STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

Board of Chiropractic Examiners
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Consumer Complaint Hotline (866) 543-1311
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NOTICE OF PUBLIC MEETING

Government Relations Committee

May 7, 2008
1:30 p.m.
2525 Natomas Park Drive, Suite 120
Sacramento, CA 95833

AGENDA

CALL TO ORDER

Approval of Minutes
- March 27, 2008

Public Comment

Discussion and Possible Action
- Board Member Use of State Issued E-Mail Accounts

Discussion and Possible Action
- Status of Implementing the March 25, 2008 Bureau of State Audits' Recommendations and 60 Day Status Report

Discussion and Possible Action
- Status of Implementing 2006 Sunset Review Report Recommendations

Public Comment

Future Agenda Items

ADJOURNMENT

GOVERNMENT RELATIONS COMMITTEE
Jim Conran, Chair
Frederick Lerner, D.C.

The Board of Chiropractic Examiners' paramount responsibility is to protect California consumers from the fraudulent, negligent, or incompetent practice of chiropractic care.

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DRAFT

BOARD OF CHIROPRACTIC EXAMINERS
MEETING MINUTES
Administrative Committee
March 27, 2008
400 R Street, Room 101
Sacramento, CA 95814

Committee Members Present
Jim Conran, Chair
Frederick Lerner, D.C.
Hugh Lubkin, D.C.

Staff Present
Brian Stiger, Executive Officer
LaVonne Powell, Senior Legal Counsel
Thomas Rinaldi, Deputy Attorney General
Marlene Valencia, Staff Services Analyst

Call to Order

Mr. Conran called the meeting to order at 9:32 a.m.

Roll Call

Dr. Lubkin called the roll. All committee members were present.

Board Member Administrative Procedure Manual Updates

Mr. Stiger recommended minor updates to the manual to reflect new officers, committees, deletion of a cited statute, and a new revision date for the manual.

MOTION: DR. LUBKIN MOVED THAT COMMITTEE ADOPT THE RECOMMENDED CHANGES TO THE MANUAL.
MOTION SECONDED: DR. LERNER SECONDED THE MOTION
VOTE: 3-0
MOTION CARRIED

Interagency Agreement with the Department of Consumer Affairs (DCA)

Mr. Stiger recommended that the Board enter into a two year contract with DCA for personnel, fiscal, legal, public affairs, and IT services. He stated that these services are important to daily operations and that DCA has provided outstanding services over the course of the current contract.

Mr. Conran provided a historical perspective of the services that DCA has provided over the years and he recommended support of a proposed contract.

Dr. Lerner voiced his support for the services of DCA and the proposed contract.

Dr. Lubkin added his full support of the proposed contract.

Public Comment:
Dr. Charles Davis, International Chiropractic Association of California (ICAC) asked if the contract would authorize DCA to override any Board polices. Mr. Conran stated the purpose of the contract is to provide consulting services and that the Board continues to maintain the authority to develop and implement polices.

MOTION: DR. LERNER MOVED THAT THE COMMITTEE AUTHORIZE THE EXECUTIVE OFFICER TO CONTINUE TO NEGOTIATE AND ENTER INTO A CONTRACT WITH DCA AND PRESENT A COPY TO THE FULL BOARD UPON COMPLETION.
MOTION SECONDED: DR. LUBKIN SECONDED THE MOTION
VOTE: 3-0
MOTION CARRIED

State Issued E-mail Addresses for Board Members

Mr. Stiger presented the Bureau of State Audits' recommendation to establish e-mail accounts for all Board members.

Dr. Lerner supports the concept and voiced concerns about members of the public sending e-mails to Board members, raises the possibility of Bagley-Keene Act violations. Dr. Lubkin agreed.

Mr. Conran recommended approval of concept and asked that staff remind Board members how to protect themselves if they receive a questionable e-mail from the public.

MOTION: DR. LUBKIN MOVED THAT THE PROPOSAL TO ISSUE BOARD MEMBERS STATE ISSUED E-MAIL ADDRESSES BE RECOMMENDED TO THE FULL BOARD FOR APPROVAL.
MOTION SECONDED: DR. LERNER SECONDED THE MOTION
VOTE: 3-0
MOTION CARRIED

Investigator Contracts

Mr. Stiger announced that he terminated two private investigator contracts because the individuals were not licensed. Further, he stated that the Enforcement Committee supported a proposal for the Board to establish its own Special Investigator positions and if the Board moved in this direction the

DRAFT

two remaining contracts would expire on June 30, 2008.

Mr. Conran expressed his concern that previous management entered into contracts with unlicensed individuals and praised the Executive Officer for taking swift action to resolve.

Public Comment:

Dr. Davis asked Mr. Stiger what the backlog was on consumer complaints, how many complaints would be assigned to investigators and what is the timeline on hiring the investigators.

Mr. Stiger stated the complaint backlog amounts to about 600 complaints and the investigator proposal would take some time to bring the investigators on board. He said if AB 450 is passed the Board would immediately begin refilling positions to address the backlog.

Future Agenda Items:

Dr. Lerner reminded Mr. Stiger to ensure the revised manual includes the revision date to ensure the public references the most current version of the Board Member Administrative Manual.

ADJOURNMENT

Mr. Conran adjourned the meeting at 9:55 a.m.

DRAFT

(Agency response provided as text only.)

Board of Chiropractic Examiners
2525 Natomas Park Drive, Suite 260
Sacramento, California 95833-2931

March 10, 2008

Elaine M. Howle, State Auditor*
California Bureau of State Audits
555 Capitol Mall, Suite 300
Sacramento, CA 95814

Dear Ms. Howle:

Enclosed is the State Board of Chiropractic Examiners' (BCE) response to your draft audit report. The BCE thanks you for the opportunity to respond to the recommendations.

We would like you to know that the (BCE) welcomed this audit from its inception. For the past two years, board members have expressed concerns about the effectiveness and efficiency of BCE operations including personnel, enforcement procedures, financial and legal aspects. We believe the audit may have been improved if board members who were present during the audit period were interviewed. (1)

Additionally, we found that many facts and findings of the audit were based on what occurred at the BCE prior to March of 2007; however, the draft audit report does not clearly articulate the significant improvements that were implemented after March of 2007. We believe the readability of the final audit report would be improved if the time periods were identified. (2)

We concurred with all but two of the forty-three recommendations. Most of your recommendations, as you will read from the responses, have already been implemented, with plans to meet or exceed your recommendations pending restoration of our funding. The BCE has been, and continues to be, very committed to improving Board governance, enforcement, licensing, and continuing education functions.

Sincerely,

(Signed by: Dr. Fredrick N. Lerner)

Dr. Frederick N. Lerner, D.C., Ph.D.
Board Chair

Sincerely,

(Signed by: Brian J. Stiger)

Brian J. Stiger
Executive Officer

* California State Auditor's comments begin on page 113.

Bureau of State Audit Recommendations and Agency Responses
Chapter One

(The following responses to the BSA recommendations were prepared by the board chair and executive officer. The full audit report and agency response will be placed on the agenda for a future public board meeting for a full discussion and possible board action.)

To ensure that it complies with all Bagley-Keene requirements, the chiropractic board should:

- *Continue to involve legal counsel in providing instruction and training to board members at each meeting.*

The Board of Chiropractic Examiners (BCE) concurs with this recommendation. The BCE recognized in March 2007, that all board members did not fully understand the requirements of Bagley-Keene. With the appointment of three new board members on or about March 1, 2007, the former board chair instructed the acting executive officer to place Bagley-Keene training on the agenda of every board meeting beginning April 2007. Senior staff counsel from the Department of Consumer Affairs (DCA) provides the training and serves as the BCE in-house counsel. This interactive training has been well received by the board members and continues to be an important part of each board meeting.

- *Continue to retain documentation of the steps it takes to publicly announce its meetings.*

The BCE concurs with this recommendation. Since March 23, 2007, the BCE has publicly posted meeting agendas on its website in accordance with Bagley-Keene. In an effort to confirm the timely postings of future board meeting agendas, the BCE has instituted a check list that will be signed by the board member liaison and confirmed by the executive officer. Additionally, the board member liaison will print the agenda from the website, which includes the posting date.

To ensure that the chiropractic board complies with administrative procedure act requirements, board members should ensure they limit their communications related to board business so they do not engage in ex parte communications or compromise their ability to fulfill their responsibility in enforcement hearings.

