BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

# NOTICE OF TELECONFERENCE
# ENFORCEMENT COMMITTEE MEETING
**January 27, 2015**
**3:00 p.m.**

One or more Committee Members will participate in this meeting at the teleconference sites listed below. Each teleconference location is accessible to the public and the public will be given an opportunity to address the Enforcement Committee at each teleconference location. The public teleconference sites for this meeting are as follows:

## Teleconference Meeting Locations:

Sergio Azzolino, DC
1545 Broadway St., #1A
San Francisco, CA 94109
(415) 563-3800

Heather Dehn, DC
Frank Ruffino
901 P St., #142A
Sacramento, CA 95814

## AGENDA

1. **Call to Order**

2. **Approval of Minutes**
   October 28, 2014

3. **Discussion and Possible Action on Advertising a Chiropractic Specialty**

4. **Discussion and Possible Action on Proposed Language Regarding Maintenance of Patient Records/Amendments to Title 16, California Code of Regulations Sections 312.2 and 318**

5. **Discussion of Developing Qualifications and Proficiency Standards for Expert Consultants with the Enforcement & Scope of Practice Committee to Define Criteria and Standards for Expert Consultant Selection. [2014-2107 Strategic Plan]**

6. **Public Comment**
   Note: The Committee may not discuss or take action on any matter raised during this public comment section that is not included on this agenda, except to decide whether to place the matter on the agenda of a future meeting. [Government Code Sections 11125 & 11125.7(a).] Public comment is encouraged; however, if time constraints mandate, comments may be limited at the discretion of the Chair.

7. **Future Agenda Items**

8. **Adjournment**

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Board of Chiropractic Examiners
901 P Street, Suite 142A
Sacramento, California 95814
www.chiro.ca.gov

## ENFORCEMENT COMMITTEE

Sergio Azzolino, D.C., Chair
Heather Dehn, D.C.
Frank Ruffino

Meetings of the Board of Chiropractic Examiners' Committee are open to the public except when specifically noticed otherwise in accordance with the Open Meeting Act. Public comments will be taken on agenda items at the time the specific item is raised. The Board's Committee may take action on any item listed on the agenda, unless listed as informational only. All times are approximate and subject to change. Agenda items may be taken out of order to accommodate speakers and to maintain a quorum. The meeting may be cancelled without notice. For verification of the meeting, call (916) 263-5355 or access the Board's Web Site at **www.chiro.ca.gov**.

The meeting facilities are accessible to individuals with physical disabilities. A person who needs a disability-related accommodation or modification in order to participate in the meeting may make a request by contacting Marlene Valencia at (916) 263-5355 ext. 5363 or e-mail marlene.valencia@dca.ca.gov or send a written request to the Board of Chiropractic Examiners, 901 P Street, Suite 142A, Sacramento, CA 95814. Providing your request at least five (5) business days before the meeting will help to ensure availability of the requested accommodation.

BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

# Board of Chiropractic Examiners
## MEETING MINUTES
## Enforcement Committee
## October 28, 2014
## State of California
## San Diego State Building
## 1350 Front Street, Room B-109
## San Diego, CA 92101

**Committee Members Present**
Sergio Azzolino, D.C., Chair
Heather Dehn, D.C.
Frank Ruffino

**Staff Present**
Robert Puleo, Executive Officer
Linda Shaw, Licensing Manager
Sandra Walker, Compliance Manager
Maria Martinez, Supervising Special Investigator
Dixie Van Allen, Associate Governmental Program Analyst
Kristy Schieldge, Attorney III

**Call to Order**
Dr. Azzolino called the meeting to order at 8:00 a.m.

**Roll Call**
Dr. Dehn called the roll. All committee members were present.

**Approval of June 26, 2014 Minutes**

Ms. Schieldge stated her last name was spelled incorrectly in the June 26, 2014 Minutes. The correct spelling is Schieldge.

**MOTION: MR. RUFFINO MOVED TO APPROVE THE MINUTES**
**SECOND: DR. DEHN SECONDED THE MOTION**
**VOTE: 3-0**
**MOTION CARRIED**

**Discussion and Possible Action on Advertising a Chiropractic Specialty**

Dr. Azzolino expressed concern that the Chiropractic Act and Regulations do not specify requirements for licensees who advertise as a specialist.

Ms. Schieldge stated there is current authority under Business and Professions Code section 650 to restrict false and misleading advertising. However, there is an issue when it needs to be determined who is calling themselves a specialist. There have been legal problems when trying to enforce this. It is a difficult area to regulate in.

Mr. Puleo asked if we can put something in our regulations that specifies the accrediting bodies and the specialty boards that we will accept.

Ms. Schieldge stated she thinks it may be a challenge to only specify certain bodies because the courts are not typically open to allowing deferential treatment and ceding authority to particular accrediting bodies.

Mr. Puleo asked; what if we specify the requirements that in order to be an approved specialty Board you have to meet these requirements such as so many hours of training or whatever requirements the Board feels appropriate.

Ms. Schieldge stated the problem is in terms of evidence and proving that that's the only way to truthfully advertise a specialty.

Dr. Azzolino stated that he has experience with the NCCA accreditation. Currently with the Chiropractic Board of Neurology we have NCCA accreditation. Many other boards are striving for accreditation. Dr. Azzolino stated he believes we should allow any other specialty board that wants to be certified and strive to that level. Dr. Azzolino believes it is in the public's best interest that we pass a regulation. It's an oversight on who and what can be deemed a specialist.

Ms. Schieldge reported that past cases from other boards have shown possible liability in this area.

Mr. Puleo stated that he believes the Medical Board may specify Accrediting Bodies in their regulations regarding specialties.

Dr. Azzolino requested Ms. Schieldge get the BCE the information regarding accreditation and specialties from the Medical Board and past specialty regulation cases including a Dental Board case.

**Discussion and Possible Action on Proposed Language Regarding Maintenance of Patient Records/Amendment to Title 16, California Code of Regulation Section 318**

Ms. Schieldge stated that the proposed language was intended to address the Board's concerns regarding the death or incapacity of a licensee as well as if a licensee wants to sell

their practice, retire or go inactive. The proposal also addressed what to do in terms of notifying the patients of their relocation; currently there is no requirement.

Dr. Azzolino stated that he has several concerns regarding the proposed language. The proposed language stated active and inactive patients are to be notified. This could be 10,000 to 20,000 patients. Dr. Azzolino would like e-mail notification to be an option.

Ms. Schieldge stated that the problem with electronic mail is that there are no legal presumptions in law for service. There are legal presumptions for first class mail.

Dr. Azzolino stated that the language should be clarified to notify active patients (patients that have been treated within the last 12 months) and all inactive patients (that have been treated within the last 5 years).

Mr. Puleo agreed and stated that otherwise, the proposed language would contradict CCR section 318 whereas patient records must only be maintained for 5 years.

Ms. Schieldge suggested that the notification be provided to the Board and the Board publish it on their website.

Mr. Puleo inquired if there was any liability for the Board if we published such information on the web site.

Ms. Schieldge stated we would need to add a disclaimer.

Dr. Azzolino questioned who would be responsible under subdivision (d), the associate or chiropractor, the practice where the services were rendered, or both?

Ms. Schieldge stated that this section is designed for the person who is leaving to notify the patients where their records are going to be. She questioned whether the records are going to stay with that practice or move with that chiropractor.

Mr. Puleo stated we may need to address the issue in CCR 318 regarding group practices and who exactly should maintain the records if one or more of the chiropractors treated the patient. We may need to add language such as; if the patient was treated by more than one chiropractor, the patient is a patient of the practice.

Dr. Azzolino suggested amending CCR 318 entirely to avoid redundancy.

Dr. Dehn has concerns regarding subsection (d) specifically wanting to address why the departing chiropractor would have to follow the procedures listed in subsections (a), (b) and (c). She stated if she was moving away and another chiropractor was taking over her practice, it should be as simple as sending a letter to all of the patients advising them their records are with the new chiropractor. She questioned notifying them again in 5 years when they already are aware.

Ms. Schieldge stated that subsection (c) is going to be replaced with notifying the Board as opposed to a 5 year re-notification. However, she suggested adding a requirement regarding

notifying the Board to subsection (b) and eliminating subsection (c). She suggested keeping the last sentence in subsection (c).

Dr. Dehn asked; what are the consequences for not complying with this section?

Mr. Puleo stated we could issue a citation. If there is something egregious, where patient confidentiality was violated, we could refer the case to the Attorney General's Office or the local District Attorney's Office.

Dr. Dehn asked, why is the age records must be maintained, age 21 as opposed to age 18, as stated in subsection (e).

Ms. Schieldge stated she would need to research this.

Dr. Azzolino referenced numbers 3 and 4 in CCR 318 and stated that with electronic records, he doesn't believe that a true signature is necessary; an electronic signature should be sufficient.
Dr. Azzolino suggested we strike number 3 completely.

Dr. Azzolino's concerns led to a lengthy conversation regarding CCR 318 subsection 3 and 4. Following discussion of pros and cons of numbers 3 and 4, it was decided further investigation was necessary on how to improve/update the signature process.

Ms. Martinez stated that during her investigative site visits, she is seeing more and more chiropractors are utilizing electronic record keeping on devices such as an I-Pads or Tablets.

Ms. Schieldge provided a sample form, from Board of Pharmacy, regarding notifying the Board of discontinuance of business. The BCE will need to develop a form with the regulatory package.

**Discussion of Developing Qualifications and Proficiency Standards for Expert Consultants with the Enforcement & Scope of Practice Committee to Define Criteria and Standards for Expert Consultant Selection. [2014-2017 Strategic Plan]**

Dr. Azzolino stated he was going to schedule a meeting and attend an Expert training to see what a true Expert training looks like.

Mr. Puleo stated staff will schedule an Expert training in early 2015. We typically conduct one in the North and one in the South. Mr. Puleo recommended that 2 Board members attend/observe each session to identify any deficiencies in the existing training and materials. This may be a better approach than making changes blindly.

Dr. Dehn asked if there was anywhere on the Expert Application that asks if they are actively treating patients.

Ms. Walker stated that specific question is not on the application and it may be a good question to add.

Mr. Puleo stated we may want to also ask what percentage of their time they are treating. Mr. Puleo also asked whether we could require experts to treat patients a certain percentage of time in order to qualify to be an expert.

Ms. Walker asked if Board members attending the Expert training would be an issue in regards to separation of function.

Ms. Schieldge stated she does not see it as a problem if there is less than a quorum of Board members attending the Expert training. As a rule, experts should not be interacting with the Board members as it may become a conflict.

