

MEETING MINUTES

Compliance and Enforcement Committee March 25, 2010

Department of Consumer Affairs
El Dorado Room
1625 North Market Blvd.
2nd Floor North, Room 220
Sacramento, CA 95834

Committee Members Present:

Patricia Lock-Dawson, Public Member,
Chair
Harry Douglas, Public Member

Staff Present:

Kim Madsen, Executive Officer
Tracy Rhine, Assistant Executive Officer
Gena Beaver, Enforcement Analyst
Cynthi Burnett, Enforcement Analyst
Marsha Gove, Examination Analyst
Cassandra Kearney, Enforcement Analyst
Julie McAuliffe, Enforcement Analyst
Sean O'Connor, Outreach Coordinator
Elina Taylor, Administrative Analyst
Pearl Yu, Enforcement Manager

Committee Members Not Present

Victor Perez, Public Member

Guest List:

Guest list on file

Patricia Lock-Dawson, Committee Chair, called the meeting to order at 9:03 a.m. Elina Taylor called roll, and a quorum was established.

I. Introductions

Committee members, staff, and audience members introduced themselves.

II. Presentation of the Enforcement Process

Kim Madsen, Executive Officer, Board of Behavioral Sciences, noted that the day's meeting was the first for the Compliance and Enforcement Committee. She acknowledged the presence of many of the Board's Enforcement staff.

Ms. Madsen provided a general overview of the Enforcement process. She stated that complaints can be filed by anyone who believes a licensee or registrant has engaged in conduct which violates the Board's laws and regulations. All such grievances are reviewed and if it is determined that the individual in question is a licensee or registrant of the Board, a case file is opened and the matter assigned to an Enforcement Analyst. Ms. Madsen provided information regarding the number of complaints received in the current fiscal year through February.

Ms. Madsen indicated that the assigned analyst assesses the complaint to determine if the allegations are within the Board's jurisdiction to address. If the alleged misconduct violates the Board's laws and regulations, steps are taken to obtain facts and evidence sufficient to prove or disprove the allegations in the complaint. Those steps might involve contacting the complainant for additional information, such as releases or other documentation relative to the complaint. In the event the information received by the Board pertains to an arrest or conviction, the appropriate law enforcement agency and, if applicable, court will be contacted for documentation pertaining to the incident.

Ms. Madsen emphasized that due to issues of confidentiality associated with a therapeutic relationship, an investigation generally will not proceed without a signed release from all involved in the therapeutic relationship.

Ms. Madsen described the role of the Enforcement Analyst as a fact finder. Upon review of the documentation obtained by the analyst in a case, a decision is made whether sufficient evidence exists to support that a violation of law has occurred. If no additional information is required, a report is prepared. The case may be referred to a Subject Matter Expert for review and issuance of an opinion. If additional evidence or interviews are needed, the matter might be referred to an Investigative Analyst or, in situations requiring the services of a peace officer, the Department of Consumer Affairs Division of Investigation (DOI). Ms. Madsen reported that in 2009 the Board hired two Investigative Analysts to look into cases that require field work such as face-to-face contact with parties to the complaint, but do not require the expertise of a licensed peace officer.

Mary Riemersma, California Association of Marriage and Family Therapists (CAMFT), asked how it is distinguished which complaints are investigated by an Investigative Analyst versus being referred to the Division of Investigation. Ms. Madsen responded that while a majority of complaints are handled by the Board's investigators, the Division of Investigation is used for more serious or volatile situations that could present safety issues. Cases might also be sent to DOI if under-cover investigation is needed, or if peace officer status is required in order to obtain records that would otherwise not be accessible to the Board, such as documents from the Department of Motor Vehicles. Pearl Yu, Enforcement Manager, confirmed that DOI services are often requested in cases where there is or could be a problem obtaining records.

Ms. Riemersma asked how much information the subject of a complaint is provided prior to being interviewed. Ms. Madsen indicated that the individual is typically contacted by the investigator, informed that a complaint has been received, and provided a summary of the complaint. She emphasized that the subject of the complaint is not provided with a copy of the complaint, but rather a synopsis of the grievance. In response to a question from Ms. Riemersma, Ms. Madsen stated that the summary is generally provided to the licensee or registrant in question prior to the interview. A summary may also be provided upon request from the subject of the complaint. A brief discussion followed. Ms. Riemersma noted that the complaint and investigation process can be unsettling for the

licensee or registrant, leaving the individual unsure how to respond or what is expected of them. Ms. Madsen indicated that the Board's intent is to gather sufficient information to make an informed decision whether or not a violation of law has occurred. The interview process affords the individual the opportunity to provide input and be otherwise involved in the investigation of the allegations. Ms. Riemersma asked about the presence of or need for legal counsel at the interview. Ms. Madsen indicated that such a decision would lie with the licensee or registrant being interviewed.

