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V. Review and Discussion of Office of the Attorney General Legal Opinion Relating to SB 1441 (Ridley-Thomas, Chapter 548, Statues of 2008) Relating to Substance Abusing Healing Arts Licensees

Relevant Sections

California Code of Regulations Section 1760 requires the board to consider disciplinary guidelines when reaching a decision on a disciplinary action.

Business and Professions Code Section 315 established the Substance Abuse Coordination Committee (SACC) within the Department of Consumer Affairs. The committee was charged with formulating uniform and specific standards in several areas for dealing with substance-abusing licensees.

Chapter 9, Division 2, Chapter 19 (Business and Professions Code sections 4300-4315) defines disciplinary proceeding for the board as well as the grounds for taking such discipline.

Background

In early 2011, the board directed staff to restructure and update its Disciplinary Guidelines. Subsequent to this, in April 2011, the uniform standards required in B&PC section 315 were finalized. Over the course of the next year, the board initiated a rulemaking to update the disciplinary guidelines and incorporate the SB 1441 uniform standards as it deemed appropriate considering comments from counsel and staff on how best to proceed.

In addition to the standards themselves, the board also received opinions on what was required to implement the uniform standards. The board was provided a copy of a legal opinion from the Legislative Counsel Bureau, executive summary issued by the Office Of the Attorney General as well as an implementation memo from Doreatha Johnson, Deputy Director of Legal Affairs, DCA. The opinions provided did not provide consistent guidance and as such the board requested a formal legal opinion from the Office of the Attorney General in January 2013. The board received a response to this request on April 8, 2015.

During the April 2015 Board Meeting, the board briefly discussed the new legal opinion and was advised that the new opinion provides for some discretion by the board. This is contrary to prior guidance provided to the board. As such, members were advised that staff and counsel would work on implementation options and discuss the issue during the June Meeting.

Recent Update

Board staff completed a review of the proposed Disciplinary Guidelines initially approved by the board in April 2011, which included changes to implement the Uniform Standards as well as improve our probation monitoring requirements. During the meeting member will receive a brief presentation on the standards as well as one possible implementation strategy being offered by staff.

Staff Recommendation

Because of the complexity of the Disciplinary Guidelines and the scope of changes anticipated, board staff recommends that an ad hoc committee of two or more members meet in advance of the July Board Meeting. This will allow time to fully discuss all of the proposed changes to the guidelines and develop a recommendation for the board to consider during its July meeting.

Attachment 1 includes a copy of the legal opinion as well as the Uniform Standards.

Attachment 1

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

STATE OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS

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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, randomnicity, 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.

KAMALA D. HARRIS
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DEPARTMENT OF JUSTICE

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April 8, 2015

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Virginia Herold, Executive Officer
California State Board of Pharmacy
1625 N. Market Blvd. N219
Sacramento, CA 95834

RE: Opinion No. 13-202

Dear Ms. Herold:

Enclosed is our Opinion No. 13-202 issued in response to your request of January 10, 2013.

Sincerely,

Susan Duncan Lee /sg

SUSAN DUNCAN LEE
Supervising Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

SDL:sg

Enclosure
cc: Bruce M. Slavin

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

KAMALA D. HARRIS
Attorney General

OPINION	:	No. 13-202
of	:	April 8, 2015
KAMALA D. HARRIS Attorney General	:	
BRUCE M. SLAVIN SUSAN DUNCAN LEE Deputy Attorneys General	:	

VIRGINIA HEROLD, EXECUTIVE OFFICER FOR THE CALIFORNIA BOARD OF PHARMACY, has requested an opinion on the following questions:

1. Is the law that prescribes the development and issuance of uniform standards for healing arts boards to use in dealing with their "substance-abusing licensees" invalid either (a) for vagueness or (b) as an improper delegation of legislative authority to the committee charged with formulating the standards?

2. To be effective, must the uniform standards be adopted as regulations under the Administrative Procedure Act, and, if so, by what entities?

3. May individual healing arts boards adopt regulations defining the term "substance-abusing licensees" for purposes of determining which of their licensees are subject to the uniform standards?

4. Must individual healing arts boards use the uniform standards as written in all cases in which they are found to apply, and, if so, do the boards nonetheless retain discretion in applying the uniform standards to particular circumstances and in deciding individual cases?

