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

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

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

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

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

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

1. Previous Testing/Sobriety – In cases where a board has evidence that a licensee has participated in a treatment or monitoring program requiring random testing, prior to being subject to testing by the board, the board may give consideration to that testing in altering the testing frequency schedule so that it is equivalent to this standard.

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

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

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

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

27. Positive Drug Test

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

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

28. Major and Minor Violations

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

Major violations include, but are not limited to:

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

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

Minor violations include, but are not limited to:

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

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

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

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

29. Clinical Diagnostic Evaluation

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

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

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

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

30. Group Meetings with Qualified Facilitator

The specific purpose of this amendment is to address with the uniform standard No. 5 established by the SACC. The proposed amendment specifies that, if the Board requires a licensee to participate in facilitated group support meetings, the group must be led by a facilitator who has a minimum of 3 years experience in the treatment and rehabilitation of substance abuse and shall by license or certified by the State or other nationally certified organization(s). The facilitator must not have a financial, personal, or business relationship with the licensee within the last 5 years. The meeting facilitator must provide a signed document showing the licensee's name, group name, dates and location of meetings, licensee's attendance, level of participation, and progress. Unexpected absences must be reported to the Board by the facilitator within 24 hours.

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

31. Worksite Monitor

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

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

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

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

Underlying Data

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

Business Impact

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

Specific Technologies or Equipment

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

Consideration of Alternatives

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

(7/12/11)