Ms. Walker asked if the Board legally needed to promulgate a regulation for the Expert process.

Ms. Schieldge stated she is unsure at this point. Further research was needed.

Dr. Azzolino asked how many Experts do we currently have, how many are applying?

Ms. Walker stated staff are currently recruiting and have recruitment information on the Board's web site. She reported that the Board has just over 60 Experts in our current pool. This does not include new applicants.

Dr. Dehn asked if current Experts will be required to complete the new application.

Mr. Puleo stated that every time the Board conducts Expert training, all Experts must re-apply.

Dr. Azzolino stated that on section 6 of the new Expert application the applicant must state why they feel they have extensive knowledge or experience.

Dr. Azzolino asked if we are conducting personal interviews with the applicants.

Mr. Puleo stated that we have not conducted personal interviews with the applicants in the past.

Dr Azzolino stated it is important to conduct the interview since we are using them as Experts and they may possibly testify on the stand.

**Discussion and Possible Action Regarding the Consumer Protection Enforcement Initiative (CPEI) Regulations**

**MOTION: DR. AZZOLINO MADE A MOTION TO DIRECT STAFF AND RECOMMENDTO THE BOARDTHAT THE BOARD TAKE ALL NECESSARY STEPS TO INITIATE THE FORMAL RULE MAKING PROCESS WITH THIS TEXT, AUTHORIZE THE EXECUTIVE OFFICER TO MAKEANY NON-SUSTANTIVE CHANGES TO THE RULE MAKING PACKAGE AND SET THE REGULATION FOR A HEARING.**
**SECOND: MR. RUFFINO SECONDED THE MOTION**
**VOTE: 3-0**
**MOTION CARRIED**

**Discussion and Possible Action on the Selection of "Trigger 3" in Regards to Substance Abusing Licensees [SB 1441]**

Ms. Schieldge stated this Trigger was selected as the option for the Trigger language at the last Board meeting. The next step will be to meet with Enforcement staff to discuss making sure that the Substance Abuse Coordination Committee recommendations or standards are incorporated into standards for disciplining licensees who have a substance abuse problem. Ms. Schieldge recommended that staff separate the Uniform Standards from the Disciplinary Guidelines because the Guidelines are a recommendation and you can not deviate from Uniform Standards. The Uniform Standards will need to be re-written and incorporated into standard or model orders, so that when an Administrative Law Judge thinks there is a substance abuse problem, the terms and conditions can be dropped into the probationary orders without any extra work.

**Public Comment**

None

**Future Agenda Items**

None

**Comment**

Mr. Ruffino recommended that we have future Enforcement Committee Meetings on a day other than a Board meeting day, as it causes a hardship and runs the risk of rushing through the agenda.

**Adjournment**

Dr. Azzolino adjourned the meeting at 9:21 a.m.

# MEMORANDUM

| | |
|---|---|
| **DATE** | January 20, 2015 |
| **TO** | Enforcement Committee Members<br>Board of Chiropractic Examiners<br>Department of Consumer Affairs |
| **FROM** | Kristy Schieldge, Attorney III, Legal Affairs Division<br>Department of Consumer Affairs |
| **SUBJECT** | **Case Law Involving Advertising as a Specialist for Discussion of Item 3 of the Committee's Agenda Regarding "Discussion and Possible Action on Advertising a Chiropractic Specialty"** |

## Issue

At the last Enforcement Committee Meeting, the Committee requested that information about Medical Board of California's regulations and litigation involving the Dental Board's regulation of advertising specialties be brought to this meeting. I am providing a copy of Title 16, California Code of Regulations section 1363.5 and the following case information and summary for the Committee's review and discussion.

## Background and Summary of Cases

In 2000, the Dental Board of California (Dental Board) lost the attached federal court case *Bingham v. Hamilton, (2000)* 100 F.Supp.2d 1233. In that action, the federal court struck down as unconstitutional the Board's proposed regulations on advertising that attempted to restrict advertising as a specialist unless certain requirements were met, including obtaining education from Board-recognized specialty boards or successful completion of a formal advanced education program at or affiliated with an accredited dental or medical school. The Board paid approximately $254,000 to settle that case.

In 2003, plaintiffs Michael Potts, D.D.S. and the American Academy of Implant Dentistry (AAID) ("Plaintiffs") sued the former Director of the Department of Consumer Affairs Kathleen Hamilton, and the Dental Board. Plaintiffs challenged the constitutionality of Business and

Professions Code section 651(h)(5)(A), which governed false and misleading advertising and outlined the conditions under which a dentist could advertise as a "specialist." Section 651 permitted, among other things, a dentist to advertise a specialty if: (i) he or she has completed a specialty education program or is a member of a national specialty board approved by the American Dental Association (ADA); or, (ii) in the absence of ADA accreditation, he or she has attained membership in or been credentialed by an accrediting organization that is recognized by the board as a "bona fide" organization for that area of dental practice.[1]

Consequently, Plaintiff, AAID members could not advertise as specialists, only as "general dentists," despite the fact that their members truthfully earned additional education and training in a specific area. AAID alleged this violated their constitutional rights of free speech.

On September 8, 2004, the federal district court ruled in favor of Plaintiffs in this case, finding the Dental Board's advertising statutes were unconstitutional as applied and that the statute had to be "invalidated." (*Potts v. Hamilton*, 334 F. Supp.2d 1206 is attached.) Plaintiffs sought and received an injunction prohibiting the Dental Board's enforcement of the statute and obtained an order for payment of attorneys' fees in the amount of $324,252.91, which the Dental Board paid. On February 2, 2007, the Ninth Circuit reversed the lower court's judgment for plaintiffs and remanded the case for further proceedings at the District Court level to consider "survey evidence" collected by the Dental Board to show that the advertising was potentially misleading to consumers. (See attached *Potts v. Zettel*, unpublished decision.)

On October 15, 2010, the district court again found against the Dental Board, ruling that Business and Professions Code section 651(h)(5)(A) was unconstitutional because it violated the plaintiffs' First Amendment rights of free speech. On November 18, 2010, the Board filed an appeal, but later settled the matter. It was estimated that the Dental Board expended over 1.5 million dollars to litigate and settle this case. The Dental Board's advertising statute was later repealed. (Stats.2011, ch. 385 (SB 540).)

Attachments: 16 CCR 1363.5
*Bingham v. Hamilton* (100 F.Supp.2d 1233)
*Potts v. Hamilton* (334 F.Supp.2d 1206)
*Potts v. Zettel* February 2, 2007

[1] The amendments to Business and Professions Code section 651(h)(5)(A), challenged in this later action, essentially placed into statute those regulations that were struck down by the federal court in the prior *Bingham* case.

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**§ 1363.5. Advertising of Specialty Board Certification.**
16 CA ADC § 1363.5 BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS *(Approx. 5 pages)*

Barclays Official California Code of Regulations Currentness
Title 16. Professional and Vocational Regulations
Division 13. Medical Board of California [FNA1]
Chapter 2. Division of Medical Quality
Article 5. Advertising and Standards of Practice (Refs & Annos)

16 CCR § 1363.5

## § 1363.5. Advertising of Specialty Board Certification.

(a) As used in this section,

(1) "specialty board" means a board or association which certifies physicians in a specialty or subspecialty area of medicine.

(2) "Specialty or subspecialty area of medicine" means a distinct and well-defined field of medical practice. It includes special concern with diagnostic and therapeutic modalities of patients' health problems, or it may concern health problems according to age, sex, organ system, body region, or the interaction between patients and their environment. A medical specialty promotes the standards of practice within its specialty association.

(b) If a physician advertises that he or she is certified by a specialty board or association in a specialty or subspecialty area of medicine and that specialty board or association is not a member board of the American Board of Medical Specialties (ABMS) or does not have a postgraduate training program approved by the Accreditation Council for Graduate Medical Education (ACGME) or the Royal College of Physicians and Surgeons of Canada (RCPSC), then the specialty board or association shall be approved by the Division of Licensing and shall comply with all of the following requirements:

(1) The primary purpose of the specialty board shall be certification in a medical specialty or subspecialty. The specialty board shall encompass the broad areas of the specialty or subspecialty.

(2) The specialty board shall not restrict itself to a single modality or treatment which may be part of a broader specialty or subspecialty.

(3) If the specialty board certifies professionals other than physicians, the specialty board shall not represent either that (i) the criteria set forth in these regulations or (ii) the medical board's approval of the specialty board's certification program is applicable to nonphysicians.

(4) The specialty board shall be a nonprofit corporation or association, and it shall have at least a total of 100 members located in at least one-third of the states who shall possess a clear and unrestricted license to practice medicine.

(5) The specialty board shall have articles of incorporation, a constitution, or a charter and bylaws which describe its operation. The bylaws shall:

(A) provide for an independent and stable governing body with staggered, limited terms of not more than six years that is internally-appointed or selected by the members.

(B) set forth the requirements and policies for certification by the specialty board.

(C) require that the specialty board promote the public interest by contributing to improvement of medicine by establishing requirements and evaluating applicants who apply.

(D) require that the specialty board determine whether applicants have received adequate preparation in accord with standards established by the specialty board.

(E) require evidence that applicants have acquired capability in a specialty or subspecialty area of medicine and will demonstrate special knowledge in that field.

(F) require that the specialty board conduct comprehensive evaluations of the knowledge and experience of applicants.

(6) The specialty board shall have standards for determining that those who are certified possess the knowledge and skills essential to provide competent care in the designated specialty or subspecialty area.

(7) More than 80 percent of the specialty board's revenue for continuing operations shall be from certification and examination fees, membership fees and interest and investment income.

(8)(A) Except as provided in subparagraph (B) or (C) of this paragraph (8), the specialty board shall require all applicants who are seeking certification to have satisfactorily completed a postgraduate training program accredited by the ACGME or the RCPSC that includes identifiable training in the specialty or subspecialty area of medicine in which the physician is seeking certification. This identifiable training shall be deemed acceptable unless determined by the Division of Licensing to be either (1) inadequate in scope, content and duration in that specialty or subspecialty area of medicine in order to protect the public health and safety or (2) not equivalent in scope and content to the residency training required for board certification by any related ABMS board for the specific conditions, disease processes and surgical procedures within the scope of the applicant certifying board's examination and certification.

(B) If the training required of applicants seeking certification by the specialty board is other than ACGME or RCPSC accredited postgraduate training, then the specialty board shall have training standards that include identifiable training in the specialty or subspecialty area of medicine in which the physician is seeking certification and that have been determined by the Division of Licensing to be equivalent in scope, content and duration to those of an ACGME or RCPSC accredited program in a related specialty or subspecialty area of medicine. This training shall be evaluated by the Division of Licensing to ensure that its scope, content and duration are equivalent to those of an ACGME or RCPSC accredited program and are adequate for training in that specialty or subspecialty area of medicine in order to protect the public health and safety.