CONCLUSIONS

1. The law that prescribes the development and issuance of uniform standards for healing arts boards to use in dealing with their "substance-abusing licensees" is not invalid either (a) for vagueness or (b) as an improper delegation of legislative authority to the committee charged with formulating the standards.

2. The uniform standards need not be adopted as regulations under the Administrative Procedure Act in order to be effective. Individual healing arts boards may, but are not required to, adopt regulations incorporating the uniform standards for the purpose of administering their own programs.

3. Individual healing arts boards may adopt regulations defining the term "substance-abusing licensees" for purposes of determining which of their licensees are subject to the uniform standards, so long as such regulations are consistent with the legislation directing the formulation and issuance of the uniform standards and reasonably necessary to effectuate the purposes of that legislation.

4. To the extent practicable, individual healing arts boards must use the uniform standards as written in all cases in which they are found to apply, but the boards retain discretion in applying the uniform standards to particular circumstances and in deciding individual cases.

ANALYSIS

In 2008, the Legislature enacted Senate Bill 1441 to address the increasing problem of substance abuse in the health-care professions,[1] where "the impairment of a health care practitioner for even one moment can mean irreparable harm to a patient."[2] Finding that various health care licensing boards have inconsistent or nonexistent standards for dealing with substance-abusing professionals, the Legislature determined

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[1] Senate Bill 1441 added an article to the Business and Professions Code entitled Uniform Standards Regarding Substance-Abusing Healing Arts Licensees. (Stats. 2008, ch. 548 (Sen. Bill No. 1441), § 3.)

[2] *Id.* at § 1(a).

that patients would be better protected if regulatory boards would agree to follow consistent standards and best practices in this area.[3]

To that end, new Business and Professions Code section 315 (section 315) created an entity within the Department of Consumer Affairs called the Substance Abuse Coordination Committee (Committee).[4] The Committee is chaired by the Director of the

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[3] Stats. 2008, ch. 548 (Sen. Bill No. 1441), § 1(g), (h).

[4] Section 315 states:

> (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 Health Care Services. 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.
>
> (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.

Department of Consumer Affairs and consists of the executive officers of the department's healing arts boards, the State Board of Chiropractic Examiners, and the Osteopathic Medical Board of California, as well as a designee of the State Department of Health Care Services.[5]

Section 315 required the Committee to formulate standards on sixteen specific subjects for the healing arts boards to use in dealing with substance-abusing licensees, "whether or not a board chooses to have a formal diversion program."[6] The subjects include clinical evaluation of licensees for substance abuse, suspension of licensees from practice, communications between the licensing board and the licensee's employer, and the use of private-sector diversion programs.[7] In December 2009, the Committee adopted uniform standards for each of the sixteen subjects. The standards were published

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(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.

[5] Bus. & Prof. Code, § 315, subd. (a).

[6] Bus. & Prof. Code, § 315, subd. (c).

[7] *See* Bus. & Prof. Code, § 315, subds. (c)(1)-(16).

in April 2010, and revised in April 2011.[8] In this opinion, we address several questions and concerns that have been raised regarding the uniform standards

Question 1

We begin with the threshold question whether section 315 is valid. It has been suggested that section 315 is too vague to be enforceable because it fails to define the phrase "substance-abusing licensees."[9] It has also been argued that the Legislature improperly delegated its authority by charging the Committee with developing standards instead of crafting them itself. We reject both of these propositions.

a. Vagueness

While "void-for-vagueness" challenges arise most often in the context of criminal statutes, the principle extends to other types of legislation as well.[10] In addressing a vagueness claim, we give the challenged statute "a reasonable and practical construction in accordance with the probable intent of the Legislature."[11] "Reasonable certainty" is all that is required; a statute will not be held void for vagueness if any reasonable, practical construction can be given to it, either on its own footing or by reference to other definable sources.[12]

Because section 315 itself does not define the term "substance-abusing licensees," (nor expressly require the Committee to do so), our task is to determine whether the term may be made reasonably certain by reference to other sources.[13] Where a statute or statutory scheme does not specify a definition for a given term or phrase, the general rule is to give the words "their usual, ordinary meaning, which in turn may be obtained by referring to a dictionary."[14]

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[8] The uniform standards may be accessed from the Department of Consumer Affairs' public website, at http://www.dca.ca.gov/about_dca/sacc/uniform_standards.pdf.