The BCE concurs with this recommendation. Since April 2007, the board members have received extensive training on the requirements of Bagley-Keene and Administrative Procedure Act. The board members are committed to conducting themselves in accordance with these laws and seeking legal advice whenever they have a question. DCA staff counsel has noted on several occasions that the board members have been conducting themselves in an exemplary manner since receiving their initial training.

To ensure compliance with the initiative act, the chiropractic board should modify its current process so that board members make the final decision to approve or deny all licenses. Additionally, board members should ratify the previous license decisions staff made.

The BCE needs to consider options to implement this recommendation. The BCE agrees that absent a regulation delegating the decision to issue a license to BCE staff, the members must make the final decision to approve a license application.

However, the BCE respectfully disagrees that the board members must vote to deny issuance of a license. This would be a direct conflict with current BCE regulations that delegate to the executive officer the filing of all statements of issues. It would also violate the ex parte prohibitions contained in the Administrative Procedure Act and would result in any board member who voted to deny the issuance of a license having to recuse himself or herself if a proposed decision came to the board members for a vote. (3)

To comply with the political reform act, the chiropractic board should do the following:

- *Ensure that its filing official is aware of the role and responsibilities and similarly, promptly inform anyone replacing the filing official.*

The BCE concurs with this recommendation. The executive officer updated the filing officer's duty statement and explained the role, duties, and responsibilities of the position to the employee. On February 27, 2008, the filing officer attended and completed training provided by the Fair Political Practices Commission on the role of a filing officer. The BCE will develop a desk manual for the filing officer by July 1, 2008.

- *Establish an effective process for tracking whether all designated employees, including board members, have completed and filed their statements of economic interests on time, to identify potential conflicts of interest.*

The BCE concurs with this recommendation. The BCE plans to address this issue in the filing officer's desk manual, which will be completed by July 1, 2008.

- *Periodically review its employees' responsibilities to ensure that all individuals who are in decision-making positions are listed as designated employees it its conflict-of-interes code.*

The BCE concurs with this recommendation. On a yearly basis the BCE will review the duties of all employees and ensure those in decision-making positions are designated employees pursuant to the conflict-of-interest code.

The chiropractic board should consider providing state e-mail accounts to its board members so they conduct their chiropractic board business in a secure and confidential environment and make their actions and correspondence accessible under public records act requests.

The BCE will place this item on the agenda for the next administrative committee meeting for discussion and possible action. If adopted by the committee it will be placed on the agenda for a future public board meeting.

To ensure that they continue to improve their knowledge and understanding of Bagley-Keene, other state laws, and board procedures, board members should continue to use their newly adopted administrative manual as guidance for conducting board business.

The BCE concurs with this recommendation. The BCE developed and adopted its first Board Member Administrative Manual on October 25, 2007, as a tool to improve board governance. The BCE will update the manual as needed to address issues as they arise.

To ensure that it complies with Bagley-Keene requirements and state laws requiring board members to attend training within specific time frames, and to ensure board members receive orientation within a reasonable amount of time of assuming office, the chiropractic board should:

- *Ensure staff retain documentation when they provide a copy of the Bagley-Keene to each board member.*

The BCE concurs with this recommendation. Beginning with the appointment of three new board members on or about March 2007, the board member liaison has maintained a file that documents when copies of Bagley-Keene are provided to board members.

- *Continue to use the member appointment checklist and establish procedures to periodically record and monitor board member training.*

The BCE concurs with this recommendation and has been utilizing the board member appointment checklist since March 2007. The BCE plans to have written procedures in place by July 1, 2008, to record and monitor board member training. Further, the Board Member Administrative Manual will be updated to include a listing of required training with specific timeframes.

- *Continue the practice of sending new board members to the orientation that Consumer Affairs provides.*

The BCE concurs with this recommendation. All current board members have completed this orientation offered by the DCA. The three newest board members completed this training within the first year of appointment. The BCE considers board member orientation as required training and will update the Board Member Administrative Manual to reflect this requirement.

Bureau of State Audit Recommendations and Agency Responses
Chapter Two

To ensure that it has adequate controls over its complaint review process, the chiropractic board should do the following:

- *Develop procedures to ensure that the chiropractic board processes and resolves complaints as promptly as possible by establishing benchmarks and more structured policies and procedures specific to each step in its complaint review process.*

The BCE concurs with this recommendation. The BCE is currently collecting and analyzing data to propose performance measures to the board members at its July 2008 meeting. The BCE will complete internal policies and procedures to monitor complaint handling time and address problematic areas.

- *Establish time frames for staff to open complaint cases, complete initial review, refer cases to an investigator or expert if necessary, and close or otherwise resolve complaints through implementing informal discipline or referring for formal discipline to ensure that all complaint cases move expeditiously through each phase of the complaint review process.*

The BCE concurs with this recommendation. The BCE expects all consumer complaints to be acknowledged and opened in our database within 10 days of receipt. The BCE anticipates establishing timeframes for each phase of the enforcement process by July 2008.

Beginning with the FY 07/08, the BCE implemented steps assigned case management responsibilities to the enforcement analysts. In this role, the same enforcement analyst has responsibility to monitor the case from complaint analysis through the formal discipline phase. The BCE has established a monthly reporting requirement of pending cases generated through the enforcement database and status reports compiled by the enforcement analysts. These reports are reviewed monthly by BCE management.

- *Periodically review the status of all open complaints and investigations and identify and resolve any delays in processing.*

The BCE concurs with this recommendation. The BCE management reviews monthly workload reports, status reports, conducts staff meetings, and meets with individual staff members to resolve delays in processing.

- *Strengthen its enforcement policies and procedures to minimize the amount of time it takes staff to process consumer complaints before forwarding them to the attorney general or other law enforcement agency to ensure that it adequately assists attorneys and law enforcement agencies in enforcing the laws of chiropractic.*

The BCE agrees that improving the complaint handling and investigative process has positive effects on the ability of the attorney general and other law enforcement agencies to perform their jobs. The BCE collaborates with state and federal agencies and local law enforcement to protect the health and safety of California consumers.

To ensure that its enforcement procedures are complete and provide adequate guidance to enforcement staff, the chiropractic board should do the following:

- *Develop policies and procedures requiring that only a manager or a designated employee are allowed to make the final decisions on complaint resolution.*

The BCE concurs with this recommendation. The BCE implemented a review and approval process beginning in December 2007 in which all final decisions on complaint cases are made by the executive officer. The enforcement analysts review and analyze all of the available information and submit written recommendations along with the complaint file to the executive officer. The executive officer conducts a final review and makes the final decision. The BCE anticipates hiring an enforcement manager in the future who will assume this role.

- *Develop procedures to ensure that staff reports the issuance of citations to other states' chiropractic boards and regulatory agencies.*

The BCE reports disciplinary actions to the Federation of Chiropractic Licensing Boards which serves as a clearing house for all chiropractic licensing boards across the United States. The BCE is currently evaluating the most effective way to report the issuance of citations to other agencies keeping mind that citations are not considered discipline. The BCE expects to resolve this issue by July 1, 2008.

- *Develop procedures instructing staff when to open and how to process complaints generated internally.*

The BCE concurs with this recommendation. The BCE's updated procedures will define an internal complaint and include guidelines to assist staff determine when to generate an internal complaint. Potential internal complaints that fall outside the guidelines will require management review and approval.

To ensure that it processes and resolves consumer complaints regarding the same allegations consistently and that it consistently processes consumer complaints according to its enforcement policies and procedures, the chiropractic board should strengthen its existing procedures to provide guidance for staff on how to process and resolve all types of complaints and to ensure appropriate management oversight.

The BCE concurs with this recommendation. The BCE's updated procedures will provide instructions and guidelines to assist staff process complaints and make recommendations on disciplinary matters.

Additionally, the BCE will provide staff with formal training from the Attorney General's office, in-house staff counsel, and on the job training to ensure staff have the necessary tools to perform their duties.

To ensure that its processes for prioritizing consumer complaints are adequate and effective to ensure that staff clearly identify and process priority complaints promptly, the chiropractic board should do the following:

- *Implement tracking methods, such as flagging priority cases during complaint intake, using multiple levels of priority categories, and assigning specific time frames to process those priority categories.*

The BCE concurs with this recommendation. Effective April 1, 2008, the BCE will implement a new complaint review process that places consumer complaints into three categories: Urgent (Highest Priority), High, and Routine. Urgent complaints will receive the most focus and the shortest time frames for completion.