(C) In lieu of the postgraduate training required under subparagraph (A) or (B) of this paragraph (8), the specialty board shall require applicants seeking certification to have completed (1) a minimum of six years of full time teaching and/or practice in the specialty or subspecialty area of medicine in which the physician is seeking certification and (2) a minimum of 300 hours of continuing medical education in the specialty or subspecialty area of medicine in which the physician is seeking certification which is approved under Section 1337 and 1337.5 of these regulations. Any teaching experience acceptable under this subparagraph shall have been in a postgraduate training program accredited by the ACGME or RCPSC or that meets the standards set forth in subparagraph (B) that includes identifiable training in the specialty or subspecialty area of medicine to be certified. This training shall be evaluated by the Division of Licensing and determined to be equivalent in scope, content, and duration to those of an ACGME or RCPSC accredited program in a related specialty or subspecialty area of medicine and to be adequate for training in that specialty or subspecialty area of medicine in order to protect the public health and safety. Teaching or practice experience accepted under this subparagraph shall be evaluated by and acceptable to the credentials committee of the specialty board pursuant to standards that are (1) specified in the bylaws of the specialty board and (2) approved by the Division of Licensing in accordance with criteria set forth in these regulations.

Physicians applying for certification who qualify under this subparagraph shall be required by the specialty board to have satisfactorily completed an ACGME or RCPSC accredited residency training program. This residency shall have provided training in the conditions and disease processes that are included in the new specialty.

Physicians who are certified by specialty boards under this subparagraph which are incorporated, or organized as an association on the effective date of these regulations, may advertise their board certification for three years from the effective date of these regulations. During that time, the specialty board shall demonstrate to the satisfaction of the Division of Licensing that there is in existence one or more postgraduate training programs that include identifiable training in the specialty or subspecialty area of medicine to be certified that meet the requirements of subparagraph (A) or (B) of this paragraph (8); then the specialty board's approval shall be permanent unless withdrawn under subsection (c). This training shall be

evaluated by the Division of Licensing and determined to be equivalent in scope, content, and duration to those of an ACGME or RCPSC accredited program in a related specialty or subspecialty area of medicine and to be adequate for training in that specialty or subspecialty area of medicine in order to protect the public health and safety. If a specialty board cannot demonstrate its equivalency to ABMS boards in the three years following the effective date of these regulations, its members may not thereafter advertise certification by that board. This period may be extended for a year if the Division of Licensing determines that the specialty board is making a good faith effort towards achieving equivalency to ABMS boards.

Physicians who are certified by specialty boards under this subparagraph which are incorporated, or organized as an association after the effective date of these regulations, may not advertise their certification until the specialty board is determined by the Division of Licensing to be equivalent to ABMS boards. The specialty board shall demonstrate to the satisfaction of the Division of Licensing that there is in existence one or more postgraduate training programs that include identifiable training in the specialty or subspecialty area of medicine to be certified that meet the requirements of subparagraph (A) or (B) of this paragraph (8). This training shall be evaluated by the Division of Licensing and determined to be equivalent in scope, content, and duration to those of an ACGME or RCPSC accredited program in a related specialty or subspecialty area of medicine and to be adequate for training in that specialty or subspecialty area of medicine in order to protect the public health and safety.

(9) Except as provided in subparagraph (8)(C) above, at the time of application for approval to the Division of Licensing, a specialty board shall demonstrate that one or more postgraduate training programs are in existence and that these programs provide identifiable training in the specialty or subspecialty area of medicine in which physicians are seeking certification. This training shall be evaluated by the Division of Licensing and determined to be equivalent in scope, content and duration to those of an ACGME or RCPSC accredited program in a related specialty or subspecialty area of medicine and to be adequate for training in that specialty or subspecialty area of medicine in order to protect the public health and safety.

The specialty board shall submit a plan that (A) estimates the number of physicians to be certified through subsection (b)(8)(C), above; (B) specifies the number and location of post graduate training programs developed and to be developed; the number of trainees completing the training annually; (C) demonstrates the equivalency of those programs, as provided for in subsection (b)(8)(B), above; (D) provides for monitoring to evaluate the quality of existing programs; and (E) allows for upgrading of the parameters of the specialty or subspecialty area of medicine to accommodate new developments.

Every year the specialty board shall report to the Division of Licensing its progress in implementing the plan for postgraduate training programs in the specialty or subspecialty area of medicine in which physicians are seeking certification. Failure to so report shall be grounds for withdrawal of approval by the division. Failure of a specialty board to establish to the satisfaction of the division that it is in compliance with its plan, as stated in its original submission to the division, shall be grounds for withdrawal of the division's approval of the specialty board. Failure of a specialty board to provide evidence that the postgraduate training programs are equivalent in scope, content and duration to those of ACGME or RCPSC accredited programs shall be grounds for withdrawal of the approval.

(10) The specialty board shall require all physicians who are seeking certification to successfully pass a written or an oral examination or both which tests the applicants' knowledge and skills in the specialty or subspecialty area of medicine. All or part of the examinations may be delegated to a testing organization. All examinations shall be subject to a psychometric evaluation. The examinations shall be a minimum of sixteen (16) hours in length. Those specialty boards which require as a prerequisite for certification, prior passage of an ABMS examination in a related specialty or subspecialty area, may grant up to eight hours credit for the ABMS qualifying board examination toward the sixteen (16) hour testing requirement.

(11) The specialty board shall issue certificates to those physicians who are found qualified under the stated requirements of the specialty board.

(12) The specialty board shall assist in maintaining and elevating the standards of graduate medical education and facilities for specialty training in medicine in collaboration with other concerned organizations and agencies, and have a mechanism for assisting accrediting agencies in the evaluation of training programs.

(c)(1) Upon request the Division of Licensing will approve a specialty board if it meets the criteria set forth in these regulations. The division may withdraw the approval of a specialty board if the division finds that it fails to meet the criteria set forth in these regulations.

(2) Within 30 working days of receipt of an application for specialty board approval, the division shall inform the applicant in writing that it is either complete and accepted for filing and referral to a medical consultant selected by the division or that it is deficient and what specific information or documentation is required to complete the application.

(3) Within 918 calendar days from the date of filing of a completed application, the division shall inform the applicant in writing of its decision regarding the applicant's approval as a specialty board.

(4) The division's time periods for processing an application from the receipt of the initial application to the final decision regarding approval or disapproval based on the division's actual performance during the two years preceding the proposal of this section were as follows:

(A) Minimum - 646 days.

(B) Median - 714 days.

(C) Maximum - 918 days.

(d) Specialty boards approved by the Division of Licensing shall certify every three years from the date of approval that they continue to meet the requirements of these regulations.

(e) The Division of Licensing shall conduct such evaluations as it deems appropriate to ensure that applicant boards applying to the division meet the criteria of these regulations.

Note: Authority cited: Sections 651 and 2018, Business and Professions Code; and Section 15376, Government Code. Reference: Section 651, Business and Professions Code; and Section 15376, Government Code.

**HISTORY**

1. New section filed 1-27-94; operative 2-28-94 (Register 94, No. 4).

2. Amendment of subsections (c)(2) and (c)(3) and new subsections (c)(4)-(c)(4)(C) filed 3-24-99; operative 4-23-99 (Register 99, No. 13).

This database is current through 1/2/15 Register 2015, No. 1

16 CCR § 1363.5, 16 CA ADC § 1363.5

End of Document

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**Bingham v. Hamilton**
United States District Court, E.D. California. May 15, 2000 100 F.Supp.2d 1233 *(Approx. 12 pages)*

Original Image of 100 F.Supp.2d 1233 (PDF)

100 F.Supp.2d 1233
United States District Court,
E.D. California.

Perry J. BINGHAM, D.D.S., and the American Academy of Implant Dentistry, Plaintiffs,
v.
Cathleen HAMILTON, in her Official Capacity as Director, California Department of Consumer Affairs, et al., Defendants.

No. CIV. S--99--0499 DFL JFM. May 15, 2000.

Dentist and the American Academy of Implant Dentistry (AAID) brought action challenging the California State Board of Dental Examiners' enforcement policy prohibiting the advertisement of certain credentials by California licensed dentists. Upon plaintiffs' motion for summary judgment, the District Court, Levi, J., held that board's enforcement policy violated First Amendment to extent that it prohibited advertisement of AAID credentials unless the advertising dentist had at least one year of post graduate academic study in implant dentistry.

Motion granted.

**West Headnotes (9)**

Change View

1 **Federal Courts** Fitness and hardship
In considering whether a case is ripe for review, a court must evaluate the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

2 **Federal Courts** Fitness and hardship
A claim is fit for decision, for purposes of ripeness analysis, if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.

3 **Federal Courts** Environment and health
Although regulation containing policy for advertising of credentials issued by recognized dental specialty boards and associations was not yet operative, suit challenging California State Board of Dental Examiners' enforcement policy prohibiting advertisement of certain credentials by California licensed dentists was ripe for adjudication since record was developed, the dispute was primarily legal, and plaintiffs would suffer hardship with continued delay; if dentist were to advertise his American Academy of Implant Dentistry (AAID) credentials, he would violate statute and could be immediately subject to sanctions, including revocation of his license. West's Ann.Cal.Bus. & Prof.Code § 651; Cal.Code Regs. title 16, § 1054.

5 Cases that cite this headnote

4 **Federal Courts** Younger abstention
*Younger* abstention only applies to proceedings that are judicial in nature.

5 **Federal Courts** Particular Cases, Contexts, and Questions
Agency's review of proposed regulation for compliance with the necessity and clarity standards of Government Code was not a judicial proceeding, and *Younger* abstention, therefore, did not apply.

**SELECTED TOPICS**

Health
Regulation
Commercial Speech Protection of Its Advertising

Business or Professional Services
Commercial Speech Protection of Its Advertising

Federal Courts
Judicial Decision and Hardship

Right to Decline Jurisdiction; Abstention Doctrine
State Court Review of Denial and Federal Court Abstention

**Secondary Sources**

**B. Jurisdiction Over Parties—Personal Jurisdiction**

Cal. Prac. Guide Civ. Pro. Before Trial Ch. 3-B

...[3:130] Assuming the action is filed in a court with subject matter jurisdiction, the next step is to determine whether that court has power to render an effective judgment against the defendants invol...