[9] Bus. & Prof. Code, § 315, subds. (a), (c).

[10] *Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 763-764.

[11] *County of Nevada v. MacMillen* (1974) 11 Cal.3d 662, 672-673.

[12] See *id.* at p. 673.

[13] *Id.* at pp. 672-673.

[14] *Smith v. Selma Community Hospital* (2010) 188 Cal.App.4th 1, 30; see 95 Ops.Cal.Atty.Gen. 16, 19 (2012).

The term "substance-abusing" is hardly unique to section 315. Some form of the term has been used by the Legislature in many different statutes without express definition.[15] This is not surprising. The common definition of "substance abuse" is "excessive use of a drug (as alcohol, narcotics, or cocaine)" or "use of a drug without medical justification."[16] The concept of substance abuse is exceedingly familiar in society, and we see no reason why the commonly understood definition of this term may not be applied with reasonable certainty in the context of protecting patients by ensuring practitioner competency.[17]

Also, when the Legislature enacted section 315, there were already statutes pertaining to substance abuse by licensees of most healing arts boards. For example, existing law provides for diversionary programs as an alternative to traditional disciplinary action to address "unprofessional conduct relating to controlled substances or dangerous drugs" by licensed nurses,[18] and for recovery programs for pharmacists "whose competency may be impaired due to abuse of alcohol [or] drug use."[19] In addition, for most healing arts licensees, existing law provides that unprofessional conduct includes the use of a controlled or intoxicating substance in a manner impairing the licensee's ability to practice safely.

Indeed, in enacting section 315, the Legislature acknowledged the existing statutes addressing substance-abusing licensees, and made express findings that further legislation was necessary to address deficiencies in existing programs.[20] Despite the existence of

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[15] See e.g. Bus. & Prof. Code, § 8025.1 (certified shorthand reporter subject to suspension where "licensee is unable to perform the duties of a certified shorthand reporter due to the abuse of chemical substances or alcohol"); Ed. Code, § 44049 (school principal may report to parent or guardian any instance of "alcohol or controlled substance abuse" by student); Fam. Code, § 3200 (Judicial Council to develop standards for supervised visitation in cases of alleged "substance abuse"); Health & Saf. Code, § 11367.5 (immunity from prosecution for peace officer possessing controlled substance "while providing substance abuse training to law enforcement").

[16] Webster's 3d New Internat. Dict. (1993) p. 112.

[17] Cf. *In re Drake M.* (2012) 211 Cal.App.4th 754, 764-765 (interpreting "substance abuse" for purposes of removing child from custody of parent or guardian who puts child at risk through substance abuse).

[18] Bus. & Prof. Code, § 2762; see *id.* at § 2770.

[19] Bus. & Prof. Code, § 4360; see *id.* at § 4364 (Board of Pharmacy to establish criteria for program entry).

[20] See Stats. 2008, ch. 548 (Sen. Bill No. 1441), § 1(a), (b).

myriad healing-arts statutes that use this or similar terms,[21] the Legislature refrained from adopting any single definition. Given the prevalence of the problem, and the Legislature's intention to steer boards toward "best practices," we perceive not vagueness but flexibility in the use of the term "substance-abusing licensees."

Reading section 315 in the "context of the statutory framework as a whole in order to determine its scope and purpose," we conclude that it is not void for vagueness. Based on the ordinary meaning of the words "substance-abusing licensees" as those words are understood in common parlance and in other statutory contexts, we conclude that section 315 describes with reasonable certainty the class of individuals who are subject to the uniform standards prescribed by section 315.[22]

b. Delegation of Authority

We next consider whether, by requiring the Committee to develop uniform standards, instead of crafting them itself, the Legislature improperly delegated its authority to the Committee. We find no improper delegation.