- *Establish procedures that direct board management to monitor the status of open complaints regularly especially those given priority status, to ensure that they do not remain unresolved longer than necessary.*

The BCE concurs with this recommendation. The BCE anticipates filling the vacant enforcement manager position in July 08 pending budget approval. The enforcement manager will be responsible and held accountable to ensuring all complaint investigations are processed timely.

To ensure that it is in compliance with all of its regulations, the chiropractic board should carefully consider the intended purpose of the quality review panels and whether implementing them is the best option to fulfill that intent. If the chiropractic board decides that another option would better accomplish the intended purpose of the quality review panels, it should implement the process for revising its regulations.

The BCE concurs with this recommendation. The Board has begun the review of both the feasibility and the intended purpose of the "quality review panels" found in Section 306 of its regulations. The Board has heard from licensees, associations, representatives from the Center for Public Interest Law, DCA staff counsel and the liaison deputy attorney general assigned to the Board regarding the options to ensuring that the Board's enforcement program is operating in the best manner possible.

To ensure that it has necessary resources to answer technical questions regarding quality of care and improper treatment that often arise, the board should fill and maintain its chiropractic consultant position. In addition, the board should ensure that its chiropractic consultant acts only in an advisory capacity and that the executive officer makes the final decision.

The BCE respectfully disagrees with the recommendation that the Board fills and maintains its chiropractic consultant position. The BCE does not want to limit its initial review of complaints to only one person because he or she would only be able to bring his or her own education, training, and experience to the position. This is too limiting and would inevitably lead to a myopic review of complaints. Additionally, no single consultant would have expertise in each practice style and school of thought plus the specialties within these various practice styles to provide competent expert advice. 4

To ensure that it adequately controls the use of experts, the chiropractic board should do the following:

- *Establish policies and procedures requiring its staff to document interviews with experts, including the content of those discussions to ensure that it refers cases to qualified experts who are free of conflicts.*

The BCE concurs with this recommendation. On March 27, 2008, BCE staff will present to the full board a proposed Expert Witness Guideline handbook, conflict of interest policy for all expert reviewers, and criteria for evaluating the qualifications of those of wish to become experts for the Board.

The BCE plans to follow up with the Attorney Generals Office providing training to those who wish to be hired as expert witnesses. The BCE is also looking into utilizing the same software program the Medical Board of California uses to document expert witness training, evaluations, areas of expertise and other pertinent information.

- *Consider entering into formal written contracts for services from experts or require them to provide written attestations that they are free of conflicts in cases assigned.*

The BCE concurs with this recommendation. The BCE has gathered examples of other licensing boards' expert witness contracts including conflict of interest and confidentiality provisions. The BCE will review these samples and create its own contract containing conflict of interest and confidentiality provisions.

- *Strengthen its policies and procedures to ensure that its staff monitor experts on their adherence to the established 30-day deadline for reviewing complaint cases and submitting a written report.*

The BCE concurs with this recommendation. The BCE has drafted procedures that enforcement analysts will use to monitor and follow up on performance expectations.

Prior to the case being sent to the expert, the analyst will contact the expert and provide a brief overview of the case and discuss any potential conflicts. Within three days of receiving the case, the expert must contact the analyst and confirm that a report will be submitted within 30 days. The analyst will follow up with the expert at approximately 15 days for a status update. Depending on the specifics of the case, an extension may be granted for good cause. The BCE will not tolerate any unacceptable delays.

- *Consistently perform an evaluation of the expert's written report and thoroughly document the results of the evaluations to ensure that it does not inappropriately refer complaint cases to experts who have not demonstrated quality work in the past.*

The BCE concurs with this recommendation. The BCE will draft evaluation reports that will be completed by BCE staff and the deputy attorney general assigned to the case. These evaluations will be kept on a file and reviewed prior to assigning cases to expert witnesses.

To ensure that the chiropractic board can demonstrate that its employees meet the minimum qualifications for their positions, it should retain personnel documentation on all employees according to record retention policy. In addition, the chiropractic board should require its personnel contractor to comply with the same requirements.

The BCE concurs with this request. On March 14, 2007, the BCE contracted with the Department of Consumer Affairs for personnel services. Subsequent to the initiation of the contract, the BCE began the process of disbanding its personnel office. The DCA personnel office reviews and approves all personnel transactions and maintains relevant documents in the headquarters office.

To ensure that future chiropractic consultants are hired with the desired qualifications, the board should consider revising the position's minimum qualifications to provide additional clarity on the term practice of chiropractic, similar to the board's current requirements for experts.

(4) The BCE does not intend to use the chiropractic consultant at this time.

(5) If the BCE decides to use this classification in the future, it will first revisit the classification concept and most certainly revise the classification specification to clarify minimum qualifications and typical duties. The BCE is currently reviewing the scope of practice as it was defined in 1922 according to the Chiropractic Act. The BCE can only define the term "practice of chiropractic" according to the Act.

Bureau of State Audit Recommendations and Agency Responses
Chapter Three

To ensure that it is able to measure the overall efficiency of its licensing program in processing applications and petitions, the chiropractic board should do the following:

- *Establish time frames for all types of applications and petitions the board processes.*

The BCE concurs with this recommendation. The BCE will analyze current processes to identify opportunities to reduce cycle time, improve quality, and decrease costs. Once completed, the BCE will establish performance measures to monitor the processing times.

- *Establish a tracking system for applications and petitions to analyze where delays are occurring and ensure that applications and petitions are processed promptly.*

The BCE concurs with this recommendation. As stated above, the BCE will analyze current processes to identify opportunities to reduce cycle time, improve quality, and decrease costs. Once completed, the BCE will establish performance measures to monitor the processing times.

- *Establish a time frame for resolving appeals that includes milestones for each phase of the process.*

The BCE concurs with this recommendation. As stated above, the BCE will analyze current processes to identify opportunities to reduce cycle time, improve quality, and decrease costs. Once completed, the BCE will establish performance measures to monitor the processing times.

To ensure that it only licenses those who are committed to following its laws and regulations, the chiropractic board should develop specific policies and procedures for staff to follow when the board has received a complaint against an applicant seeking licensure.

The BCE concurs with this recommendation. The BCE will update its procedures to include a reference and training on Business and Professions Code section 480.

To ensure that the chiropractic board is able to defend its decisions on approved applications for satellite offices, corporations, and referral services, it should implement a standard of required documentation that includes identifying when and who conducted eligibility verifications.

The BCE concurs with this request. The BCE will include signed checklists in licensing files to document that eligibility verifications were completed.

To ensure that it is placing licenses on forfeiture status according to the initiative act, the chiropractic board should do the following:

- *Establish specific procedures for staff to follow when licensees submit invalid payment when renewing licenses.*

The BCE concurs with this recommendation. The BCE will consult with the Department of Consumer Affairs to establish procedures to address dishonored checks.

- *Establish a tracking method to ensure that requests for repayment are sent promptly.*

The BCE concurs with this recommendation. The BCE will consult with the Department of Consumer Affairs to establish procedures to address dishonored checks and track repayments.

To ensure that the chiropractic board's continuing education program complies with current regulations, it should do the following:

- *Have board members ratify staff approvals of continuing education providers.*

The BCE concurs with this request. The BCE will incorporate board member ratifications of continuing education providers as appropriate.

- *Ensure its process to approve continuing education providers conforms with its regulations.*

The BCE concurs with this request. The BCE is in the process of reviewing the current process and identifying areas for improvement. Once completed, the BCE anticipates promulgating regulations to reflect these changes.

- *Comply with requirements for notifying providers of board member approval within two weeks following a scheduled board meeting and for notifying providers of application deficiencies within three weeks of receiving the application.*

The BCE concurs with this recommendation. The BCE will work with staff to coordinate board member ratifications and provider notifications pursuant to existing regulations. BCE management will monitor to ensure timeframe are being met.

- *Establish a process to track and monitor whether continuing education providers submit attendance rosters within 60 days of course completion.*

The BCE concurs with this recommendation. The BCE will develop a tracking tool to use to ensure providers are submitting rosters with 60 days of course completion.

- *Establish a procedure for maintaining accurate documentation of continuing education audits of licensees.*

The BCE concurs with this recommendation. The BCE will draft procedures to ensure accurate record keeping.

- *Establish a mechanism to ensure that all relevant steps are taken before continuing education audits are considered complete.*

The BCE concurs with this recommendation. The BCE will include a staff checklist and management review to ensure all relevant steps completed.