Ms. Madsen next spoke about various possible results of an investigation. She indicated that when an investigation is completed, a decision is made whether sufficient evidence exists to proceed with action against the licensee or registrant. In cases where the evidence is insufficient to prove a violation of law has occurred, or if the investigation reveals that the allegations do not constitute a violation of law, the case is closed and no action is taken.

If the investigation substantiates that a violation of law has occurred, the decision is then made about the action that is warranted. Ms. Madsen noted that issues considered when making this determination include the nature of the violation, prior enforcement actions, and threat to public safety. She then reviewed the two levels of disciplinary action available to the Board.

Ms. Madsen reported that Citation and Fine is used in cases where the investigation substantiates a violation has occurred, but the violation does not warrant revocation of the license in order to ensure public safety. This level of discipline is generally used in cases involving violations of the continuing education requirements; advertising violations; or practicing with a delinquent license. She indicated that fines are assessed commensurate with the violation. Ms. Madsen provided a general outline of the contents of a citation, which includes instructions for compliance and the options available to the individual being cited.

Ms. Madsen reported that formal administrative action is pursued in cases involving serious violations of law. Such cases are referred to the Office of the Attorney General for initiation of action to deny an application for licensure or revoke an existing license. Ms. Madsen provided an overview of the formal administrative process, from initiation of the action through final disposition of the matter. She indicated that the formal disciplinary process can be very lengthy. She noted that unless the nature of the violation warrants immediate suspension of the license or registration in order to ensure public safety, the licensee or registrant is allowed by law to continue practicing while facing possible discipline. Ms. Madsen also spoke about steps the Board can take in situations where the alleged misconduct is so egregious that immediate action is warranted.

Ms. Lock-Dawson opened the item for discussion by meeting participants.

Mary Riemersma, CAMFT, commented about the use of Penal Code 23 (PC 23) pertaining to interim suspension orders. She and Ms. Madsen discussed the wording in the statute, with Ms. Riemersma expressing concern that the Board's interpretation of the provisions of PC 23 might be inaccurate. Ms. Madsen touched on her knowledge of PC 23, and her experience with the use of the statute. She agreed to review the statute to ensure correct understanding and use of the provisions. Ms. Lock-Dawson suggested making discussion of PC 23 an agenda item for a future meeting. She asked Ms. Madsen to research the statute and provide clarification for future committee review and discussion.

An unidentified audience member asked if one conviction for driving while under the influence (DUI) constitutes grounds for denial of licensure. Ms. Madsen responded that while conviction for DUI could be the basis to deny an application for licensure, it does not always result in that action. The Board thoroughly reviews the particulars of the arrest and conviction, and other related factors, prior to making the decision to grant or deny an application.

The same unidentified individual asked the percentage of complaints received that pertain to unlicensed activity. Ms. Madsen deferred to Pearl Yu, Enforcement Manager, who responded that approximately five to ten percent of complaints alleged unlicensed practice. Ms. Lock-Dawson asked Ms. Yu for clarification. Ms. Yu indicated that unlicensed activity could involve registrants practicing without supervision, or individuals who are neither licensed nor registered by the Board advertising and/or engaging in the practice of therapy.

Mr. Douglas asked about the function of the Compliance and Enforcement Committee, and how it was anticipated the group would impact the established process. (TAPE 1 – 38:00) Ms. Madsen explained that with the increased direction and guidance from the Department of Consumer Affairs and State and Consumer Services Agency, enforcement is a priority. The committee was intended to evaluate the performance of the enforcement process by Board staff, as well as compliance with established performance measures, which she noted would be discussed later in the meeting. Ms. Madsen noted other areas in which the committee could anticipate involvement, such as review and possible revision of the Board's Disciplinary Guidelines. She indicated that her presentation was intended to give a clear overview of the enforcement process at the Board.

Mr. Douglas commented about the importance of establishing a neutral, cooperative relationship with individuals who are the subject of a complaint. Ms. Madsen deferred to Enforcement Unit staff to speak about their experiences in this area. Cassandra Kearney, Enforcement Analyst, noted that upon being contacted by the Board about a complaint, the individual generally seems more concerned that a complaint has been filed than they are about being contacted by the Board. The Board is not generally seen as punitive; rather, it is generally understood that upon receipt of a complaint, it is the Board's responsibility to investigate the allegations.