**Appropriateness of Federal Court Abstention Under Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483, Given the Existence of Concurrent Parallel Proceeding**

193 A.L.R. Fed. 291 (Originally published in 2004)

...This annotation collects and analyzes cases in which the federal courts have discussed or determined the appropriateness of a district court's abstention from a federal proceeding given the existence o...

**When Are Proceedings Parallel so as to Permit Federal Court Abstention Under Colorado River Water Conservation Dist. v. U. S., 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483, 9 Env't. Rep. Cas. (BNA) 1016**

176 A.L.R. Fed. 517 (Originally published in 2002)

...This annotation collects and analyzes cases in which federal courts have discussed or determined whether a concurrent action in a state or foreign court is parallel to a federal action for the purpose ...

See More Secondary Sources

**Briefs**

**Joint Appendix**

2010 WL 723711
Krupski v. Crociere
Supreme Court of the United States.
February 24, 2010

...Plaintiff, WANDA KRUPSKI, by and through her undersigned attorneys, sues Defendant, COSTA CRUISE LINES, N.V., L.L.C., d/b/a COSTA CRUISE LINES, and alleges as follows: 1. That this is a cause of action...

**Brief for the Petitioner**

2013 WL 3362093
Sprint Communications Company, L.P. v. Jacobs

6 **Constitutional Law** Health care
**Health** Advertising
Dentists' advertisement of their American Academy of Implant Dentistry (AAID) credentials constituted commercial speech protected under the First Amendment. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

7 **Constitutional Law** Reasonableness; relationship to governmental interest
Commercial speech that is not false, deceptive, or misleading can be restricted, but only if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest. U.S.C.A. Const.Amend. 1.

8 **Constitutional Law** Business or professional services
With regard to advertising of credentials from professional organizations, state may not, under First Amendment, completely ban statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations. U.S.C.A. Const.Amend. 1.

9 **Constitutional Law** Health care
**Health** Advertising
California State Board of Dental Examiners' enforcement policy violated First Amendment to extent that it prohibited advertisement of American Academy of Implant Dentistry (AAID) credentials unless the advertising dentist had at least one year of post graduate academic study in implant dentistry; board failed to show that advertisement of AAID credentials was inherently misleading, that advertisement of AAID credentials would mislead the public into believing that the dentist placing the advertisement had at least one year of post graduate academic work in implant dentistry or that any potential for consumer deception could not be addressed by disclosure requirements rather than prohibition. U.S.C.A. Const.Amend. 1; West's Ann.Cal.Bus. & Prof.Code § 651.

4 Cases that cite this headnote

## Attorneys and Law Firms

*1234 Richard W Nichols, McDonough Holland and Allen, Sacramento, CA, Frank R Recker, pro hac vice, Frank R Recker and Associates, Marco Island, FL, for Plaintiffs.

Joel S Primes, Attorney General's Office of the State of California, Sacramento, CA, for Defendant.

***MEMORANDUM OF OPINION AND ORDER***

LEVI, District Judge.

This is a First Amendment commercial speech case in which plaintiffs Perry Bingham and the American Academy of Implant Dentistry (AAID) challenge the California State Board of Dental Examiners' ("California Dental Board" or "Dental Board") enforcement policy prohibiting the advertisement of certain credentials by California licensed dentists. Plaintiffs now move for summary judgment. For the reasons stated below, the motion will be granted.

I.

Implant dentistry consists of the placing of "devices for attaching artificial replacement teeth to the same bones to which natural teeth are anchored." [1] (Pls.' Exh. DD, Defs.' Regulatory File, at 546, AAID Position Paper: Specialty Recognition and the Future of Dental Implants.) This case arises from the interaction of four sets of facts or circumstances concerning the practice of implant dentistry. First, any dentist with a general license to practice as a dentist may perform implant dentistry in California. There is no requirement of any special training or education beyond that required for the license to practice as a dentist. As a consequence, any licensed dentist may advertise that he or she practices implant dentistry. Second, implant dentistry is not one of the eight specialties recognized by the American Dental

Supreme Court of the United States.
June 28, 2013

...Sprint Communications Company, L.P., ("Sprint") is a limited partnership organized under Delaware law that primarily provides telecommunications services to the public. Sprint's partners include U.S. T...

**Joint Appendix**

2002 WL 32102932
DOLE FOOD COMPANY, et al., Petitioners, v. Gerardo Dennis PATRICKSON, et al., Respondents. DEAD SEA BROMINE CO., LTD., et al, Petitioners, v. Gerardo Dennis PATRICKSON, et al., Respondents.
Supreme Court of the United States.
August 23, 2002

...Pursuant to Hawaii Rule of Civil Procedure 14 and within ten days after serving its original answer, defendant Dole Food Company, Inc. ("Dole") hereby files its third-party complaint complaining of Dea...

See More Briefs

**Trial Court Documents**

**POINTE SAN DIEGO RESIDENTIAL COMMUNITY L.P., a California limited partnership and Gosnell Builders Corporation of California, a California corporation, Plaintiffs, v. W.W.I. PROPERTIES, LLC., a California limited liability company; Astra Management Corporation, a California corporation; Palomba Weingarten, an individual Peter Wenner & Associates; Atlas Homes, LLC, a California limited liability a California corporation and Does 1 through 50,**

2002 WL 34077806
POINTE SAN DIEGO RESIDENTIAL COMMUNITY L.P., a California limited partnership and Gosnell Builders Corporation of California, a California corporation, Plaintiffs, v. W.W.I. PROPERTIES, LLC., a California limited liability company; Astra Management Corporation, a California corporation; Palomba Weingarten, an individual Peter Wenner & Associates; Atlas Homes, LLC, a California limited liability a California corporation and Does 1 through 50,
Superior Court of California, San Diego County
March 04, 2002

...The plaintiffs/cross defendants were represented by Steven Strauss, Frank Tobin and Paul Tyrell. Defendants/cross-complainants were represented by Douglas Reynolds, R. Gaylord Smith and Alan Greenberg....

**City of Cotati v. Cashman**

2000 WL 35728036
City of Cotati v. Cashman
Superior Court of California, Sonoma County
February 01, 2000

...Cirm. 19 The defendants' motion to strike the complaint under CCP §425.16 was heard by this Court on December 6, 1999. Plaintiff appeared by and through its attorneys, Jeffrey Walter and Henry Hester; ...

**Abcede v. Hosp. Corp. of America**

2014 WL 6602676
Abcede v. Hosp. Corp. of America
Superior Court of California, Ventura County
July 01, 2014

...TIME: 03:21:00 PM DEPT: 20 CLERK Christine Schafiels EVENT TYPE: Ruling on Submitted Matter CASE CATEGORY: Civil - Unlimited CASE TYPE: Wrongful Termination The Court, having previously taken the Moti...

See More Trial Court Documents

Association (ADA) and therefore no ADA credentials are available in implant dentistry as a distinct field or specialty. However, the ADA does award credentials in oral surgery, periodontics, and prosthodontics, fields that include implant dentistry, but that require extensive post graduate academic training. (*See* Berger Decl. ¶¶ 3–4.) Third, the AAID, a national dentist organization founded in 1953 with some 211 California members, (*see* Compl. ¶ 13), arguably fills the gap between the general dentist and the ADA specialist by awarding the credentials of "Fellow" and "Diplomate" in implant dentistry to licensed dentists who *1235 have completed certain requirements.[2] These requirements include testing, several hundred hours of continuing education in implant dentistry, and clinical experience also in implant dentistry. (*See* Shuck Aff. at 1.) The AAID requirements, however, do not include post graduate academic training at an accredited dental or medical school.

Finally, as applied to dentists, Cal. Bus. & Prof.Code § 651(h)(6)(A) allows a dentist to advertise credentials or a specialty certification awarded by a private or public board only if that board or agency is recognized by the California Dental Board. Until recently the California Dental Board appeared to rely upon the ADA in making recognition decisions. More recently, however, as a result of the predecessor lawsuit to this action, the California Dental Board has developed its own recognition standards which have been reduced to a proposed regulation.

Plaintiff Bingham is a California licensed dentist practicing general dentistry. He is a member of the AAID and has been awarded the "Fellow" and "Diplomate" rankings in implant dentistry from that organization. Not surprisingly, Bingham and other members of the AAID want to advertise their AAID credentials and have sought permission to do so from the Dental Board. As explained below, the California Dental Board's legal position has undergone some development in the course of this litigation. Its bottom line has not changed, however. It does not recognize the AAID or its credentials, and it states that under § 651(h)(6)(A), Cal. Bus. & Prof.Code, it is entitled to take enforcement action against any dentist who advertises AAID credentials unless the dentist has one academic year studying implant dentistry at an accredited dental or medical school.

***A. Prior Litigation History***

The plaintiffs first challenged the California Dental Board's position in an action filed in September 1997. The court dismissed that action as unripe. *See Bingham v. Berte*, Civ. No. S–97–1817 DFL JFM (*Bingham I*), Order of Jan. 15, 1998. At the time of the prior action, the Dental Board followed an informal policy of deferring to the ADA as to which credentials and specialities should be recognized. In the federal action, plaintiffs argued that the ADA improperly had declined to recognize implant dentistry in order to protect other existing specialities from competition. Whatever the merits of that position, the court concluded that those arguments had not been presented to the Dental Board in the first instance and that plaintiffs had not yet sought a declaratory decision from the Dental Board either approving or disapproving a particular proposed advertisement. Thus, prior to litigating their claim in federal court, the plaintiffs were ordered to "seek relief from the Dental Board directly."[3] *Id.* at 4. The court noted:

> The Dental Board also must consider whether a flat ban on any advertisement of AAID credentials—even if accompanied by appropriate disclaimers—is required to protect the public from misleading advertising. The Dental Board may well conclude that the proposed advertisement should be permitted. Even if it reaches a different conclusion, the record will be far clearer as to why the Dental Board concludes that such a *1236 ban is justified in the circumstances here.
> *Id.*

On February 9, 1998, the plaintiffs requested, by letter, a declaratory decision from the Dental Board under the terms of Cal. Gov.Code § 11465.20.[4] (*See* Compl. ¶ 8.) Despite an exchange of letters between counsel for plaintiffs and counsel for defendants, no action has ever been taken by the Dental Board on plaintiffs' request for a declaratory decision, presumably because at roughly the same time as the request the Dental Board began drafting a regulation to address the issues presented by *Bingham I*.

On March 15, 1999, the plaintiffs again filed a complaint in federal court, "containing substantially the same legal assertions" as the earlier September 29, 1997 complaint. (Compl.¶ 6.) Since the filing of that complaint, the Dental Board has proposed Cal.Code Regs. tit. 16 § 1054 as its mechanism to enforce Cal. Bus. & Prof.Code § 651.