In *Kugler v. Yocum*,[23] the California Supreme Court considered the validity of a city ordinance which decreed that the salaries of certain employees would be no less than the average of those of an adjoining city and county, and that future salaries would be set according to that formula. The Court held that the ordinance was not an unlawful

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[21] E.g., Bus. & Prof. Code, § 1681, subd. (b) (dentists); Bus. & Prof. Code, § 2239, subd. (a) (physicians); Bus. & Prof. Code, § 2533, subd. (c)(1) (speech language pathologists and audiologists); Bus. & Prof. Code, § 2570.29, subd. (b) (occupational therapists); Bus. & Prof. Code, § 2762, subd. (b) (nurses); Bus. & Prof. Code, § 2878.5, subd. (b) (vocational nurses); Bus. & Prof. Code, § 2960, subd. (b) (psychologists); Bus. & Prof. Code, § 3750.5, subd. (b) (respiratory therapists); Bus. & Prof. Code, § 4982, subd. (c) (marriage and family therapists); Bus. & Prof. Code, § 4989.54, subd. (c) (licensed educational psychologists); Bus. & Prof. Code, § 4992.3, subd. (c) (social workers).

[22] The agency requesting this opinion has raised a concern that a "given agency might, for example, define 'substance-abusing licensee' to be a licensee with *any* history of substance abuse, whereas another agency might require that a licensee exhibit signs of addiction . . . within the last 5 years, and a third agency might go so far as to require that the licensee have been in active use within the last 12 months." We do not believe that the possibility of such variations undercuts our conclusion that the term "substance-abusing licensee" is reasonably certain in this context.

[23] *Kugler v. Yocum* (1968) 69 Cal.2d 371.

delegation of the city's legislative authority.[24] The Court's reasoning started from the well established principle that "'[t]he power . . . to change a law of the state is necessarily legislative in character, and is vested exclusively in the legislature, and cannot be delegated by it . . . .'"[25] There are also, however, well established limits to that principle. For example, "legislative power may properly be delegated if channeled by a sufficient standard."[26]

The Court explained that the "essentials" of the legislative function are the determination and formulation of legislative policy.[27] "'Generally speaking, attainment of the ends, including how and by what means they are to be achieved, may constitutionally be left in the hands of others.'"[28] Once it declares a policy and establishes a primary standard, the legislature is free to delegate power to executive officers to "fill up the details" by making rules and regulations designed to carry the legislative purpose into effect.[29]

In enacting Senate Bill 1441, the Legislature made the fundamental policy determination that "[p]atients would be better protected from substance-abusing licensees if their regulatory boards agreed to and enforced consistent and uniform standards and best practices in dealing with substance-abusing licensees."[30] It then directed the Committee to address sixteen specific areas in formulating such standards. Generally, "standards for administrative application of a statute need not be expressly set forth; they may be implied by the statutory purpose."[31] Given the Legislature's clear statement of purpose and its articulation of specific areas in which the Committee was to formulate standards, we conclude that the Legislature's delegation of authority to the Committee was not an invalid delegation of the legislative function.[32]

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[24] *Id.* at p. 373.

[25] *Id.* at p. 375, quoting *Dougherty v. Austin* (1892) 94 Cal. 601, 606-607.

[26] *Id.* at pp. 375-376.

[27] *Id.* at p. 376.

[28] *Ibid.*, quoting *First Industrial Loan Co. v. Daugherty* (1945) 26 Cal.2d 545, 549.

[29] *Ibid.* By contrast, an unconstitutional delegation of powers was held to occur when the Legislature gave an administrative agency unfettered authority to make fundamental policy determinations. (*Clean Air Constituency v. Air Resources Bd.* (1974) 11 Cal.3d 801, 816-817.)

[30] Stats. 2008, ch. 548 (Sen. Bill No. 1441), § 1(h).

[31] *People v. Wright* (1982) 30 Cal.3d 705, 713.

[32] It is also important to note what powers the Legislature did *not* delegate to the

Question 2

Section 315 directs the Committee to formulate uniform standards for healing arts boards to use in dealing with substance-abusing licensees, and the Committee has done so. Question 2 here asks whether these standards must also be adopted as regulations under the Administrative Procedure Act (APA)[33] in order for them to become effective. We conclude that the standards need not be adopted as regulations under the APA, but that individual boards are free to adopt regulations incorporating or pertaining to those standards for the purpose of administering their own programs.