Discussion continued among Committee members and Board staff. Ms. Lock-Dawson suggested that a periodic agenda item could be a report from the Board's investigators about their experiences conducting investigations.

Ms. Riemersma made note of a conversation she had recently with an individual who had been notified of a complaint filed against him. When asked, he was unable to provide her with information about the nature of the complaint or who filed the grievance. Ms. Riemersma commented that often licensees are unnerved by the idea that a complaint has been filed and are not sure the questions to ask or how to proceed. Ms. Lock-Dawson asked if the licensee is informed initially about the nature of the complaint. Ms. Kearney stated that the identity of the complainant is provided unless he or she requests to remain anonymous. She added that given the confidentiality issues inherent in therapy, complaints filed anonymously generally cannot be pursued. Ms. Kearney reported that initial contact with the subject of a complaint is usually in writing. The correspondence includes a summary of the complaint. Ms. Yu indicated that the process is different when

investigators are involved. She explained that when investigators contact the subject to schedule an interview, the nature of the complaint is not disclosed at that time.

Discussion continued. Ms. Lock-Dawson asked about the percentage of cases that go to hearing before an administrative law judge, and if there is anything the committee can do to impact those numbers. Ms. Yu indicated only a small percentage of cases go to administrative hearing. Ms. Madsen explained the Board's role in the enforcement process is the timely turnaround of disciplinary decisions or stipulations that are presented for review and action. Ms. Lock-Dawson also asked about the Disciplinary Guidelines used by the Board, specifically about the basis for that document. She asked who has the ability to change the guidelines. Ms. Madsen responded that it is the Board's responsibility to make changes to the Disciplinary Guidelines when needed. She noted that the guidelines are incorporated in the Board's regulations. She confirmed for Ms. Lock-Dawson that the committee would be involved in making any future changes to those guidelines.

Mr. Douglas asked what becomes of case files when the investigation has uncovered no violation, or when the evidence is insufficient to substantiate the allegations in the complaint. Ms. Madsen responded that such files are destroyed after a designated period of time. She explained that information regarding unsubstantiated complaints is not available to the public. Ms. Yu stated that the length of time a closed case file is retained is contingent upon the basis for closure of the case. She also noted that information about a complaint becomes public only if an accusation is filed or if a citation is issued and the matter resolved.

III. Presentation of Enforcement Performance Measures

Ms. Madsen provided information about implementation by the Department of Consumer Affairs (DCA) of the Consumer Protection Enforcement Initiative (CPEI). She indicated the effort was undertaken to improve the enforcement process and provide boards within the department with resources needed for timely investigation and prosecution of cases. She noted that while enforcement has historically been a high priority for healing arts boards within DCA, a series of recent news articles reported an average time frame of three years to investigate and prosecute cases of licensee misconduct. Upon review of the existing enforcement process, DCA identified systemic problems which limited a board's ability to resolve the cases in a timely manner.

The goal of the CPEI is to reduce the average enforcement completion timeline from 36 months to between 12 and 18 months. Proposed changes to the existing enforcement process include requesting additional staffing resources, improved IT resources and systems, and legislative changes.

Ms. Madsen reported on the Board's progress in meeting the goal set by CPEI. She stated that the Board and many other licensing boards within DCA use the services of the Division of Investigation (DOI). She noted that an increase in the number of complaints received by the boards understandably has resulted in an increased number of cases sent to DOI for investigation. She reported that the Board had previously identified a problem with the length of time required for DOI to complete an investigation. As a result, the Board requested and, in January 2009, was able to hire two investigative analysts to gather evidence and otherwise investigate cases not requiring the services of the peace officers employed by DOI. Ms. Madsen reported that in 2009, a drastic reduction was

noted in the length of time required for completion of most investigations, from 497 days for DOI cases to 119 days for cases assigned to the Board's investigative analysts.

Ms. Madsen spoke briefly about the Board's statute of limitations. This law requires the Board to initiate disciplinary action against a licensee within three years from the date the alleged misconduct becomes known to the Board, or within seven years from the date the alleged violation occurred, whichever occurs first.

Ms. Madsen noted that staff is conducting a full review of the enforcement process. The goal is to ensure investigations are conducted thoroughly and efficiently, and meet the performance measure established by CPEI. Numerous duplicative and obsolete steps and procedures have been identified and eliminated. Ms. Madsen also noted that staff has made changes in other enforcement-related areas, such as the method of reporting enforcement statistics to DCA, a change made to align with the performance measures established by CPEI.