- *Establish a process to track course audits conducted and a procedure for taking corrective action when the course reviewer identifies a deficiency.*

The BCE concurs with this recommendation. The BCE is revamping its course audit function to increase course audits and take appropriate action to correct deficiencies.

Joint Committee on Boards, Commissions, and Consumer Protection

BACKGROUND PAPER FOR HEARING
December 6, 2005

BOARD OF CHIROPRACTIC EXAMINERS

BACKGROUND, IDENTIFIED ISSUES, AND QUESTIONS

BRIEF OVERVIEW OF THE CHIROPRACTIC PROFESSION AND THE BOARD OF CHIROPRACTIC EXAMINERS

Chiropractors provide non-drug, non-surgical health care through treatment of the musculoskeletal and nervous systems and manipulation of the spinal column and bony tissues.

The Board of Chiropractic Examiners (Board) was created on December 21, 1922, as the result of an initiative measure approved by California voters on November 7, 1922. The Board is a seven-member policy-making body. Five professional members and two public members appointed by the Governor serve four-year terms.

Member's Name	Appointed By	Type	Term Expires
Barbara Stanfield, D.C. – Chair	Governor	Professional	02/10/07
R. Michael Hamby, D.C. – Vice Chair	Governor	Professional	02/10/08
Richard H. Tyler, D.C. – Secretary	Governor	Professional	02/10/08
David F. Yoshida, D.C.	Governor	Professional	02/10/06
Ronald G. Hayes, D.C.	Governor	Professional	02/10/06
Judge James Duvara, RET	Governor	Public	11/03/08
Vacant	Governor	Public	

The Board's mission is to protect consumers from fraudulent or incompetent chiropractic practice, examine applicants for licensure in order to evaluate entry level competence, and enforce the Chiropractic Initiative Act (Act), statutes, and regulations relating to the practice of chiropractic.

The Board's regulatory program also approves chiropractic schools and colleges whose graduates may apply for licensure in California and approves continuing education.

As a quasi-law enforcement agency, the Board enforces laws and regulations pertaining to the practice of chiropractic in California.

In FY 2004/05 the Board had a license base of 15,412 -- 14,206 active and 1,206 inactive licensees.

Board committees are generally made up of two members who are appointed by the Board Chair. The current committees are the Administrative Committee, Continuing Education Committee, the Examination/Licensing Committee, Enforcement Committee, Legislative Committee, Regulation Committee and the Sunset Review Committee. The committees are scheduled to meet during open session meetings held three times a year. Additionally, the committees may meet as needed; however, they have no authority independent of the Board.

The Board maintains a single office in Sacramento, which is staffed by the Board's Executive Director, who oversees a staff of 12 permanent full-time employees and one part-time employee.

In November 2004, the Board hired a new Executive Director to continue what the Board calls an aggressive program enhancement begun by prior administrators. Additionally, the Board says the office was restructured to effectively utilize positions and to improve communication.

The Board says that its educational requirements are designed to ensure the entry level competence of a chiropractor prior to licensure, while its continuing education function ensures licensees maintain up-to-date knowledge of advances in the chiropractic profession.

The Board's enforcement program disciplines licensees who violate the laws and regulations governing the practice of chiropractic. The Board contracts out for its investigative services and the Board states that the timeframe for investigation completion has shortened considerably over the last four years.

The Board's website is continually being updated, according to the Board. The consumer can verify license status and check disciplinary actions or citations on-line, as well as access consumer complaint processing information. All of the Board's forms are available on the website. Through the website, licensees have

immediate access to the Act, the regulations governing the profession, and up-to-date information on Board-approved continuing education providers and courses.

The Board states that its Licensing Unit continues to revise and update its various renewal forms. In February 2004, the Board implemented the new Chiropractic Law and Professional Practices examination through computer-based testing.

Because the Board was created by an initiative that does not permit amendment by the Legislature, the Legislature is without the power to sunset the Board or repeal the state's regulation of chiropractic. The Legislature could, however, place proposed reform statutes before the electorate by a two-thirds vote and seek the electorate's approval.

PRIOR SUNSET REVIEW

The Board was last reviewed by the Joint Legislative Sunset Review Committee (JLSRC) during 2001-2002. At that time, the JLSRC, which has been renamed the Joint Committee on Boards, Commissions and Consumer Protection (JCBCCP), identified a number of problem areas concerning this Board and directed the Board to address these concerns and implement a number of recommended changes. Those recommendations included the following.

- Recommended the continued regulation of chiropractors in order to ensure public health and patient safety;
- Recommended the continuation of the Board;
- Recommended that all current and future provisions of the Business and Professions Code that apply to other health-related practitioners and licensing boards should also apply to chiropractors;
- Recommended that the Board add two new public members for a total of nine members (five professional and four public);
- Recommended that the Board continue with its plan to address an excessive fund reserve by further strengthening its enforcement program and dealing with staffing changes;
- Recommended that the Board review its current requirements for reciprocal licensure and implement more efficient and appropriate terms for establishing reciprocity; and,
- Recommended that the Board continue to study the issue of whether a Bachelor's Degree should be required for licensure as a chiropractor.

Since its last review, the Board states that it has been aggressively pursuing regulatory enhancements to broaden its enforcement, licensing, and continuing education requirements. The following is a list from the Board's Sunset Review Report of the regulation changes enacted since the 2001 review. Each of them is described in more detail in Exhibit 6 to the Report.

- Section 306.2 – Persons Hired By or Under Contract with the Board.
- Section 306.3 – Investigators; Authority to Inspect Premises.
- Section 308 – Display of License.
- Section 317(h) – Unprofessional Conduct.
- Section 325.1 – License Reapplication.
- Section 326 – Criteria for Rehabilitation.
- Section 331.12.2(e)(1) – Curriculum.
- Section 355.1 - Continued Jurisdiction of a License.
- Section 356.1 – Cardiopulmonary Resuscitation/Basic Life Support.
- Section 360 – Continuing Education Audits.
- Section 386 – Fraud.
- Section 390.2 – Violation Codes and Penalties (Citation Program).

The Board has also since the last review been included in legislation designed to bring the Board into line with other health practitioner licensing boards.

As part of the 2003-04 budget, $4 million from the Board's reserve was involuntarily loaned to the General Fund. To date none of the loan has been repaid, but it will have accumulated interest in excess of $180,000 by the end of the current fiscal year, based on the pooled money rate.

The following are areas of concern for the Joint Committee, along with background information concerning the particular issue. There are questions that staff have asked concerning the particular issue. The Board was provided with these issues and questions and is prepared to address each one if necessary.

CURRENT SUNSET REVIEW ISSUES

ISSUE #1: Should the Board of Chiropractic Examiners be continued?

Issue #1 question for the Board: *Is an appointed board the most appropriate regulatory entity for the profession? Why or why not? Why is an independent board more appropriate than a bureau with more direct accountability to the Governor? Does the profession continue to necessitate regulation in the first place?*

Background: California Business and Professions Code Section 473.3 states that "Prior to the termination, continuation, or reestablishment of any board or any of the board's functions," the Joint Committee on Boards, Commissions, and Consumer Protection is required to hold public hearings, during which "each board shall have the burden of demonstrating a compelling public need for the continued existence of the board or regulatory program, and that its licensing function is the least restrictive regulation consistent with the public health, safety, and welfare."

Additionally, Governor Schwarzenegger proposed in January of this year to eliminate 88 boards and commissions, including eliminating all of the boards within the Department of Consumer Affairs and converting most of them to bureaus. This Government Reorganization Proposal was based partly upon recommendations from the Governor's California Performance Review (CPR), but went further in recommending board elimination than did the CPR. The Governor withdrew this proposal in February.

Of note, this Board is not situated within the Department of Consumer Affairs. The Board's stand-alone structure places it outside of the administrative services and oversight functions provided by the Department. As a result of this unique structure, the Department does not monitor the operations of the Board and is in a limited position to offer meaningful comment on its operation. An initiative statute would be required to eliminate the Board or place it under the jurisdiction of the Department or another agency. In the past there did not appear to be any need to change the current regulatory structure for the chiropractic profession. If the Board is eliminated and a desire to regulate the profession still exists another entity would have to be given that responsibility.

Issue # 2: Are statutes enacted by the Legislature since 1923 related to the regulation of chiropractic constitutional?