***B. The Dental Board's Current Interpretation of § 651***

Although § 1054 has not gone into effect, the Dental Board currently interprets and enforces Cal. Bus. & Prof.Code § 651 according to the standards contained in the proposed regulation.[5] According to the Executive Officer of the Dental Board, "[t]he Board policy for advertising of credentials issued by Recognized Dental Specialty Boards and Associations is expressed in proposed Section 1054."[6] (Coleman Decl. ¶ 11.)

Thus, the Dental Board's current policy under Cal. Bus. & Prof.Code § 651 is that:

(a) A dentist may advertise that he or she has credentials from one of the dental specialty boards recognized by the Board of Dental Examiners of the State of California, pursuant to Section 1054.

(b) A dentist may not advertise credentials granted by a private or public board or parent association which is not recognized pursuant to Section 1054, unless:

(1) The private or public board or parent association which grants the credentials currently requires:

(A) The successful completion of a formal advanced education program at or affiliated with an accredited dental or medical school equivalent to at least one academic year beyond the predoctoral curriculum;

(B) Successful completion of an oral and written examination based on pyschometric principles; and

(C) Training and experience subsequent to successful completion of (A) and (B) above, to assure competent practice in the dental discipline as determined by the private or public board or parent association which grants the credentials.

*1237 (2) Any advertisement which references the dentist's credentials shall include the following statement "[Name of announced dental discipline] is a discipline not recognized as a dental specialty by the Board of Dental Examiners of the State of California."

(3) The dentist discloses that he or she is a general dentist in any advertising which references the dentist's credentials.

Cal.Code Regs. tit. 16 § 1054.1 (proposed).

The AAID is not recognized by the Dental Board. Thus, under the Dental Board's current enforcement policy, AAID credentials cannot be advertised since they are not earned after an academic year of postdoctoral curriculum at an accredited dental or medical school.[7] Because plaintiff Bingham has not completed one year of post graduate study in implant dentistry, and because the AAID is not recognized by the Dental Board, were he to advertise his AAID credentials, he would violate Cal. Bus. & Prof.Code § 651 and could be subject to sanctions, including revocation of his license. *See* Cal. Bus. & Prof.Code § 652.

Plaintiffs bring this action to challenge the one year educational requirement. They do not attack the Dental Board's disclosure requirements nor do they quarrel with the testing, training and experience requirements.

## II. Ripeness

The Dental Board argues that the plaintiffs' claim is not ripe for adjudication because Cal.Code Regs. tit. 16 § 1054 is not yet operative. Instead, the Dental Board argues that the court should abstain from jurisdiction until the regulation goes into effect. The basic problem with this argument, however, is that what is being challenged is the Dental Board's present enforcement policy under § 651, and this policy is now in place and does not wait upon implementation of § 1054.

1 2 "In considering whether a case is ripe for review, a court must evaluate '[1] the fitness of the issues for judicial decision and [2] the hardship to the parties of withholding court consideration.' " *US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (1999) (quoting *Winter v. California Med. Review, Inc.*, 900 F.2d 1322, 1325 (9th Cir.1989)) (brackets in original). "A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Winter*, 900 F.2d at 1325.

3 Unlike the claims in *Bingham I*, the plaintiffs have presented sufficient evidence of the Dental Board's enforcement policy. The Dental Board has conceded in its opposition papers, (*see* Defs.' Opp. Summ. J. at 5), in its answers to the plaintiffs' requests for admissions,[8]

and at oral argument on March 24, 2000, that Bingham and other members of the AAID would be subject to sanctions if they were *1238 to advertise their AAID credentials. It is no longer "speculative" as to whether the plaintiffs would be subject to discipline for advertising AAID credentials. *See Bingham I*, Order of Jan. 16, 1998, at 3. As a result, the controversy is primarily legal: whether the Dental Board's advertising prohibition violates the First Amendment.

The plaintiffs also present a compelling argument for hardship. Over two years have elapsed since the dismissal of *Bingham I*. During this two-year period, Bingham and members of the AAID have been unable to advertise their AAID credentials without justifiable fear of professional discipline from the Dental Board. This injury will persist if their claim is further delayed.

The Dental Board also argues that plaintiffs have failed to exhaust administrative remedies. Yet it is unclear what further steps plaintiffs could take to challenge the Dental Board's present enforcement policy. After *Bingham I* was dismissed, plaintiffs promptly sought declaratory relief from the Dental Board to clarify whether AAID certifications could be advertised under § 651. Although their request for declaratory relief was not acted upon,[9] the Dental Board in fact did clarify and articulate its enforcement policy, and this clarification is embodied in proposed § 1064. There are no administrative remedies left to exhaust.

4 5 Finally, the Dental Board argues that if plaintiffs' claim is ripe for adjudication, the court should nonetheless abstain from exercising its jurisdiction under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), because the Dental Board's proposed regulation is before the OAL in an ongoing administrative proceeding. *Younger* abstention, however, only applies to proceedings that are judicial in nature. *See New Orleans Public Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 370, 109 S.Ct. 2506, 2518, 105 L.Ed.2d 298 (1989). The OAL's review of the proposed regulation for compliance with the necessity and clarity standards of the Government Code is not a judicial proceeding. *Younger* abstention, therefore, does not apply.

Plaintiffs claim is ripe for adjudication. The record is developed, the dispute is primarily legal, and the plaintiffs would suffer hardship with continued delay.

**III. Commercial Speech**

6 7 The plaintiffs' advertisement of their AAID credentials constitutes commercial speech protected under the First Amendment. *See Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976). The states may prohibit false, deceptive or misleading advertising. *See id.* at 771–72, 96 S.Ct. at 1830–31. "Commercial speech that is not false, deceptive, or misleading can be restricted, but only if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Ibanez v. Florida Dep't of Business and Professional Regulation, Bd. of Accountancy*, 512 U.S. 136, 142, 114 S.Ct. 2084, 2088, 129 L.Ed.2d 118 (1994) (citing *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980)); *see also In re R.M.J.*, 455 U.S. 191, 203, 102 S.Ct. 929, 937, 71 L.Ed.2d 64 (1982).

***1239 A. Commercial Speech in Professional Services***

8 The Supreme Court has held that the advertising of credentials from professional organizations is not inherently misleading to the public. In *Peel v. Attorney Registration & Disciplinary Comm'n of Illinois*, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990), a plurality of the Court found that an attorney who designated himself as a "Certified Civil Trial Specialist by the National Board of Trial Advocacy" was not engaged in misleading advertising. In overturning the Illinois Supreme Court's finding that the general public might be misled by the advertisement and could mistakenly believe that the lawyer was more qualified than his peers or had received a credential from an official state organization, the Court held:

> This analysis confuses the distinction between statements of opinion or quality and statements of objective facts that may support an inference of quality. A lawyer's certification ... is a verifiable fact, as are the predicate requirements for that certification. Measures of trial experience and hours of continuing education, like information about what schools the lawyer attended or his or her bar activities, are facts about a lawyer's training and practice. A claim of certification is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success but is simply a fact, albeit

> one with multiple predicates, from which a consumer may or may not draw an inference of the likely quality of an attorney's work in a given area of practice.

*Id.* at 101, 110 S.Ct. at 2288 (internal citations omitted). Moreover, the Court concluded that even if the public might potentially be misled by a term such as "certified" or "specialist," less restrictive regulations requiring disclosure could address this potential well short of an outright prohibition: "a State might consider screening certifying organizations or requiring a disclaimer about the certifying organizations or the standards of a specialty. A state may not, however, completely ban statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations ...." *Id.* at 110, 110 S.Ct. at 2292–93 (internal citations omitted).

Similarly, in *Ibanez v. Florida Dep't of Business and Professional Regulation, Bd. of Accountancy*, 512 U.S. 136, 114 S.Ct. 2084, 129 L.Ed.2d 118 (1994), the Florida Board of Accountancy reprimanded a lawyer for advertising her credentials as a Certified Financial Planner (CFP)—awarded by a private organization—beside her credentials as a Certified Public Accountant (CPA)—licensed by the Board of Accountancy. The Board of Accountancy argued that the use of the term "certified" in her CFP credentials "inherently mislead[s] the public into believing that state approval and recognition exists." *Id.* at 142, 114 S.Ct. at 2088 (brackets in original).

9 Applying *Peel*, the Court held that without concrete evidence of deception caused by the credentials, the evidence was "not sufficient to rebut the constitutional presumption favoring disclosure over concealment." *Id.* at 145, 114 S.Ct. at 2090 (citation omitted). The Court held that the mere claim that the commercial speech may be potentially misleading cannot supplant the state's "burden to 'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' " *Id.* at 146, 114 S.Ct. at 2090 (quoting *Edenfield v. Fane*, 507 U.S. 761, 771, 113 S.Ct. 1792, 1800, 123 L.Ed.2d 543 (1993)).

The reasoning in *Peel* and *Ibanez* is applicable to any professional advertising, including the advertisement of dental credentials. *See Borgner v. Cook*, 33 F.Supp.2d 1327 (N.D.Fla.1998) (applying *Peel* and *Ibanez* in a suit involving the advertising of dental credentials); *cf. *1240 Parker v. Commonwealth of Kentucky, Board of Dentistry*, 818 F.2d 504 (6th Cir.1987). Under *Peel* and *Ibanez*, then, the Dental Board's prohibition of AAID credentials can only be sustained if there is a real, demonstrable potential that the public may be misled, and if the prohibition is necessary to address this problem, as opposed to lesser measures.

***B. AAID Credentials and Commercial Speech***

The Dental Board's contention that the advertisement of AAID credentials will mislead members of the public is not persuasive. To begin with, as in *Peel*, there is nothing inherently or necessarily misleading about the advertisement of the AAID's credentials. The Dental Board does not contend that the credentials are meaningless or that the organization is a sham. The AAID is a bona fide organization, and it actually issues credentials according to certain published standards. Thus, the AAID credentials that Bingham and other AAID members desire to advertise exist and members of the public can confirm this fact as well as the predicate acts required for AAID certification. In short, the advertising is not false, deceptive or inherently misleading.

