

**Dental Hygiene Board of California
California Department of Consumer Affairs**

INITIAL STATEMENT OF REASONS

Hearing Date: No hearing has been scheduled.

Subject Matter of Proposed Regulations: Unprofessional Conduct

Section Affected: Section 1138.1 of Title 16 of the California Code of Regulations (CCR)

Background

The Dental Hygiene Board of California (Board) is charged with oversight of registered dental hygienists, registered dental hygienists in alternative practice, and registered dental hygienists in extended functions. The Board carries out its regulatory authority through enforcement of statutory provisions of the Dental Practice Act, Business and Professions Code (BPC) sections 1900 through 1967.4, and Title 16 of the CCR.

Specific Purpose of Each Adoption, Amendment, or Repeal:

1. Problem Being Addressed:

Existing law sets forth the categories of conduct that constitute unprofessional conduct and the conduct that will result in the imposition of civil or administrative penalties or fines. Currently, there is no regulation including additional conduct the Board considers to be unprofessional conduct.

The Board proposes to add section 1138.1 to add the following categories of unprofessional conduct: (1) providing false statements to the Board; (2) failure to provide requested documentation to the Board; (3) failure to cooperate with Board investigations; and (4) failure to report convictions and disciplinary actions against the licensee.

The Board approved the initial proposed language at the Board's November 21, 2020 Full Board WebEx Teleconference meeting. Additionally, the Board approved edits to the proposed language at the Board's July 17, 2021 Full Board WebEx Teleconference meeting.

2. Anticipated Benefits from this Regulatory Action:

Proposed section 1138.1 will identify additional conduct the Board considers unprofessional that are not included in BPC sections 1950.5 and 1955. As protection of the public is paramount to the Board's mission (Bus. & Prof. Code, § 1902.1), the Board has developed additional categories of unprofessional conduct to ensure safety of the

public.

First, the Board proposes to include providing false statements to the Board because such conduct could lead to compromised care for the patient. This proscription encourages licensees to be truthful and forthright in their care of patients.

Second, the Board proposes to include failure to provide requested documentation to the Board because a licensee's provision of requested documentation furthers timely investigations and promotes protection of the public.

Third, the Board proposes to include failure to cooperate with Board investigations because evidence a licensee provides to the Board is especially probative of the appropriateness or lack of care provided to a patient. A licensee's cooperation furthers an accurate investigation by the Board to determine the merits of complaints against licensees.

Fourth, the Board proposes to include failure to report convictions and disciplinary actions against the licensee. Licensees are viewed as professionals guided by a "Code of Ethics" which states: "The Code establishes concise standards of behavior to guide the public's expectations of our profession and supports dental hygiene practice, laws and regulations. By holding ourselves accountable to meeting the standards stated in the Code, we enhance the public's trust on which our professional privilege and status are founded." (Code of Ethics for Dental Hygienists, American Dental Hygienists' Association, June 2020.) Depending on the nature and circumstances of the offense, which the Board would examine, a conviction could undermine public trust.

Factual Basis/Rationale

Adopt Section 1138.1 Unprofessional Conduct

Preface

The preface of the regulation states that unprofessional conduct includes the categories of conduct set forth in the list that follows. It states that the conduct included in the regulation is in addition to the conduct set forth in BPC sections 1950.5 and 1955.

This preface is necessary, so the reader understands that the conduct is in addition to conduct already proscribed by law, and is not exclusive list of unprofessional conduct.

Subdivision (a)

Subdivision (a) of the proposal provides that knowingly making any statement or signing any certificate or other document directly or indirectly related to the practice of dental hygiene which falsely represents the existence or nonexistence of a state of facts is unprofessional conduct.

The Board's highest priority is consumer protection. (Bus. & Prof. Code, § 1902.1.) It is necessary to include false representations of fact as acts of unprofessional conduct because such conduct could lead to compromised care for the patient. This category encourages licensees to be truthful and forthright in their care of patients. For instance, if an RDH were to administer an anesthetic containing epinephrine to a patient with high blood pressure, and a patient experiences an emergency necessitating treatment by a paramedic, knowingly misreporting the type of anesthetic used to the paramedic could compromise care of the patient and their eventual outcome. Additionally, this requirement is also consistent with requirements in other regulations. (See e.g., Cal. Code Regs., tit. 16, § 1104, subd. (e) ["A material misrepresentation of fact by a new educational program or an approved educational program in any information required to be submitted to the Committee is grounds for denial of approval or revocation of the program's approval."].)

Subdivision (b)

Subdivision (b) of the proposal provides that a licensee's failure to provide lawfully requested copies of documents within 15 calendar days of receipt of the request, or within the time specified in the request, to the Board unless the licensee is unable to provide the documents within this time period for good cause, is unprofessional conduct.

This requirement is necessary because a licensee's provision of requested documentation furthers timely investigations and promotes protection of the public. In the Board's experience, 15 calendar days is sufficient time for the licensee to access and copy records for submission to the Board. Additionally, the Board does not want to penalize the licensee if the licensee does not have access to the records. This requirement will encourage licensees to timely comply with requests. This requirement is also consistent with requirements in other regulations. (See e.g., Cal. Code Regs., tit. 16, § 1131 ["If the committee or its designee asks a licensee to provide criminal history information, a licensee shall respond to that request within 30 days. The licensee shall make available all documents and other records requested and shall respond with accurate information."].)

Subdivision (c)

Subdivision (c) of the proposal provides that failure to cooperate or participate in any Board investigation pending against the licensee, except for any privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory privileges, would be considered unprofessional conduct.