Issue #2 question for the Board: *Are statutes enacted by the Legislature since 1923 related to the practice of chiropractic vulnerable to a legal challenge and, if so, what steps can be taken to protect them?*

Background: Many statutes enacted by the Legislature since 1923 relating to the practice of chiropractic may be legally precarious. The uncodified Act was enacted in 1922. Eight subsequent initiatives have been enacted. Unlike many initiatives that contain provisions allowing for the Legislature to amend the initiative to further the initiative's purposes, neither the Act nor its successor initiatives contain provisions permitting any amendment by the Legislature at all.

Article II, section 10(c) of the California Constitution states that the "Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval." This means that the Legislature without a vote of the electorate may not enact statutes that amend initiative statutes unless the initiative statute so provides. "When a statute enacted by the initiative process is involved, the Legislature may amend it only if the voters specifically gave the Legislature that power, and then only upon whatever conditions the voters attached to the Legislature's amendatory powers." (*Amwest v. Wilson* (1995) 11 Cal.4th 1243, 1251)

The purpose of California's constitutional limitation on the Legislature's power to amend initiative statutes is to "protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent." (*Huening v. Eu* (1991) 231 Cal.App.3d 766, 781." *See also Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1483-84

The determination of what constitutes an amendment to initiated statutes is purely a question of law, invoking *de novo* judicial review. (*See*, e.g., *Mobilepark West Homeowners Assn. v. Escondido* (1995) 35 Cal.App.4th 32.) An amendment is a "legislative act designed to change some prior or existing law by adding or taking from it some particular provision." (*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1485)

Where there is doubt as to whether or not a statute enacted by the Legislature constitutes an amendment, courts will seek first and foremost to effectuate the intent of the electorate which, where the Act is concerned, was apparently an intent to completely bar amendment by the Legislature. Article IV, section 1 of the California Constitution establishes the initiative power as a legislative power "reserved" to the "people" "themselves." Courts have long held that "the initiative power must be liberally construed to promote the democratic process" and that courts have a "solemn duty to guard the precious initiative power and to resolve any reasonable doubts in favor of its exercise." (*Gerken v. Fair Political Practices Comm'n.* (1993) 6 Cal4th 707, 721 (Baxter, J. concurring)

Here, the questions are, "what is the intended breadth of the Act and the subsequent initiatives?" And, "how much of the Legislature's authority to regulate chiropractic was occupied by the electorate; how much – if any – remains for the Legislature?" These questions must be answered to determine

whether or not a statute enacted by the Legislature constitutes an amendment to the Act and subsequent initiatives.

In *Proposition 103 Enforcement Project v. Quackenbush*, *supra*, the Second District considered in part whether a statute that had the impact of reducing rate refunds under Proposition 103 was an amendment to that initiative.

Importantly, the Court held that the mere intrusion upon the authority and discretion of the regulator – the Commissioner, made elected by the voters in the initiative – constituted legislation that "took away" from the initiative and, hence, was an amendment.

> "Applying these principles to the case here, it is apparent that section 769.2 is an attempted amendment of Proposition 103, because the section both 'takes away' from the provisions of the Proposition and changes its scope and effect. Proposition 103 made the position of Commissioner an elected rather than appointed position, thus making the Commissioner responsive to the voters, not the Legislature. Proposition 103 authorized the Commissioner, not the Legislature, 'to adopt a ratemaking formula to implement the rate rollback requirement provision-specifically, to determine whether, for an individual insurer, a maximum rate for the rollback year higher than 80 percent of the 1987 rate is required to avoid confiscation and, if so, what such higher maximum rate is.' As the Commissioner concedes, under Proposition 103, it is the Commissioner, not the Legislature, who is to determine the minimum nonconfiscatory rate. Thus, because section 769.2 removes from the Commissioner the discretion to determine whether any or all of the taxes and commissions paid by an insurer (which were paid by the insurer in connection with collecting premiums which were higher than the allowable at-least-20-percent-less-than-the-1987-premiums) were reasonable expenses and deductible from the insurer's gross premiums (which premiums in turn form one factor in determining the insurer's actual rate of return on its capital investments), the enactment of section 769.2 'takes away' from the provisions of Proposition 103, which vest ratemaking determinations with the Commissioner."

(*Id.* at 1488)

To the extent that the Act and subsequent initiatives were intended by the electorate to establish a system whereby the chiropractic profession was to be regulated solely or mostly by the Board, the Legislature may be powerless to enact statutes addressing those particular issues.

Observe that even an amendment that the Board agreed with could be void if enacted by the Legislature. The issue raised by *Amwest* and its progeny is not whether an amendment is good or bad. The question is one of power; of whether the Legislature has the power to tread upon amendment turf the electorate has staked out as its own.

A cursory review of some of the statutes enacted by the Legislature dealing with the chiropractic profession shows that many may be of precarious legality. Examples include:

- B&P Code section 1050, et seq., addressing chiropractic corporations;
- B&P Code section 650, banning kickbacks for referrals; and,
- Many of the forty-eight provisions of the B&P Code made applicable to the Board just this year by SB 1913, B&P Code section 1005 (cite and fine power for violating regulations; "deadbeat dads" must be refused license renewal; reinstatement of license lapsed while serving in armed forces; falsifying a license made a crime; failure to record cash transactions as ground for discipline; prohibition against Board asking in application for license for arrest records where arrest did not lead to conviction or plea; grounds for denial of a license).

These statutes are identified for illustrative purposes only. This analysis does not constitute an answer one way or the other as to whether these or other statutes are definitively invalid or definitively beyond challenge.

However, given (i) the number of chiropractic statutes enacted by initiative; (ii) the number of statutes enacted by the Legislature dealing with the chiropractic profession; and (iii) the increasing use of Article II, section 10(c) as a weapon to attack the lawfulness of statutes, it makes sense for the Board and stakeholders to (a) catalogue chiropractor-related statutes enacted by the Legislature; (b) obtain an opinion as to their likely lawfulness; and (c) take pro-active steps to protect statutes by considering such measures as placing them on the ballot.

ISSUE #3: Should the current composition and make-up of the Board, with five professional and two public members, be changed?

Issue #3 question for the Board: *Should two new public members be added to the composition of the Board, with one being appointed by the Senate Rules Committee and the other being appointed by the Assembly Speaker?*

Background: As part of the last review, the Joint Committee recommended that two additional public members be added for a total of nine members (five professional and four public). The appointing authority should be given to the Legislature with one of the new members appointed by the Senate Rules

Committee and the other by the Assembly Speaker. Currently, the Board is unique in that all seven members of the Board are appointed by the Governor with no appointments made by the Legislature.

The Joint Committee based its recommendation on the premise that this composition would provide adequate public representation while continuing to maintain the expertise needed for chiropractic issues. Requiring closer parity between public and professional members is consistent with both this Committee's and the Department of Consumer Affairs' recommendations regarding other boards that have undergone sunset review.

This recommendation was included in SB 1954 in 2002. However, due to the approximate cost of $200,000 to the General Fund to print the amendments to the Act for the 2004 statewide election, the bill was not passed.

Comments in the Board's Sunset Review Report state that although the current composition of the Board has not been a problem in the past, and restructuring its composition would not affect its mission, the Board continues to have no objection to adding two additional public members to be appointed by the Senate and Assembly.

ISSUE #4: What is the status of the fund reserve and the General Fund loan, and what efforts, if any, should be taken to reduce the overall reserve?

Issue #4 question for the Board: *What is the status of the fund reserve including the General Fund loan, and what efforts are being made to reduce the overall reserve to a more reasonable level?*

Background: During the last two reviews the Joint Committee recommended that the Board continue with its plan to address excessive fund reserve by further strengthening its enforcement program and dealing with staffing shortages. Unfortunately, due to limits on establishing new positions that have existed for the past few years, the Board has had little success in expanding its staffing levels notwithstanding its surplus. In addition, in 2003-04, the General Fund borrowed $4 million from the fund surplus to help offset the General Fund shortages.

If you include repayment of the General Fund loan in the overall surplus the surplus totals just under $5 million over the past three years, and is estimated to be approximately $4.6 million in the current year and $4.2 million in the next budget year, which includes proposed staff increases. This translates into a reserve level of about two years, when a three- to four-month reserve is the recommended standard for most boards.

The Board's response to this issue in the Sunset Review Report states that the Board has consistently submitted budget change proposals (BCPs) for additional staff every fiscal year. Last fiscal year was the first full-time position the Board has been authorized by the Department of Finance. The Board will continue its efforts to augment staff in the budget year by requesting two support staff positions in enforcement; one support staff for licensing; and to restore the blanket funding for two retired annuitants. The Board has not proposed any other specific plan for reducing the reserve all the way to a more reasonable level.