Under the APA, no state agency may issue, utilize or enforce a regulation unless the agency complies with the procedures established in the APA.[34] A "regulation" is "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."[35] To be valid and effective, a regulation must be "consistent and not in conflict with" the legislation to which it pertains and "reasonably necessary to effectuate" its purpose.[36] The APA sets forth a formal process by which regulations must be adopted. The process has been neatly summarized as follows:

> The agency must give the public notice of its proposed regulatory action (Gov. Code, §§ 11346.4, 11346.5); issue a complete text of the proposed regulation with a statement of the reasons for it (Gov. Code, § 11346.2 (subds. (a), (b)); give interested parties an opportunity to comment on the

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Committee in this bill. The Committee was not charged with adopting regulations having the force of law; it was not charged with adjudicating cases involving individual licensees; and it was not charged with enforcing diversionary referrals or disciplinary actions involving individual licensees. Nor was the Committee established as an independent agency with any budget, staff, or ongoing programs to administer. Rather, it is a committee within the Department of Consumer Affairs, composed primarily of executive officers of healing arts boards, for the specific and limited purpose of "determining uniform standards that will be used by healing arts boards in dealing with substance-abusing licensees." (Bus. & Prof. Code, § 315, subd. (a).)

[33] Gov. Code, tit. 2, div. 3, pt. 1, chs. 3.5, 4, 4.5, 5 (§ 11340 et seq.).

[34] Gov. Code, § 11340.5; see *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 333.

[35] Gov. Code, § 11342.600.

[36] Gov. Code, 11342.2; see *Woods v. Super. Ct.* (1981) 28 Cal.3d 668, 679.

proposed regulation (Gov. Code, § 11346.8); respond in writing to public comments (Gov. Code, §§ 11346.8, subd. (a), 11346.9); and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law (Gov. Code, § 11347.3, subd. (b)), which reviews the regulation for consistency with the law, clarity, and necessity (Gov. Code, §§ 11349.1, 11349.3).[37]

In our view, the Committee is not an "agency" within the meaning of the APA. For purposes of the APA, a regulation is a rule adopted "by any *state agency*" to implement the law enforced or administered by the agency.[38] Government Code section 11000, subdivision (a), defines "state agency" to include "every state office, officer, department, division, bureau, board and commission." But the Committee is not an agency or authority that has responsibility for the enforcement or administration of any state policies or programs.[39] Rather, it is a *committee*—a group of selected officials brought together to perform a specific task—whose responsibilities are consummated when its assigned task is completed. Nor, in our view, do the uniform standards as formulated by the Committee qualify as "regulations" under the APA. The Committee's sole function is to formulate standards, not to implement, interpret, enforce, or administer them.[40] Therefore, we conclude that the Committee was not required to follow the APA process in order to formulate, publish, or amend the standards.

That leaves open the question whether an individual healing arts board may or must adopt the standards as regulations in compliance with APA procedures in order to implement the uniform standards in dealing with substance-abusing licensees. We believe that the boards may, but are not required to, adopt regulations incorporating the uniform standards. Neither the Committee, nor the Department of Consumer Affairs within which it was created, regulates the healing arts boards or their licensees.[41] That task falls to the individual healing arts boards themselves,[42] which are state agencies.

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[37] *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568.

[38] Gov. Code, § 11342.600 (emphasis added); see also Gov. Code, § 11342.520 (defining "agency" as used in the APA to mean any "state agency").

[39] While the Department of Consumer Affairs—within which the Committee was formed—is unquestionably a "state agency," it is not the entity responsible for formulating the uniform standards.

[40] *Cf.* Gov. Code, § 11342.600; see also Gov. Code, § 11342.5.

[41] See Cal. Code. Regs. tit. 16, Div. 38.

[42] See Cal. Code Regs. tit. 16, Divs. 4, 11, 13, 13.1, 13.2, 13.3, 13.4, 13.5, 13.6, 13.7, 13.8, 13.9, 14, 15, 16, 17, 18, 20, 25.

Thus, if an individual healing arts board wishes to enact regulations governing its own programs—including drug diversion programs—it is up to that board to do so.[43] In fact, several healing arts boards have already promulgated regulations that expressly incorporate by reference the uniform standards.[44] Of course, if an individual board sought to adopt the uniform standards as its own regulations, it would be required to comply with the APA to do so.[45]

We conclude that the Committee need not comply with the Administrative Procedure Act in order to make the uniform standards effective. Individual healing arts boards may, but are not required to, adopt regulations incorporating the uniform standards for the purpose of administering their own programs.