By cooperation and participation, the Board expects the licensee to assist the Board when it requests information during an investigation in a manner that does not require the licensee to provide criminally inculpatory information. This is necessary because evidence provided to the Board would be especially probative of the appropriateness or lack of care provided to the patient. A licensee's cooperation furthers an accurate investigation by the Board to determine the merits of complaints against licensees.

Additionally, the Board is excepting constitutional and statutory privileges because in these instances, the licensee has a legal right not to provide evidence to the Board. Therefore, it is necessary to state the instances in which the Board would not penalize a licensee for failure to provide information.

This requirement is also consistent with reporting requirements in other regulations. (See e.g., Cal. Code Regs., tit. 16, § 1131.)

Subdivision (d)(1)

Subdivision (d)(1) of the proposal provides that licensees must report to the Board within 30 calendar days the conviction of the licensee, including any verdict of guilty, or pleas of guilty or no contest, of any felony or misdemeanor.

As the Board's highest priority is protection of the public, the Board determined that as a licensee provides intimate care to their patients, certain convictions such as offenses against a person (e.g., assault) or sexual offenses (e.g., rape) would preclude contact with those patients. Furthermore, licensees are viewed as professionals guided by a "Code of Ethics" which states: "The Code establishes concise standards of behavior to guide the public's expectations of our profession and supports dental hygiene practice, laws and regulations. By holding ourselves accountable to meeting the standards stated in the Code, we enhance the public's trust on which our professional privilege and status are founded." (Code of Ethics for Dental Hygienists, American Dental Hygienists' Association, June 2020.) Depending on the nature and circumstances of the offense, which the Board would examine, a conviction could undermine public trust. Therefore, failure to report a conviction would negate legal and ethical standards as expected of RDHs.

Additionally, in the Board's experience, 30 days allows sufficient time for the licensee to request records associated with convictions of the licensee and to be copied for submission to the Board.

This requirement is also consistent with reporting requirements in other regulations. (See e.g., Cal. Code Regs., tit. 16, § 1131.)

Subdivision (d)(2)

Subdivision (d)(2) of the proposal provides that licensees must report to the Board within 30 calendar days any final disciplinary action taken by another licensing entity or authority of this state or of another state or an agency of the federal government or the United States military.

As the Board's highest priority is protection of the public, this requirement is necessary because disciplinary action taken by another agency may be directly related to the practice of the licensee. For example, a licensee with an RDH license in Nevada could be convicted of malpractice and their license be revoked. In such an instance, the Board

may want to review the RDH's records to ensure appropriateness of care provided to their patients in California.

Additionally, in the Board's experience, 30 calendar days is sufficient time for the licensee to request and/or copy records associated with the licensee's convictions and submit them to the Board.

This requirement is consistent with requirements in other regulations, (See e.g., Cal. Code Regs., tit. 16, § 1132, subd. (b) ["As a condition of renewal, a licensee shall disclose whether, in the prior renewal cycle, he or she has been convicted of any violation of the law in this or any other state, the United States, or other country, omitting traffic infractions under \$1000 not involving alcohol, dangerous drugs, or controlled substances. In addition, a licensee shall disclose any disciplinary actions against any other license he or she may hold."].)

Underlying Data:

- Senate Bill 1482 (Hill, Chapter 858, Statutes of 2018)
- Minutes: DHBC Full Board WebEx Teleconference, November 21, 2020
- Minutes: DHBC Full Board WebEx Teleconference, July 17, 2021
- "Code of Ethics for Dental Hygienists" from the American Dental Hygienists' Association, Adopted June 2020, retrieved June 6, 2021, from https://www.adha.org/resources-docs/7611_Bylaws_and_Code_of_Ethics.pdf

Business Impact:

This regulation will not have any economic impact on businesses. This initial determination is based on the following facts:

The proposed amendments to the regulation set forth additional conduct the Board considers unprofessional that is not included in BPC section 1950.5 and 1955.

Economic Impact Assessment:

This regulatory proposal will have the following effects:

The Board has determined that this regulatory action would not impact jobs within the State of California as the regulation sets forth additional conduct the Board considers unprofessional that is not included in BPC section 1950.5 and 1955.

The Board has determined that this regulatory action would not impact new businesses within the State of California as the regulation sets forth additional conduct the Board considers unprofessional that is not included in BPC section 1950.5 and 1955.

This regulatory proposal would not impact worker safety as the proposed language in the regulation does not involve worker safety.

This regulatory proposal will would positively impact the health and welfare of California residents as the regulation sets forth additional conduct the Board considers unprofessional, thereby holding RDHs accountable to adhere to acceptable standards of care when working with the public.

This regulatory proposal will not affect the state's environment because this proposed regulation does not involve environmental issues. The proposed regulation sets forth additional conduct the Board considers unprofessional that is not included in BPC section 1950.5 and 1955.

Specific Technologies or Equipment:

This regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

The Board has initially determined that no reasonable alternative to the regulatory proposal would be either more effective in carrying out the purpose for which the action is proposed or would be as effective or less burdensome to affected private persons and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the law being implemented or made specific.

Set forth below are the alternatives which were considered and the reasons each alternative was rejected:

1. Not adopt the regulation: This alternative was rejected by the Board as BPC section 1906 authorizes the Board to adopt regulations to implement BPC section 1950.5, which contains a non-exclusive list of acts considered to be unprofessional conduct.
2. Adopt the regulation: The Board determined that this alternative is the most feasible because it establishes a regulation for the Board to expand the list of acts the Board considers to be unprofessional conduct, thereby holding RDHs accountable to adhere to acceptable standards of care when working with the public.