



To: Board Members

Subject: Agenda Item XVII – Sternberg v. California Board of Pharmacy

a. Publication of Court of Appeal Case (California’s 2nd District Court of Appeal Case No. B255862; Filed August 6, 2015)

Background

Recently the board prevailed in a State Court of Appeal case involving a pharmacist-in-charge who appealed the board’s disciplinary decision involving substantial controlled substances losses during his tenure as pharmacist-in-charge. The final decision from this court provides a number of substantial findings and determinations involving the role of a pharmacist-in-charge. A copy of this decision is provided in **Attachment I** following this memo.

To further educate pharmacists about the findings of the court with respect to the role of pharmacists-in-charge, and to ensure the board’s ability to rely on this decision’s findings in future disciplinary matters, the executive officer, with President Gutierrez’s consent, requested the publication of the decision. Provided in **Attachment 2** is the request of the Attorney General’s office seeking publication of the decision (which must have been filed within 20 days of the court’s decision).

From the request for publication is the following summary which explains the importance of this decision:

Publication of *Sternberg* decision is appropriate pursuant to Rule 8.1105 because it would be the first published decision explicitly holding that a pharmacist-in-charge is strictly liable for pharmacy misconduct. Publication would also provide guidance to pharmacists-in-charge in carrying out their responsibilities, would assist the Board of Pharmacy in ensuring pharmacist compliance and would protect the public by incentivizing pharmacists to actively maintain pharmacy security and be aware of conduct in their pharmacies. Accordingly, Respondent respectfully asks that the opinion be certified for publication.

Among the conclusions in the Sternberg decision:

1. *Sternberg* interpreted Business and Professions Code (“Code”) sections 4036.5, subdivision (c), 4081, and 4113, to hold that “imposing strict liability [under those

Code sections] is consistent” with prior appellate decisions interpreting other licensing statutes. This holding reaffirmed the principle applied in *Margarito v. State Athletic Commission* (2010) 189 Cal.App.4th 159, 168-169, that strict liability is an appropriate basis for license discipline when a licensing statute does not contain “qualifying language such as ‘knowingly’ or ‘intentionally.’” This holding also reaffirmed the principle of law as directly applied to the California Board of Pharmacy, which had not been the subject of a published court opinion addressing this principle for at least thirty years.

2. Sternberg would provide much needed clarification of Code sections 4036.5, subdivision (c), 4081, and 4113 to Administrative Law Judges and lower courts because there is no published decision explicitly discussing whether pharmacists-in-charge may be held strictly liable for pharmacy operations. Sternberg directly addresses this issue and clarifies the scope of these Code sections: it is appropriate to hold a pharmacist-in-charge subject to individual license discipline for misconduct of pharmacy employees, irrespective of knowledge, as long as that misconduct pertains to the practice of pharmacy.
3. While Pharmacy Law is replete with statutes that reference pharmacists-in-charge, corresponding case law discussing the pharmacist-in-charge’s indispensable role as gatekeeper of a pharmacy’s drug inventory is somewhat scarce. Sternberg directly addresses these responsibilities by confirming that the pharmacist-in-charge is responsible for ensuring the pharmacy’s compliance with state and federal laws pertaining to the practice of pharmacy. And, Sternberg explains that these responsibilities are not abstract concepts, but are linked with other Pharmacy Law statutes, including Code section 4081.

Sternberg would thus be the first appellate court decision explaining that, as long as the conduct of pharmacy employees relates to the practice of pharmacy, the pharmacist-in-charge is ultimately responsible for that conduct. This is important because, as recognized by this Court’s decision, incentivizing pharmacists-in-charge to “take necessary precautions to adequately supervise and maintain the inventory of dangerous drugs” helps protect the public.

4. Sternberg explains that pharmacists are required to take affirmative measures to maintain pharmacy security. In doing so, this Court explains that the definition of pharmacy facilities includes the pharmacy’s phone ordering system. The Court’s decision also explains the importance of conducting random checks or audits, and that the pharmacist-in-charge is ultimately responsible if the pharmacist-in-charge declines to do so. Finally, Sternberg explains that if a pharmacist-in-charge gives an employee authority over pharmacy equipment, the pharmacist is responsible for how the employee utilizes that equipment.

A future newsletter article will be developed around this decision for the next *The Script*.

Recommendation

Staff recommends that the board ratify the decision to publish the Sternberg decision.

b. Making the Underlying Administrative Case Precedential (Board Case No. 3377; OAH No. 2010080067)

There is also the potential to make the underlying decision from Board Case No. 3377 into a precedential decision. To do this the board would need to vote to make this decision precedential under Government Code Section 11425.60.