Next, Ms. Madsen referred the committee to various documents related to her presentation. She reviewed in some detail the monthly enforcement report submitted to DCA, providing clarification regarding the information captured in the report. Ms. Madsen noted the performance of the Board's enforcement staff in meeting the standards set by CPEI.

Mr. Douglas asked about the noted difference in time required for investigation between board investigators and the DOI. Ms. Madsen explained that DOI conducts investigations for many boards within DCA, and is the sole provider of investigative services for a few of those boards. She touched on circumstances, other than volume, that could impact the length of time required for DOI to complete an investigation, including furlough days and budgetary constraints.

Mr. Douglas asked if the staff review of the enforcement process is on target for completion by June 30, 2010, as indicated in Ms. Madsen's report. Ms. Madsen confirmed that it is.

Ms. Lock-Dawson noted that the Board had previously taken steps and put mechanisms in place to ensure complaints are processed quickly. Ms. Yu reported that staffing in the enforcement unit has increased, with the number of analysts who process complaints increasing from two to five; the addition of the two investigative analysts was again noted. She and Ms. Madsen both confirmed that the number of cases referred to DOI has decreased significantly.

Discussion about various aspects of the enforcement process continued briefly.

Gil DeLuna, DCA Board/Bureau Relations, asked if the Board was seeking approval for additional enforcement positions. Ms. Madsen confirmed that additional positions had been authorized.

The committee recessed for a break and reconvened at approximately 10:30 a.m.

IV. Review and Discussion of Uniform Standards Regarding Substance Abusing Healing Arts Licensees, Senate Bill 1441

Ms. Madsen reported that the Governor signed Senate Bill 1441 into law in September 2008, thereby establishing the Substance Abuse Coordination Committee (SACC) within the DCA. Committee membership included Executive Officers from healing arts boards within DCA, a representative from the state Department of Alcohol and Drug Programs, and other interested parties. The committee was charged with developing standards to be followed by the healing arts boards when addressing the issue of substance abuse with a licensee.

Ms. Madsen reported that the committee first met to determine the most effective way to proceed. Standards were drafted that could be applied to licensees in diversion programs and licensees on probation. The proposed standards were presented at a public meeting to solicit public comment.

In December 2009, the group submitted the uniform standards to DCA Director Brian Stiger. Since that time the boards have been charged with implementing those standards. Ms. Madsen spoke about the implementation process. She reported having met with legal counsel and determined that changes to the disciplinary guidelines will be necessary. She cited, as an example, minor changes that will be made to the guidelines pertaining to biological fluid testing. Ms. Madsen commented that DCA is taking necessary steps to implement the new standards.

Ms. Madsen repeated that revisions to the Board's Disciplinary Guidelines will be required to fully implement the uniform standards. She reported that the Board is currently in the process of revising the Disciplinary Guidelines to incorporate the new profession of Licensed Professional Clinical Counselor (LPCC). No additional changes to the guidelines are allowed pending completion and approval of the current regulatory action. She confirmed that the Board will implement the uniform standards to the extent possible at the present time.

Ms. Madsen noted that one issue of concern is the required increase in testing for licensees on probation for substance abuse. She noted that currently the Board has approximately fifty individuals on probation, with nearly two-thirds of those individuals subject to biological fluid testing. She briefly described the work required by Board staff to ensure those licensees test as mandated. Ms. Madsen indicated that the requirement for increased fluid testing would result in a prohibitive workload for the Board's probation monitor. She reported that DCA is pursuing a department-wide contract to use a computerized testing system, however until such a system is in place, implementation of the increased testing requirement cannot be accomplished.

Ms. Madsen stated that although the Board does not currently have a diversion program in place, licensees found to be abusing drugs or alcohol can be addressed through the administrative process. A licensee can be placed on probation. Ms. Madsen reported that currently the Board has authority to imposed probationary terms that require psychological counseling, biological fluid testing, supervised practice, and other terms intended to ensure consumer protection. If a probationer violates any term of probation, the Board has the authority to pursue revocation of the license. She provided additional information about the current probation program. Ms. Madsen then asked Julie McAuliffe, Probation Monitor, to speak about the Board's probation program.

Ms. McAuliffe provided an overview of the process involved when a licensee is placed on probation. She spoke about the steps taken to initiate probation, and working with the licensee to ensure compliance with the terms of probation. She touched briefly on the time frames required for adherence to requirements such as initiating therapy or finding a practice supervisor.