According to the Board, the Department of Finance recently indicated that its intentions were to pay back the loan plus interest on July 1, 2006. Interest has been accumulating at 1.564 percent per year based on the pooled money rate.

ISSUE #5: Should the Board continue its efforts to improve on licensing reciprocity for applicants from other states and countries?

Issue #5 question for the Board: *What changes does the Board now recommend to improve on licensing reciprocity and how will these changes be accomplished?*

Background: As part of the last review the Joint Committee recommended that the Board review its current requirements for reciprocal licensure and implement more efficient and appropriate terms for establishing reciprocity. However, because implementation would require a change in the Act and a vote of the electorate, which involves considerable costs, an attempt to accomplish this failed. To date no further attempts have been made.

Section 5 of the Act and related regulations set forth requirements for reciprocal licensure. In order to assure that only competent practitioners are granted reciprocal licensure, applicants are required to meet the following requirements in order to reciprocate to California:

- Must be graduates from a Board-approved chiropractic college, and must have completed the minimum hours and subjects required by California law at the time their licenses were issued.

- Must have passed an equivalent examination in each of the subjects examined in California in the same year as the applicant achieved licensure; i.e., clinical competency, adjustive technique, physiotherapy, and x-ray.

- Must have 5 years of chiropractic practice and must hold a valid license from the state from which they are reciprocating; i.e., active and no disciplinary action.

- The state from which they are reciprocating agrees to reciprocate with California.

The Board does not issue temporary licenses or permits. Thus, no reciprocity applicant may commence practice in California until all requirements for licensure are met. For a number of reasons, reciprocity licensure is very difficult to attain. Common problems reciprocity applicants encounter include the following:

- Not examined in each of the subjects required in California at the time they were issued licenses; i.e., clinical competency, adjustive technique, physiotherapy, and x-ray.

- Did not receive scores of 75% or better in examination subject matter.

- Do not hold valid licenses (active and no disciplinary action) from states they are reciprocating from.

- Applicant's state will not reciprocate with California.

If applicants cannot meet the requirements for reciprocity licensure, then the applicants must apply for a California license as a new applicant. This often entails re-enrolling in classes and re-taking the national exams. A possible solution to exam equivalency problems that reciprocity applicants encounter would require amendment to Act. In lieu of requiring equivalent successful examination in each of the subjects examined in California in the same year as the applicant achieved licensure, instead, require passage of Parts I & II of the National Exam and passage of a 200-question, multiple choice Special Purposes Examination for Chiropractic (SPEC) administered by the National Board of Chiropractic Examiners. The SPEC examination is designed to assess only licensed or previously licensed practitioners in areas reflecting clinical conditions and general practice. Currently, 26 states use the SPEC in one form or another for reciprocity purposes.

As indicated in its Sunset Review Report the Board members approved amending Section 9 of the Act in July 2002 at the recommendation of the Joint Committee. The language was going to be added to SB 1954, but again due to the cost to the General Fund, it was not included in the bill.

The Board will support amending Section 9 of the Act to allow licensees more flexibility to reciprocate with California.

ISSUE #6: Should the Board establish that a Bachelors Degree be a requirement for licensure?

Issue #6 question for the Board: *What is the Board's recommendation as to whether California should require a Bachelor's Degree for licensure as a chiropractor?*

Background: There is no pre-requisite that a chiropractor obtain a Bachelor's Degree in college before attending a chiropractic school. The Joint Committee recommended as part of the last review that the Board continue to study this issue and report back to the Legislature on its findings. To date, the Board is still studying this issue and as yet has not reported any findings to the Legislature.

As of the last review eight licensing jurisdictions had established bachelor's degree pre-professional training requirements – Florida, Kansas, Maryland, Montana, North Carolina, Rhode Island, Wisconsin, and the U.S. Virgin Islands. The bachelor's degree requirement issue has been a topic of debate for years by the Federation of Chiropractic Licensing Boards and the Council on Chiropractic Education. Opposition of the chiropractic colleges and others blocked proposals to make a bachelor's degree requirement at the national level and in other states.

Since California licenses constitute approximately 19 percent of the nation's active chiropractors, any change in education requirements by this Board will be broadly felt and will become the basis for a national trend.

As noted in the Board's Sunset Review Report, since the last sunset report a ninth state now requires a bachelor's degree prior to matriculation. Effective July 2005, the state of West Virginia has now made this a requirement.

A bachelor's degree requirement is currently in with four other states.

ISSUE #7: Should the Board be authorized to implement its proposed new fee structure, and if so, is a statute necessary to authorize these changes?

Issue #7 question for the Board: *What are the specific fee changes being proposed and the justifications for these changes, and are there any potential consequences that may arise due to the fact that the Board has been collecting unauthorized fees?*

Background: In its Sunset Review Report the Board indicates that it has been carefully reviewing the current fee structure, to assess the need to change existing fees and to add new fees.

The Board candidly notes that it "currently does not have the regulatory authority to collect the corporation annual report filing fee, duplicate renewal receipt fee, satellite renewal fee, and license certification fee." This apparently means that the Board – already struggling with vast surpluses – is collecting fees it is not legally allowed to collect.

As a result the Board is proposing to offset this increased fee revenue by reducing the annual renewal fee, forfeiture fee, and inactive license fee as proposed. Prior to the restructure of any new or existing fees, the Board intends to consult with the Department of General Services, which prepares the Board's fund condition to determine the impact of the proposed fee schedule on the Board's overall budget.

The following chart from the Sunset Review Report represents a summary of the Board's existing and proposed fee schedules.

Fee Schedule	Current Fee	Proposed Fee
Application Fee	$100	*$ 100
Initial License Fee	$100	*$ 100
Renewal Fee	$150	*$ 100
Duplicate Receipt/Renewal License***	$ 5	$ 25
Inactive License Renewal Fee	$150	$ 70
Forfeiture Fee (late renewal fee)	$150	*$ 100
College Approval Application Fee***	0	$1,500
Continuing Education Course Fee	$ 50	**$ 30
Continuing Education Provider Fee***	0	$ 350
Continuing Education Provider Renewal Fee***	0	$ 200
Corporation Registration Application Fee	$100	$ 250
Corporation Special Report Filing Fee	$ 5	$ 40
Corporation Annual Renewal Fee***	$ 10	$ 150
License Certification/Out-of-State Verify.***	$ 10	$ 50
Reciprocal License Application Fee	$ 25	$ 125
Referral Service Application Fee	$ 25	$ 150
Replacement License Fee	$ 25	$ 40
Satellite Certificate Application Fee	$ 5	$ 50
Satellite Renewal Fee***	$ 5	$ 50

*Authority for fee amount is in the Act.
**Per each hour of course content requested.
***These fees will need to be established in the proposed fee regulation.

ISSUE #8: What is the status of the implementation of the citation and fine program?

Issue #8 question for the Board: *What were the reasons for the delay in implementation of the cite and fine program that was authorized in 2002, and what is the current status of this program?*

Background: In its Sunset Review Report the Board states that it obtained fine authority for its citation and fine program effective January 1, 2002. At that time the existing level of staffing could not absorb the additional workload associated with issuing fines. Therefore, a budget change proposal (BCP) was submitted for fiscal year 2001/02 to request a new position to handle the fine addition to the program. That year, the Department of Finance notified all state agencies that any BCP requesting additional personnel years would not be approved. As a consequence, the fine portion of the program was delayed until fiscal year

2004/05 when a BCP for the position was submitted and finally approved, effective July 1, 2005.

According to the Board, after the citation program was implemented in March 2001, the staff member handling the program went out on leave in April 2002. The program was suspended due to a lack of staff in the office to support the program. The increased number of citations issued in FY 2001/02 was a result of an accumulation of cases awaiting the Board's authority to issue citations.

The Report also indicates that in FY 2003/04 and 2004/05 only a few citations were issued because the Board did not have adequate staff to perform this function. The Board said that since it has been authorized the new position it has started the process of revising the citation regulation to include the fine provisions and is preparing to fully implement this program.

ISSUE #9: Are the number of responses and results of the Board's Consumer Satisfaction Survey similar to those of other licensed health professional boards?

Issue #9 question for the Board: *How do the number of responses and the results of the Board's Consumer Satisfaction Survey compare with those for the boards of similar licensed health professionals, and does the Board have a plan for increasing the number of responses?*

Background: As depicted in the table below, which is from the Board's Sunset Review Report, the Board has sent out 1,270 surveys since 2001 and only 115 have been returned. This response rate seems low and this raises the question as to whether the Board has made any comparisons with similar boards to determine if the survey is effective, or if there is a way to generate a better response level.