Nonetheless, the Dental Board apparently sees a potential for confusion because consumers might believe that the AAID's credentials are in some way sponsored by the Dental Board. The Board also apparently believes that consumers assume that professional credentials are backed by at least one year of post graduate academic work and further that members of the public may not understand the difference between an AAID certification and the more rigorous requirements of the various ADA specialties. While plausible concerns, the Dental Board has virtually no evidence beyond conjecture that any of these concerns has real substance. [10]

The only evidence that the Dental Board offers that the advertising of AAID credentials would be misleading is conclusory, anecdotal, and speculative. (*See* Coleman Decl., *Bingham I*, ¶ 6 ("In my capacity as Executive Director of the Board, I am aware that there have been complaints regarding consumer confusion caused by dental advertising of specialty board certification in specialty boards not recognized by the ADA."); Berger Decl., *Bingham I*, ¶ 9 ("[T]he public would be misled [sic] into believing that an AAID or ABOL/ID 'Fellow' or 'Diplomate' had the educational and examination requirements of an oral surgeon and specialist in prosthodontics when in fact they do not."); Atwood Decl. ¶¶ 4–6 (anecdotal

evidence from a dental patient who was allegedly misled by AAID credentials); Cincotta Decl. ¶¶ 6–18 (anecdotal evidence from a lawyer who represents a dental patient who allegedly received inadequate dental care from an AAID accredited dentist).)[11] The Dental Board has not offered any empirical evidence—in the form of studies or surveys—which would support a conclusion that the advertising of AAID credentials would mislead the general public. *See Ibanez*, 512 U.S. at 146, 114 S.Ct. at 2090; *Peel*, 496 U.S. at 106, 110 S.Ct. at 2290. More particularly, there is no evidence that members of the public assume that the AAID credentials at issue here are backed by at least one year of post graduate study in implant dentistry.

Even assuming that the Dental Board had made an adequate evidentiary showing of the potential for deception, it has failed to show that a total prohibition is necessary. ***1241** The Dental Board's concern as to sponsorship could be addressed by requiring disclosure in the advertisement that the AAID is not recognized by the Dental Board or the ADA. The proposed regulation requires disclosure that implant dentistry is not a discipline recognized by the Dental Board; an equivalent disclaimer might state that the AAID is not affiliated with the California Dental Board. Similarly, the Dental Board's concern that the public will make incorrect assumptions as to the requirements for certification could be addressed by requiring the advertisement to summarize the requirements for certification. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 375, 97 S.Ct. 2691, 2704, 53 L.Ed.2d 810 (1977).

In short, the Dental Board fails to show that the advertisement of AAID credentials is inherently misleading. It further fails to show that the advertisement of AAID credentials will mislead the public into believing that the dentist placing the advertisement has at least one year of post graduate academic work in implant dentistry. Finally, the Dental Board fails to show that any potential for consumer deception cannot be addressed by disclosure requirements rather than prohibition.

**IV. Relief**

The court finds and declares that the Dental Board's enforcement policy is unconstitutional to the extent that it prohibits advertisement of AAID credentials unless the advertising dentist has at least one year of post graduate academic study in implant dentistry. The remainder of the Dental Board's enforcement policy under Cal. Bus. & Prof.Code § 651 is not before the court and, therefore, remains undisturbed.

V.

The plaintiffs' motion for summary judgment is GRANTED.

IT IS SO ORDERED.

**Footnotes**

1 According to the AAID, "[u]nlike most current forms of dentures, which sit on top of the gums or are attached to existing teeth, implants may be inserted into the bone, functioning like an artificial tooth root, or may be placed directly against the bone to support a dental prosthesis." *Id.*

2 The "Fellow" designation is awarded directly by the AAID; the higher rank of "Diplomate" is awarded by the American Board of Oral Implantology/Implant Dentistry, a certifying board sponsored by the AAID. (Compl.¶ 11.)

3 At oral argument on December 6, 1997 in *Bingham I*, the defendants' counsel indicated that the plaintiffs could ask for a declaratory decision from the Dental Board as to whether their proposed advertisement would be in compliance with § 651(h)(5)(A). (Rep.'s Trans. of Proceedings, *Bingham I*, Dec. 5, 1997, at 8.)

4 Following the dismissal of *Bingham I*, defendants' counsel sent a letter to the Dental Board recommending that the Dental Board propose a formal regulation. (*See* Letter from Primes to Coleman, Jan. 22, 1998.)

5 On January 26, 2000, the California Office of Administrative Law (OAL) disapproved the Dental Board's proposed regulation for procedural reasons; according to defendants, OAL disapproved the proposed regulation because it failed to comply with the necessity and clarity standards of Cal. Gov.Code § 11349.1. (*See* Coleman Decl. Exh. 2, Decision of Disapproval of Regulatory Action, File No. 99–1214–08S, Feb. 2, 2000, at 1.) At oral argument on March 24, 2000, defendants' counsel stated that the Dental Board had resubmitted

the same proposed regulation to the OAL after addressing the procedural deficiencies, and that it expected approval in April 2000. According to the OAL's Internet web page, it appears that the OAL has approved the regulation and that it is scheduled to become operative on May 24, 2000. *See* <http://ccr.oal.ca.gov/>.

6 Further, at oral argument on March 24, 2000, defendants' counsel conceded that Bingham would violate the Dental Board's current policy, as expressed in the proposed regulation, if he were to advertise credentials awarded by the AAID.

7 At oral argument on March 24, 2000, defendants' counsel indicated that AAID members who have satisfied the requirements of proposed Cal.Code Regs. tit. 16 § 1054.1(b) could advertise their AAID credentials. Thus, AAID credential holders who have completed one post graduate academic year in implant dentistry at an accredited medical or dental school may not be subject to disciplinary action. However, since the defendants have conceded that Bingham has not satisfied those requirements, he cannot advertise his AAID credentials.

8 *See* Defs.' Responses to Pls.' Request for Admissions, No. 36 ("The Board's interpretation and implementation of Section 651 of the Business and Professions Code is outlined in Section 1054, et seq."); *id.*, No. 37 ("The Board's current interpretation of Section 651 of the California Business and Professions Code is outlined in Section 1054, et seq."); *id.*, No. 46 ("If the Plaintiff/licensee does not comply Section 1054, the Board would admit that it would be unlawful for him to advertise AAID and ABOI/ID credentials."). *But see id.*, Nos. 3, 19 & 44 (denying that the proposed regulation is the Dental Board's current enforcement policy).

9 "A decision not to issue a Declaratory Decision is within the discretion of the Agency. An Agency's failure to take action within 60 days of receipt of an application constitutes a denial of the application." Cal.Code Regs. tit. 1 § 1274(a). When taking action on an application for a declaratory decision, the Dental Board is required to commence a Declaratory Decision Proceeding with specific notice requirements. *See id.* at § 1272. "Within 60 days of receipt of an application ... the Agency shall serve on the Applicant ... notice of the Declaratory Decision Proceeding." *Id.* at § 1276(a). Since the Dental Board did not respond to the plaintiffs' request within 60 days of its receipt, the Dental Board denied the plaintiffs' application for a declaratory decision.

10 The Dental Board does not contend that one year of post graduate education is required to perform implant dentistry. As discussed in Part I *supra*, any dentist with a general license to practice as a dentist may perform implant dentistry.

11 It is significant to note that the patient's declaration, (Atwood Decl. ¶¶ 4–8), and the lawyer's declaration, (Cincotta Decl. ¶¶ 5–18), only allege that the AAID dentist provided substandard care. The patient alleges that she believed the dentist was well qualified because of the AAID credentials. (*See* Atwood Decl. ¶¶ 4–8.) As a result, these declarations do little to bolster the Dental Board's claim that the public would be misled by credentials which did not require an academic year of postdoctoral education.

**End of Document**

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Potts v. Hamilton
United States District Court, E.D. California. September 8, 2004 334 F.Supp.2d 1206 (Approx. 18 pages)

Reversed and Remanded by Potts v. Zettel, 9th Cir.(Cal.), February 2, 2007

Original Image of 334 F.Supp.2d 1206 (PDF)

334 F.Supp.2d 1206
United States District Court,
E.D. California.

Michael L. POTTS, D.D.S., and the American Academy of Implant Dentistry, Plaintiffs,
v.
Kathleen HAMILTON, Director, California Department of Consumer Affairs; Cynthia Gatlin, Executive Officer, California Dental Board; and Alan H. Kaye, D.D.S., President; Michael Pinkerton, Vice-President, Public Member; LA Donna Drury-Klein, R.D.A., Secretary; David I. Baron, Public Member; Newton Gordon, D.D.S., Member; Lawrence Hyndley, D.D.S., Member; Patricia Osuna, R.D.H., Member; George Soohoo, D.D.S., Member; Ariane Terlet, D.D.S., Member; and Chester Yokohama, D.D.S., Member, in their official capacities with the California Dental Board, Defendants.

No. CIV-S-03-0348DFL/DAD. Sept. 8, 2004.

**Synopsis**
**Background:** Dentist and national dental specialty organization brought action challenging constitutionality of state's prohibitions upon advertising of dental specialty credentials. Plaintiffs moved for summary judgment.

**Holdings:** The District Court, Levi, J., held that:
1 doctrine of res judicata did not bar action;
2 statute did not regulate only inherently misleading speech; and
3 statute violated First Amendment and had to be invalidated.

Motion granted.

**West Headnotes (15)**

Change View

1 **Judgment** Nature and Requisites of Former Recovery as Bar in General
**Judgment** Nature and Elements of Bar or Estoppel by Former Adjudication
"Claim preclusion" bars relitigation of claims that were raised or could have been raised in prior lawsuit, and requires identity of claims, final judgment on merits in prior lawsuit, and identity of, or privity between, parties in first and second lawsuits.

2 **Judgment** Nature and Requisites of Former Adjudication as Ground of Estoppel in General
**Judgment** Scope and Extent of Estoppel in General
"Issue preclusion" bars relitigation of issues actually litigated and decided in prior lawsuit, and requires identity of issues, final judgment on merits in prior lawsuit, full and fair opportunity to litigate issue in prior proceeding, actual litigation and decision of issue in prior proceeding, and necessity of that issue to support final judgment on merits in prior proceeding.

3 **Judgment** Effect of Change in Law or Facts

**SELECTED TOPICS**

Constitutional Law
Freedom of Speech, Expression, and Press
False or Misleading Commercial Advertising

Freedom of Speech, Expression, and Press
Protected Speech and Conduct

Judgment
Conclusiveness of Adjudication
County or Municipal Tax

**Secondary Sources**

**§ 296.Regulation of commercial activity**
13 Cal. Jur. 3d Constitutional Law § 296
...Although the existence of commercial activity in connection with speech does not prevent such speech from enjoying the constitutional protections of free speech and free press, the Constitution affords...