Ms. Madsen stated that the Board's goal in working with a probationer is to assist the individual to practice safely. Ms. McAuliffe confirmed that she relays the same message to all probationers, and makes herself available to assist the individual through the period of probation. Ms. Madsen noted that the Board generally does not seek to revoke an individual's probation unless the individual has exhibited significant non-compliance with the terms of probation.

Ms. Riemersma asked about the amount of fluid testing currently required by the Board. Ms. McAuliffe stated the current requirement is for random monthly testing. Ms. Riemersma asked about the costs involved if testing is increased to twice weekly. Ms. McAuliffe indicated that the cost of testing depends on factors like the testing site and the type of test that is ordered. Ms. Riemersma expressed concern that costs could be prohibitive to the licensee if twice weekly testing was mandated.

Mr. DeLuna reported hearing concern from many boards about the new testing standard. He asked how the decision was reached to require such frequent testing. Ms. Madsen responded that the testing requirement was different from the SACC's original recommendation. She was unclear as to the reasons behind the change.

Ms. Riemersma expressed CAMFT's support of the Board maintaining discretion regarding the frequency of testing. She asked about the Board's obligation to adopt the guidelines proposed by DCA. Ms. Madsen responded that the guidelines would be adopted to the extent possible given the available resources.

Mr. Douglas asked the distinction between a diversion program and a probation program. Ms. Madsen clarified that a diversion program is a mechanism available with various licensing boards. It allows an impaired licensee to engage in monitored practice while receiving treatment for substance abuse. No disciplinary action or other court action has been taken. Entry into diversion is voluntary and confidential. If a licensee tests positive for alcohol or drug use while in diversion, he or she would be subject to revocation of licensure. Ms. Madsen explained that individuals who are placed on probation have had their license to practice revoked. The revocation is stayed contingent upon the licensee's compliance with certain terms of probation. Notice of the disciplinary action, including terms of probation, is made available to the public.

Mr. Douglas asked if the Board had a diversion program in place. Ms. Madsen indicated there is not.

A brief discussion followed regarding related issues, such as possible changes to the disciplinary guidelines. Ms. Madsen provided clarification as requested.

The meeting adjourned and was reconvened at 1:05 p.m.

V. Review and Discussion of the Consumer Health Protection Enforcement Act, Senate Bill 1111

Ms. Rhine explained that SB 1111 is the legislation establishing the Consumer Health Protection Enforcement Act. She indicated the bill is extensive. Ms. Rhine reviewed with the committee the various provisions in the legislation that directly impact the Board.

Ms. Riemersma expressed CAMFT's concern with the legislation, largely with respect to due process issues. She offered to provide the Board with a copy of correspondence submitted to the bill's author, detailing CAMFT's position regarding the legislation.

Mr. Douglas asked if the Board has information regarding entities that are in support of or opposition to the bill. Ms. Rhine responded that such information generally did not become available until the proposed legislation was heard in the appropriate legislative committee. She noted that SB 1111 was scheduled to be heard April 12, 2010.

Harry Douglas moved to recommend to the full Board to discuss SB 1111, with no recommended position presented by the committee. Patricia Lock-Dawson seconded. The committee voted unanimously (2-0) to pass the motion.

Ms. Madsen clarified that the item would be presented to the full Board at its next meeting, scheduled May 6-7, 2010. She anticipated that at that time the legislation will have moved forward and information should be available regarding the parties in support or opposition of the bill.

Ms. Riemersma provided, in addition to the correspondence from CAMFT, a letter from various agencies expressing their position on SB 1111.

Ms. Lock-Dawson asked if the committee had the option to defer making a recommendation to the full board until more information is available to the committee. Ms. Rhine responded that the committee does have that option, but that it is also appropriate to move forward with no recommendation.

Ms. Madsen added that the input sought by the committee would not be available until after the legislative hearings. She confirmed the Board's participation in round table discussions pertaining to SB 1111. Ms. Madsen expressed the understanding that revisions to the legislation were forthcoming, and would include input received during the round table meetings.

A brief discussion ensued.

VI. Future Meeting Dates

- June 25, 2010 – Sacramento
- September 24, 2010 -- Sacramento

VII. Suggestions for Future Agenda Items

- Discussion of Penal Code 23
- Review of Enforcement Activity (for July Board Meeting)
- Possible policy changes related to streamlining of the enforcement process

VIII. Public Comments for Items not on the Agenda

There were no public comments for items not on the agenda.

The meeting was adjourned at approximately 1:30 p.m.