Question 3

In Question 3, we are asked whether a healing arts board may adopt a regulation that defines the term "substance-abusing licensees" for purposes of determining which of the board's licensees are subject to the uniform standards. As discussed in our response to Question 2, the healing arts boards are state agencies with the power and responsibility to regulate their respective licensees. As state agencies, they may adopt regulations to implement, interpret, or make specific the laws that they administer and enforce.[46] Thus, if a healing arts board finds it necessary or advisable to adopt a regulation defining the term "substance-abusing licensees," it may do so. Again, if it does, it must comply with APA procedures.[47] Further, it must ensure that any such implementing or interpretive regulations are consistent with section 315 and reasonably necessary to effectuate its purposes.[48]

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[43] Each of the healing arts boards "exists as a separate unit" with the power to set standards. (Bus. & Prof. Code, § 108.)

[44] See e.g. Cal. Code Regs. tit. 16, §§ 1018-1018.01 (Dental Bd.); Cal. Code Regs. tit. 16, § 1138 (Dental Hygiene Com.); Cal. Code Regs. tit. 16, § 1575 (Bd. of Optometry); Cal. Code Regs. tit. 16, §§ 2524 & 2579.10 (Bd. of Vocational Nursing and Psychiatric Technicians); Cal. Code Regs. tit. 16, § 4147 (Bd. of Occupational Therapy).

[45] Gov. Code, § 11340.5; *Morning Star Co. v. State Bd. of Equalization*, *supra*, 38 Cal.4th at p. 333.

[46] See Gov. Code, § 11342.600.

[47] Gov. Code, § 11340.5.

[48] Gov. Code, 11342.2; see *Woods v. Super. Ct.*, *supra*, 28 Cal.3d at p. 679.

Question 4

Section 315 directs that the uniform standards must be "used" by every healing arts board "in dealing with substance-abusing licensees."[49] We are asked whether the healing arts boards must use the uniform standards as written, and "in all cases in which they are found to apply."

At the heart of this question is what the Legislature meant when it required the healing arts boards to "use" the uniform standards. As always, the statute's language is the best starting point for determining the Legislature's intent. "Use" is a broad term with many meanings, the most apt of which here include "to put into action or service" and "to carry out a purpose or action by means of."[50] To "use," then, is something less than to "adopt" or "enact." On the other hand, the word "use" is set in the context of a statute expressing the Legislature's findings that some healing arts boards must improve their performance with respect to substance-abusing licensees, and that "uniform standards" and "best practices" are the Legislature's chosen means to that end, thereby making the standards much more than an academic exercise. Boards are not to ignore, discard, or disregard them; they are to "use" them. The uniform standards are to be "put into action;" boards are to carry out their drug-diversion programs "by means of" them. Thus we believe that, while the uniform standards are neither de jure nor de facto regulations in themselves, boards should not depart from them without some substantial reason for doing so. The Legislature's purpose was to raise the standard of practice across all boards, and in some cases that may require a board to change its procedures in order to conform to best practices.

Nevertheless, we believe that individual boards retain reasonable discretion over how to apply the uniform standards to individual cases. Although the Legislature has revised many statutes pertaining to the diversion programs administered by the healing arts boards,[51] every board still retains its independent authority over the discipline of its licensees.[52] An individual has a constitutionally protected fundamental right to practice a profession, and "a statute can constitutionally prohibit an individual from practicing a lawful profession only for reasons related to his or her fitness or competence to practice that profession."[53] Nothing in section 315 or the uniform standards undermines the

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[49] Bus. & Prof. Code, § 315, subd. (c).

[50] Webster's 3d New Internat. Dict. (1993) pp. 2523-2524.

[51] See Stats. 2008, ch. 548 (Sen. Bill No. 1441), §§ 4-26.

[52] E.g. Bus. & Prof. Code, § 108.

[53] *Hughes v. Bd. of Architectural Examiners* (1998) 17 Cal.4th 763, 788.

ability and responsibility of a healing-arts board to assess whether a licensee's substance abuse compromises his or her fitness or competence to practice the profession. Inherent in that authority, we believe, is the board's right to exercise reasonable discretion in applying the uniform standards to particular circumstances and in deciding individual cases.

We conclude that individual healing arts boards must use the uniform standards as written in all cases in which they are found to apply, to the extent that this is practicable, but that the boards retain discretion in applying the uniform standards to particular circumstances and in deciding individual cases.[54]

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[54] We have also been asked to provide a "detailed analysis of each standard," but we decline to do so. It is up to each board to determine questions such as the need to clarify or make more specific the uniform standards.