The table also indicates that the level of satisfaction with the responses of the Board to complaints appears to be low. However, there was no basis for comparison with other similar boards provided in the Report. It would be helpful for evaluation purposes if the Board could determine if comparable data can be used to enhance its ability to evaluate the survey results.

According to the Board, the table below reflects that complainants have been consistently satisfied with knowing where to file their complaints. However, as in prior years, the satisfaction consistently drops in the outcome category.

CONSUMER SATISFACTION SURVEY RESULTS				
QUESTIONS	Percent Satisfied by Calendar Year			
# Surveys Mailed: 1,270 # Surveys Returned: 115 (9%)	2001(22) 41%	2002 (26) 35%	2003(36) 53%	2004(31) 35%
1. Were you satisfied with knowing where to file a complaint and whom to contact?	59%	69%	81%	68%
2. When you initially contacted the Board, were you satisfied with the way you were treated and how your complaint was handled?	55%	58%	72%	61%
3. Were you satisfied with the information and advice you received on the handling of your complaint and any further action the Board would take?	41%	35%	47%	35%
4. Were you satisfied with the way the Board kept you informed about the status of your complaint?	41%	23%	53%	29%
5. Were you satisfied with the time it took to process your complaint and to investigate, settle, or prosecute your case?	36%	31%	53%	32%
6. Were you satisfied with the final outcome of your case?	18%	23%	22%	19%
7. Were you satisfied with the overall service provided by the Board?	32%	35%	47%	26%

ISSUE #10: Is there a need to expand the Board's use of the Internet to include services such as on-line license renewal or the Consumer Satisfaction Survey?

Issue #10 question for the Board: *What has the Board done since the last review to expand the use of the Internet, and what is the status of implementing an on-line license renewal capability or filling out the Consumer Satisfaction Survey on-line?*

Background: According to the Board's Sunset Review Report the public, licensees and insurance companies regularly access the Board's website to obtain information relating to: the Board's mission, history and membership; fact sheets on consumer complaints and advertising guidelines for chiropractors; pre-paid plans and health care reimbursement payers; the chiropractic scope of practice; license status; disciplinary actions and disciplinary report sheets; regulations and public hearings; existing law; and, to ask questions and file complaints.

The Board has researched the possibility of incorporating on-line renewal as currently provided by some Department of Consumer Affairs' boards; however, the Board was informed that DCA has put a hold on providing this to other

boards at this time. The Board is also reviewing the experience of other licensing entities with regard to on-line license renewal. In the meantime the Board is pursuing this possibility through the information technology contract. Furthermore, the Board has made advancements in the process for providing disciplinary actions that can be printed from the website.

At present, the Consumer Satisfaction Survey discussed above cannot be filled out on-line. The Board may want to consider this option as a way to increase the number of responses, as well.

ISSUE #11: Should the Board be required to disclose arbitration decisions, civil judgments and/or settlements to the public?

Issue #11 question for the Board: *Why doesn't the Board currently provide information relating to arbitration decisions, malpractice judgments or settlements to the public, and does the Board believe that making this type of information available would be helpful to consumers?*

Background: As summarized in the Sunset Review Report, the Board discloses and provides information and documentation upon request and in accordance with the Public Records Act or B&P Code Section 800(c).

The table below from the Sunset Review Report delineates the type of information the Board makes available to the public. According to the Board, all of the following is available on-line except pre-accusation referrals.

TYPE OF INFORMATION PROVIDED	YES	NO
Complaint Filed		X
Citation	X	
Fine (beginning July 2005)	X	X
Letter of Reprimand		X
Pending Investigation		X
Investigation Completed		X
Arbitration Decision	N/A	N/A
Referred to AG: Pre-Accusation	X	
Referred to AG: Post-Accusation	X	
Settlement Decision (after the effective date)	X	
Disciplinary Action Taken	X	
Civil Judgment	N/A	N/A
Malpractice Decision	N/A	N/A
Criminal Violation:		
Felony	X	
Misdemeanor	X	

As indicated above through "N/A", the Board does not make arbitration decisions, civil judgments or malpractice decisions available to the public. Nor does it make malpractice settlement information available.

In contrast, the Medical Board of California, the Osteopathic Medical Board of California and the California Board of Podiatric Medicine to disclose on their Internet websites medical malpractice judgments, settlements and arbitration awards, under certain conditions.

ISSUE # 12: Whether the Board understands and respects the electorate's role in setting policy.

Issue #12 question for the Board: *The Office of Administrative Law (OAL) recently rejected Board draft regulations. Do the Board's arguments in defense of the regulations show that the Board fails to respect the electorate's exclusive policy-making prerogatives where the regulation of chiropractic is concerned?*

Background: In October of 2005 the OAL rejected Board proposed regulations that would have permitted chiropractors in California for the first time to perform manipulation of patients while the patient was under anesthesia. The regulations would have allowed chiropractors who completed a 32-hour training course to perform manipulation while a patient was under anesthesia.

The OAL concluded that such a regulation would have created, in effect, two kinds of licenses, in violation of Section 7 of the Act that provides that a license "shall authorize the licensee to practice chiropractic in the State of California as taught in chiropractic schools or colleges."

The OAL decision did not resolve the more basic question of whether chiropractors are permitted by their voter-approved, statutory enabling authority to manipulate patients while under anesthesia. OAL elected to reject the regulations on the narrower grounds discussed above.

What most potentially reveals a fundamental misapprehension by the Board of the electorate's and its own respective legal roles is the Board's argument in defense of the rejected regulation. Essentially, the Board's argument was, if the electorate did not specifically single out manipulation under anesthesia as something chiropractors could not lawfully do, then the Board is free to allow it by regulation. Thus, the Board justified the regulation on the grounds that the Act "contains no prohibition on the use of anesthesia during ... manipulations."

Such an assertion violates the most well-known and basic principle of administrative law; namely, that a regulator may only regulate where it can point to a specific statute authorizing it to regulate. If the Board's view somehow reflected prevailing law, then the head of the Department of Corrections would be free to regulate HMOs; the head of the Office of Privacy Protection would be

permitted to regulate the Medi-Cal program; the Medical Board would be free to set education policy for high schools, only because their respective statutory schemes do not exhaustively list all of the things they cannot do.

Citing the absence of a statutory prohibition as authority to issue regulations is to arrogate to the Board the same kind of plenary lawmaking power reserved to the Legislature or, here, the electorate exercising its legislative powers. Like the Legislature, which is free to enact statutes in any area not constitutionally prohibited, the Board too under such a rationale becomes empowered to act in any arena where it is not explicitly forbidden to tread. Or, as the OAL said: "The issue which must be evaluated is not whether the Board has previously decided to prohibit the use of anesthesia by regulation. The relevant question is whether the or not the Chiropractic Act or the Medical Practices Act permit the use of anesthesia in chiropractic treatment."

ISSUE # 13: The number of days it takes to process complaints has more than doubled over the past four years, and the average number of days spent in the "pre-accusation" phase almost doubled as well in the most recent fiscal year.

Issue #13 question for the Board: *Have the reasons behind the increase in complaint processing been addressed? What is the Board's goal for average number of days to process complaints? Why did the average number of days spent in the pre-accusation phase almost double from 2003/04 to 2004/05? What is the Board doing to address this problem?*

Background: According to the Board's sunset report, the time it takes to process complaints has gone up steadily over the past four years, from 144 days in fiscal year 2001/02, to 325 days in fiscal year 2004/05. In addition, the average number of days for the "pre-accusation" phase – from the completion of the investigation to formal charges being filed – jumped from 259 in fiscal year 2003/04 to 501 days in fiscal year 2004/05. Prior to the spike in 2004/05, the average days for pre-accusation had held fairly steady.

While the average days for the other two phases of enforcement – investigations and "post-accusation" (from formal charges to conclusion of disciplinary case) – have been more consistent, and even dropping in the case of investigations, the increase in complaint processing and pre-accusation has increased the total average days for disciplinary cases from 1,056 in 2001/02 to 1,491 days in 2004/05, an unacceptably high number.

According to the Board, staff shortages and heavier workloads caused the increase in complaint processing.

FINAL RECOMMENDATIONS FOR THE BOARD OF CHIROPRACTIC EXAMINERS

FINAL RECOMMENDATIONS OF THE JOINT COMMITTEE ON BOARDS, COMMISSIONS, AND CONSUMER PROTECTION

ISSUE #1: Should the Board of Chiropractic Examiners be continued?