**§ 262.Nature and scope of protection**
13 Cal. Jur. 3d Constitutional Law § 262
...The California Constitution's Free Speech Clause protects commercial speech, at least in the form of truthful and nonmisleading messages about lawful products and services, as does the First Amendment,...

**§ 4:7.Covered speech**
Cal. Civ. Prac. Civil Rights Litigation § 4:7
...The constitutional right to free speech and press protects most types of speech on all subjects of human interest, including religious, political, social, or economic concerns. (Aaron v. Municipal Court...

See More Secondary Sources

**Briefs**

**RESPONDENTS' BRIEF ON THE MERITS**
2000 WL 172298
Gerawan Farming, Inc. v. Veneman
Supreme Court of California.
January 18, 2000
...During the Great Depression, an "unregulated scramble for market share" by agricultural producers caused a collapse of agricultural markets and the agricultural economy. Parallel national and state leg...

**Brief of Amicus Curiae Center for Individual Freedom in Support of Petitioners**
2003 WL 835292
Nike, Inc. v. Kasky
United States Supreme Court Amicus Brief.
February 28, 2003
...FN1. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than Amicus or its counsel, make a monetary contribution to the preparation or submission of thi...

**BRIEF FOR PETITIONER**
1999 WL 1129629
Gerawan Farming, Inc. v. Veneman
Supreme Court of California.
November 01, 1999
...This is a challenge to a state law requiring all California plum growers to fund collective

Officials of state dental examiners' board were not precluded, under doctrine of res judicata, from seeking to uphold constitutionality of state's prohibitions upon advertising of dental specialty credentials, despite prior judgment finding that statute violated protection afforded to commercial speech by First Amendment, where regulatory educational requirement in first action entailed "successful completion of a formal advanced education program at or affiliated with an accredited dental or medical school equivalent to at least one academic year beyond the predoctoral curriculum," and statute was subsequently amended to require "successful completion of a formal, full-time advanced education program that is affiliated with or sponsored by a university based dental school and is beyond the dental degree at a graduate or postgraduate level." U.S.C.A. Const.Amend. 1; West's Ann.Cal.Bus. & Prof.Code § 651(h)(5)(A).

4 **Judgment** Government, State, or Municipality, and Officers, Citizens, or Taxpayers
Court has discretion to relax application of preclusion where defendant is government entity, particularly political sovereign.

5 **Constitutional Law** False or Deceptive Claims; Misrepresentation
If advertisement is inherently misleading or has in actual practice misled members of consuming public, it is not protected by First Amendment and may be absolutely prohibited. U.S.C.A. Const.Amend. 1.

6 **Constitutional Law** Reasonableness; Relationship to Governmental Interest
State need not demonstrate that statute banning inherently or actually misleading commercial speech directly and materially advances substantial interest or exhibits reasonable means-end fit. U.S.C.A. Const.Amend. 1.

7 **Constitutional Law** False or Deceptive Claims; Misrepresentation
If advertisement is merely potentially misleading, in that information could be presented in different way that would not potentially mislead, then it is protected by First Amendment and may not be absolutely prohibited. U.S.C.A. Const.Amend. 1.

8 **Constitutional Law** False or Deceptive Claims; Misrepresentation
As to potentially misleading advertisements, which are protected by First Amendment, state may insist upon presentation, such as inclusion of additional clarifying information, that removes potential for deception, so long as regulation is no more extensive than necessary to directly and materially advance state's interest. U.S.C.A. Const.Amend. 1.

9 **Constitutional Law** Deception; Misrepresentation
Professional credentials issued by bona fide credentialing organizations, whose standards are rigorous, objectively clear, and verifiable, cannot be inherently or actually misleading, and thus are protected by First Amendment, because they are statements of objective, verifiable fact, rather than statements of opinion or about quality. U.S.C.A. Const.Amend. 1.

10 **Antitrust and Trade Regulation** Weight and Sufficiency
Mere speculation about possibility of deception in hypothetical cases does not suffice to show that advertisement is inherently or even potentially misleading.

11 **Antitrust and Trade Regulation** Advertising, Marketing, and Promotion
In order to regulate potentially misleading advertisement or professional credential, state must provide evidence to show that there is real potential that particular advertisement or credential will mislead public in some way.

advertising of their products. Petitioner is a large, family-run fruit farm. Its owners (hereinafter "Gerawan...

See More Briefs

**Trial Court Documents**

**American Civil Liberties Union of Northern California v. City of Redding**

2011 WL 8022009
American Civil Liberties Union of Northern California v. City of Redding
Superior Court of California, Shasta County
June 21, 2011

...NATURE OF PROCEEDINGS: FINAL RULING FINAL RULING ON ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION: Plaintiffs seek a preliminary injunction enjoining implementation or enforcement of certain sections o...

**Barry B. KAUFMAN and Vans, Inc., individually and on behalf of a class of others similarly situated, Plaintiffs, v. ACS SYSTEMS, INC., Datamart Information Services Corp.; Joe Girdwood; and Does 1-200, Defendants; David L. Amkraut and Joel Amkraut, individually and on behalf of a class of others similarly situated, Plaintiffs, v. Pacific Coast Office Products dba Copier Super Store, a California Corporation and Does 1 through 100, inclusive,**

2001 WL 38024164
Barry B. KAUFMAN and Vans, Inc., individually and on behalf of a class of others similarly situated, Plaintiffs, v. ACS SYSTEMS, INC., Datamart Information Services Corp.; Joe Girdwood; and Does 1-200, Defendants; David L. Amkraut and Joel Amkraut, individually and on behalf of a class of others similarly situated, Plaintiffs, v. Pacific Coast Office Products dba Copier Super Store, a California Corporation and Does 1 through 100, inclusive,
Superior Court of California, Los Angeles County
December 12, 2001

...This is a group of cases filed against businesses and individuals which have allegedly engaged in, and continue to engage in, "a pattern and practice of sending unsolicited faxed advertisements of and ...

**Environmental Law Foundation v. Laidlaw Transit Services**

2008 WL 2167672
Environmental Law Foundation v. Laidlaw Transit Services
Superior Court of California, San Francisco County
January 08, 2008

...The above-entitled cause came on for hearing December 4, 2007 in Department 613, the Honorable Ernest H. Goldsmith, Judge, presiding. Mark Pogelman and Todd Maiden of Reed Smith, LLP appeared as counse...

See More Trial Court Documents

12 **Constitutional Law** Health Care
**Health** Validity
State statute prohibiting advertising of dental specialty credentials not recognized by American Dental Association (ADA) or Dental Board of California did not regulate only inherently misleading speech, and thus could not be upheld against First Amendment challenge on that basis, where credentials conferred by some non-recognized groups were representations of objectively verifiable facts, rather than statements of opinion or quality. U.S.C.A. Const.Amend. 1; West's Ann.Cal.Bus. & Prof.Code § 651(h)(5)(A).

13 **Constitutional Law** False or Deceptive Claims; Misrepresentation
Defendants seeking to uphold validity of commercial speech regulation must provide concrete evidence to show that there is at least real potential that particular advertisement will mislead public in particular way. U.S.C.A. Const.Amend. 1.

14 **Constitutional Law** Health Care
**Health** Validity
State's prohibition upon advertising of dental specialty credentials not recognized by American Dental Association (ADA) or Dental Board of California was more extensive than necessary to advance state's interest in preventing misleading advertising of professional credentials, and thus statute violated First Amendment and had to be invalidated, even if credentials at issue were potentially misleading, and statute served substantial state interest, where disclaimer requirement would have restricted far less speech than outright prohibition on advertising credentials. U.S.C.A. Const.Amend. 1; West's Ann.Cal.Bus. & Prof.Code § 651(h)(5)(A).

15 **Constitutional Law** Narrow Tailoring
It is within legislature's discretion to choose between narrowly tailored means of regulating commercial speech, and court will not second-guess such choice. U.S.C.A. Const.Amend. 1.

**West Codenotes**

**Unconstitutional as Applied**
West's Ann.Cal.Bus. & Prof.Code § 651(h)(5)(A).

**Attorneys and Law Firms**

*1208 Ann Taylor Schwing, Esq., McDonough Holland and Allen, Sacramento, Frank R. Recker, Esq. (Pro Hac Vice), Cynthia June Hubbard, Esq. (Pro Hac Vice), Marco Island, FL, for Plaintiffs.

Marcia A. Fay, Esq., Attorney General's Office for the State of California, Sacramento, CA, for Defendants.

Charles S. Painter, Esq., Ericksen Arbuthnot Brown Kildruff and Day, Sacramento, CA, Laurel A. Haskell, Esq., Steven P. Means, Esq., Michael Best and Friedrich, Chicago, IL, for Intervenors: Lawrence Addleson, DDS and American Academy of Cosmetic Dentistry.

***MEMORANDUM OF OPINION AND ORDER***

LEVI, District Judge.

This case is a further chapter in the long-running dispute between plaintiffs and the State of California over the State's prohibitions upon the advertising of dental specialty credentials. Plaintiffs challenge a recently enacted California statute restricting the advertising of dental specialty credentials to those credentials recognized by the American Dental Association ("ADA") or the Dental Board of California ("Dental Board"). The court previously found that an earlier version of this statute violated the protection afforded to commercial speech by the First Amendment. ***See Bingham v. Hamilton*, 100 F.Supp.2d 1233 (E.D.Cal.2000).** This renewed effort to limit the advertising of bona fide credentials fares no better. The advertising of credentials in dental specialties awarded by boards not recognized by the ADA or the Dental Board is not inherently or actually misleading. In addition, even if such

advertising were potentially misleading, the statute is more restrictive than necessary to advance the State's interest in preventing false or misleading advertising of dental specialty credentials. Therefore, the statute violates the First Amendment, and plaintiffs are entitled to summary judgment.

I.

***A. The Parties***

Plaintiffs are Dr. Michael L. Potts, D.D.S. ("Potts") and the American Academy of Implant Dentistry ("AAID"). Potts is a California-licensed dentist in Camarillo and has been practicing general dentistry since 1975. He holds the credentials of "Fellow" from AAID and "Diplomate" from AAID's certifying board, the American Board of Oral Implantology/Implant ***1209** Dentistry ("ABOI/ID"), and he wants to advertise these credentials by listing them after his name. (Pls.' Mot. at 9.)