Recommendation #1: ***The Joint Committee recommends that regulation of the chiropractic profession by the Board of Chiropractic Examiners should be continued and that another sunset review be required in five years.***

Staff Comments: Consumers should continue to be assured that chiropractors are appropriately licensed. The licensing of chiropractors ensures that they are educated and trained in the skills and abilities to provide safe and effective care. When there is misconduct by a chiropractor, regulation of the profession through the Board's enforcement structure enables for appropriate action to be taken.

ISSUE #2: Should the Chiropractic Act be amended by an initiative statute to ensure that all statutes related to the regulation of chiropractic are constitutional; and/or, should the Act be amended to allow future amendment by statute without a vote of the people under limited conditions?

Recommendation #2: ***The Joint Committee recommends that the Board (1) identify those statutes that were enacted without a vote of the people that could be considered amendments to the Chiropractic Act; (2) determine if additional amendment of the Chiropractic Act is necessary to ensure that these statutes cannot be challenged; and, (3) determine in conjunction with the Joint Committee staff and stakeholders whether the Chiropractic Act should be amended to permit amendment by the Legislature without a vote of the people and, if so, on what terms.***

Staff Comments: Since the Chiropractic Act was created by initiative in 1922 it has been amended by initiative statute several times. In addition, since 1993 dozens of provisions in the Business and Professions, Civil, Corporations, Family, Health and Safety, Labor, Penal, Welfare and Institutions Codes and the Code of Civil Procedure that apply to the other healing arts boards, have been extended to the Board of Chiropractic Examiners. The statutes that made these changes were enacted by the Legislature without a vote of the people. As a consequence, the potential exists for these statutes to be vulnerable to a legal challenge. Therefore it may be necessary to protect them.

In addition, since the last review of the Board there have been a couple of attempts to amend the Chiropractic Act to implement recommendations of the Joint Committee. These were thwarted by the Department of Finance and the Legislature due to the costs of placing an initiative on the ballot. Hence it has become very difficult to modify the Act, even for minor changes to update its provisions. In modern times most initiatives contain provisions allowing the Legislature to amend them without requiring a vote of the people under specified conditions. For example an amendment could be enacted by initiative statute to allow the Legislature, by an extraordinary vote, to amend the Chiropractic Act to further its original purposes.

ISSUE #3: Should the current composition and make-up of the Board, with five professional and two public members, be changed?

Recommendation #3: ***The Joint Committee recommends that the Board continue to seek amendments to the Initiative Act, in conjunction with other proposed amendments, to add two additional public members, with one each appointed by the Senate and the Assembly.***

Staff Comments: As part of the last review the Joint Committee recommended that the Board increase its membership to add two new public members, with one being appointed by the Senate Rules Committee and the other being appointed by the Speaker of the Assembly. Under existing law, this change would have to be made by initiative statute. This change would also be consistent with changes in the make-up of other healing arts boards to add public members to represent consumer interests. It is based on the premise that this composition would provide adequate public representation while continuing to maintain the expertise needed for chiropractic issues.

ISSUE #4: What is the status of the fund reserve and the General Fund loan, and what efforts, if any, should be taken to reduce the overall reserve?

Recommendation #4: ***The Joint Committee recommends that the Board work with the Department of Finance to ensure that full repayment of the loan to the General Fund is reflected in the Budget Act; and, that the Board should develop a plan to reduce the level of the reserve to a more reasonable level.***

Staff Comments: At present, the Board has approximately a $5 million reserve in its contingency fund. This includes a $4 million loan to the General Fund from the surplus in the 2003-04 budget year. Overall this translates into a reserve level of about two years, when a three- to four-month reserve is the recommended standard for most boards. The Board is proposing to increase its staffing to address workload issues and modify its fee schedules to begin reducing the reserve.

ISSUE #5: Should the Board establish that a Bachelors Degree be a requirement for licensure?

Recommendation #5: ***The Joint Committee recommends that the Board continue to study the need for a Bachelor's Degree requirement for licensure and report back to the Legislature on its findings prior to its next review.***

Staff Comments: The Board is constantly reviewing its licensing requirements, including whether or not to require a Bachelor's Degree. Since California licenses about 20 percent of the nation's chiropractors any change in education requirements by the Board will probably become the basis for a national trend. For this reason and others the Board wants to carefully assess the situation before proposing a change in education requirements.

ISSUE #6: Should the Board implement its proposed new fee structure, and if so, is an amendment to the Initiative Act necessary to authorize these changes?

Recommendation #6: ***The Joint Committee recommends that the Board implement its proposed new fee structure through the regulatory process, or if necessary, by changing the Chiropractic Act.***

Staff Comments: In its review of the existing fee schedule the Board candidly admitted that it does not currently have the regulatory fee authority to collect several fees it has been collecting. The Board also indicated that it has assessed the need to change existing fees and to add new ones. Although the Board intends to implement the proposed fee changes by regulation, there is some doubt as to whether this can be done without a change in the law. If so, an initiative statute would probably be necessary.

The following chart from the Sunset Review Report represents a summary of the Board's existing and proposed fee schedules.

Fee Schedule	Current Fee	Proposed Fee
Application Fee	$100	*$ 100
Initial License Fee	$100	*$ 100
Renewal Fee	$150	*$ 100
Duplicate Receipt/Renewal License***	$ 5	$ 25
Inactive License Renewal Fee	$150	$ 70
Forfeiture Fee (late renewal fee)	$150	*$ 100
College Approval Application Fee***	0	$1,500
Continuing Education Course Fee	$ 50	**$ 30
Continuing Education Provider Fee***	0	$ 350
Continuing Education Provider Renewal Fee***	0	$ 200
Corporation Registration Application Fee	$100	$ 250
Corporation Special Report Filing Fee	$ 5	$ 40
Corporation Annual Renewal Fee***	$ 10	$ 150
License Certification/Out-of-State Verify.***	$ 10	$ 50
Reciprocal License Application Fee	$ 25	$ 125
Referral Service Application Fee	$ 25	$ 150
Replacement License Fee	$ 25	$ 40
Satellite Certificate Application Fee	$ 5	$ 50
Satellite Renewal Fee***	$ 5	$ 50

*Authority for fee amount is in the Act.
**Per each hour of course content requested.
***These fees will need to be established in the proposed fee regulation.

ISSUE #7: What is the status of the implementation of the citation and fine program?

Recommendation #7: ***The Joint Committee recommends that the Board work with the Department of Finance to ensure that it has adequate resources to fulfill its state mandate to fully implement the citation and fine program.***

Staff Comments: The Board has had numerous staffing problems in implementing the citation and fine program. To date, only the citation portion of the program has been implemented. In the near future the Board plans to evaluate all current regulations and identify those that are obsolete, out-dated, duplicative or unnecessary. During this process the fine portion of the regulations would be promulgated.

ISSUE #8: Should the Board be required to disclose arbitration decisions, civil judgments and/or settlements to the public?

Recommendation #8: ***The Joint Committee recommends that the Board identify the statutory basis for its existing disclosure policy, and determine whether that basis would support additional disclosures. If so, the Board should by regulation increase the amount of information it discloses, including malpractice judgments, settlements and arbitration awards. If the Board determines it needs additional statutory authority for additional disclosure, it should seek that authority.***

Staff Comments: According to the Board it does not have the capability or the staff to provide disclosure of arbitration decisions, civil judgments and/or settlements to the

public. Legislation was enacted recently (SB 1950 of 2002 and SB 231 of 2005) to require the Medical Board of California, Osteopathic Medical Board of California and California Board of Podiatric Medicine to provide disclosure of some settlement information about physicians, osteopaths and podiatrists, and to increase the amount of information these boards receive regarding malpractice judgments.

ISSUE #9: Since the number of days it takes to process complaints has more than doubled over the past four years, and the average number of days spent in the "pre-accusation" phase almost doubled as well in the most recent fiscal year, what can be done to reduce these timeframes?

Recommendation #9: ***The Joint Committee recommends that the Board work with the Department of Finance and the Attorney General to ensure that it has adequate resources to process complaints in a more timely fashion.***

Staff Comments: The Board's time it takes to process complaints has gone up steadily over the past four years and the number of days for the pre-accusation phase also jumped significantly. According to the Board, staff shortages and heavier workloads caused the increases in complaint processing times. The Board has requested an increase in staffing to address this problem.