AAID is a national dental specialty organization which claims approximately 60 credentialed member dentists in California. (*Id.* at 2.) AAID sues in its own name and on behalf of its credentialed members in California. (*Id.*) AAID seeks to advance knowledge, skill, and expertise in the field of implant dentistry. To that end, AAID and ABOI/ID award various credentials to their members who fulfill certain educational, practice, and testing requirements. AAID awards the credentials of "Associate Fellow" and "Fellow," while ABOI/ID awards the higher credential of "Diplomate" (which is often advertised as "Board Certified"). (*Id.* at 1-2.) Besides completion of a dental degree, each of these credentials requires a certain number of years of practice in implant dentistry, completion of a substantial number of hours of continuing education in implant dentistry, completion of a multiple-choice written examination, and presentation of a certain number of cases exhibiting competence in performing various types of implants. (Exs. in Supp. of Pls.' Mot., Ex. B.) None of these credentials requires completion of a graduate or postgraduate education program in implant dentistry at a university-based dental school. (Pls.' Mot. at 9.)

Defendants are the Director of the California Department of Consumer Affairs and the Executive Officer, President, Vice-President, Secretary, and other members of the Dental Board of California. Defendants are charged with enforcing the statute at issue in this case and are sued solely in their official capacities. Plaintiffs seek a declaration that the statute is unconstitutional and an injunction against its enforcement.

***B. Background and Prior Litigation***

Any dentist with a general license to practice may perform implant dentistry in California.[1] There is no requirement of special training or education in implant dentistry. In addition, a general dentist may advertise that he limits his practice to implant dentistry. (*Id.* at 4-5.) While implant dentistry is an area of dental specialization in the broad sense, it is not a specialty recognized by the ADA or the Dental Board.[2] The current dispute centers around California's refusal to permit dentists to advertise their credentials earned from specialty boards (such as AAID and ABOI/ID) that are not recognized by the ADA or the Dental Board.

In ***Bingham v. Hamilton*, 100 F.Supp.2d 1233 (E.D.Cal.2000) ("*Bingham II*")**, the court held unconstitutional the enforcement policy of the Dental Board and a proposed regulation embodying that policy. At that time, the Dental Board's policy permitted a dentist to advertise a credential awarded by a specialty board only if that board was recognized by the ADA ***1210** or by the Dental Board. The policy set out three criteria on which a non-ADA-recognized specialty board must condition the granting of credentials in order to be recognized by the Dental Board: (1) "successful completion of a formal advanced education program at or affiliated with an accredited dental or medical school equivalent to at least one academic year beyond the predoctoral curriculum;" (2) "successful completion of an oral and written examination based on psychometric principles;" and (3) "training and experience subsequent to successful completion of [the education and testing requirements], to assure competent practice in the dental discipline as determined by the ... board ... which grants the credentials." *Id.* **at 1236-1237.** Dentists holding AAID credentials could not advertise these credentials because AAID did not then-and does not now-require successful completion of a formal advanced education program at an accredited dental school equivalent to at least one academic year beyond the D.D.S. degree.

The plaintiffs in ***Bingham II*** challenged the one year of postgraduate education requirement under the First Amendment. The court held that the advertising of AAID credentials was not inherently or actually misleading because AAID was a bona fide organization that issued credentials according to objectively verifiable standards. *Id.* **at 1240.** Further, while the State

has a substantial interest in preventing the general public from being misled that AAID and ABOI/ID credentials are from a board recognized by the ADA or the Dental Board or that such credentials require successful completion of a postgraduate education program at an accredited dental school, this interest could be protected by a required disclaimer without a wholesale prohibition on the listing of the credential. *Id.* at 1240-1241.

***C. Business and Professions Code Section 651(h)(5)(A)***

Some two years after the Dental Board's regulation and enforcement policy was invalidated in ***Bingham II***, the California legislature enacted § 651(h)(5)(A) of the Business and Professions Code. (*Id.* at 5-7.) The legislative history of this provision shows that its sponsors intended to codify substantially the same advertising restrictions as those embodied by the proposed regulation and enforcement policy struck down in ***Bingham II***. (*Id.; see also* Compl., Exs. D-J.) Section 651(h)(5)(A)(i) specifically addresses dental specialty advertising in specialties recognized by the ADA. For these ADA-recognized specialties, § 651(h)(6)(A)(i) forbids a dentist from holding himself out as a specialist or as being a member of or holding credentials from a certifying board unless that board is recognized by the ADA (or the dentist has completed a specialty education program approved by the ADA). (Defs.' Mot. at 6.) It is undisputed that the AAID and ABOI/ID do not fall into this category because implant dentistry is not an ADA-recognized specialty. (*Id.;* Pls.' Mot. at 8.)

Section 651(h)(5)(A)(ii) regulates specialty advertising by dentists in areas of dentistry that are not recognized as specialties by the ADA. (Defs.' Mot. at 6.) It allows a dentist specializing in one of these areas to advertise credentials awarded by a non-ADA-recognized specialty board (such as AAID and ABOI/ID) only if that board is recognized as a bona fide organization by the Dental Board. In order to be recognized as bona fide, a non-ADA-recognized specialty board must condition credentialing or membership on three requirements that are similar to the three requirements for non-ADA-recognized specialty boards contained in the regulation at issue in ***Bingham II***. These three requirements are: (1) "successful completion of a formal, ***1211** full-time advanced education program that is affiliated with or sponsored by a university based dental school and is beyond the dental degree at a graduate or postgraduate level;" (2) "prior didactic training and clinical experience in the specific area of dentistry that is greater than that of other dentists;" and (3) "successful completion of oral and written examinations based on psychometric principles." Cal. Bus. & Prof.Code § 651(h)(5)(A)(ii)(I)-(III). It is undisputed that AAID and ABOI/ID do not condition membership or credentialing on successful completion of a formal, full-time advanced education program at a university-based dental school that is beyond the dental degree. (Defs.' Mot. at 6-7; Pls.' Mot. at 9.) As in ***Bingham II***, plaintiffs challenge this educational requirement as unconstitutional because it completely prevents advertising of AAID and ABOI/ID credentials.

Defendants point out that even if a dentist is not allowed to advertise a specialty credential under § 651(h)(5)(A)(i) or (ii), he may still advertise a practice emphasis in any area of dentistry, as long as he indicates in the advertisement (in capital letters) that he is a general dentist. Cal. Bus. & Prof.Code § 651(h)(5)(A)(iii). In the context of this case, defendants have indicated that nothing in § 651(h)(5)(A) prohibits implant dentists like Potts from advertising that they limit their practices to implant dentistry or that they have completed a certain number of continuing education classes in implant dentistry. (Defs.' Mot. at 7.) Defendants also acknowledge that nothing in § 651(h)(5)(A) prohibits AAID members from advertising that they are "members" of AAID. But Potts may not advertise that he is a "Fellow" of AAID and a "Diplomate" of (or "Board Certified" by) ABOI/ID. He may not indicate to the general public that he is a credentialed member of AAID and ABOI/ID. (*Id.* at 8.) In short, while Potts can advertise that he limits his practice to implant dentistry and has taken courses in implant dentistry, he cannot advertise that he has achieved a measure of expertise as determined by AAID and ABOI/ID.

II.

***A. Res Judicata***

1 2 Plaintiffs argue that defendants are precluded from contesting the constitutionality of § 651(h)(5)(A) because substantially the same advertising restrictions were held unconstitutional in ***Bingham II*** and defendants had a full opportunity in that action to defend the restrictions. (Pls.' Mot. at 17-19.)[3]

3 4 Defendants do not dispute that the parties in ***Bingham II*** and in this case are identical and that ***Bingham II*** was litigated to a final judgment on the merits. (Defs.' Opp'n at 5-6.) However, defendants contend that no identity of claims or issues exists between this

case and ***Bingham II***. (*Id.* at 6-8; Defs.' Reply at 3-6.) The court agrees. While the claims and factual circumstances are quite similar, they are not the same. The educational requirement in § 651(h)(5)(A)(ii)(I) insists upon "successful completion of a formal, ***1212** full-time advanced education program that is affiliated with or sponsored by a university based dental school and is beyond the dental degree at a graduate or postgraduate level." By contrast, the regulatory educational requirement in ***Bingham II*** entailed "successful completion of a formal advanced education program at or affiliated with an accredited dental or medical school equivalent to at least one academic year beyond the predoctoral curriculum." ***Bingham II*, 100 F.Supp.2d at 1236**. Moreover, in ***Bingham II*** there was no dispute by defendants that AAID and ABOI/ID were bona fide organizations who issued bona fide, not sham, credentials. Now that the State legislature has acted to reinvigorate the regulation, defendants contend, and the statute provides, that any organization and credential that does not meet the statutory requirements cannot be bona fide and must be misleading to the public. Finally, the court has discretion to relax application of preclusion where the defendant is a government entity, particularly a political sovereign. For all of these reasons, the court declines to find that defendants are barred by ***Bingham II*** from defending § 651(h)(5)(A).

***B. Commercial Speech***

Dr. Potts wants to tell prospective and existing patients that he has certain credentials by, for example, displaying a certificate in his office or including the credentials after his name on a business card or telephone book listing. This is a classic form of commercial speech and, unless misleading, would not be subject to prohibition under well-established principles. Where the different professions are concerned, however, the analysis becomes somewhat more complex. Professionals who lack the claimed credential consider that those who would advertise it seek an unfair competitive advantage based on the false premise that the credential equates to a higher level of skill. Moreover, state-approved accrediting organizations believe that they bring expertise and knowledge of the profession and its art to the table, and see their advertising regulations as part of their overall regulation of the profession through the establishment of meaningful standards. Those organizations that are not state-sanctioned see this kind of regulation as protectionist of certain interests and professional groups.

A state may absolutely prohibit commercial speech that is false, deceptive, or misleading. *Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772, 96 S.Ct. 1817, 1830-1831, 48 L.Ed.2d 346 (1976). Where the speech is not deceptive, the state may restrict it "only if the [s]tate shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 142, 114 S.Ct. 2084, 2088, 129 L.Ed.2d 118 (1994) (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980)).

5 6 7 8 Thus, if an advertisement is inherently misleading or has in actual practice misled members of the consuming public, it is not protected by the First Amendment and may be absolutely prohibited. The state need not demonstrate that a statute barring such inherently or actually misleading speech directly and materially advances a substantial interest or exhibits the reasonable means-end fit required under the *Central Hudson* test. However, if an advertisement is merely potentially misleading, in that the information could be presented in a different way that would not potentially mislead, then it is protected by the First Amendment and may not be absolutely prohibited. As to potentially misleading advertisements, the ***1213** state may insist upon a presentation-typically the inclusion of additional clarifying information such as a disclaimer-that removes the potential for deception, so long as the regulation is no more extensive than necessary to directly and materially advance the state's interest. *See In re R.M.J.*, 455 U.S. 191, 203, 102 S.Ct. 929, 937-938, 71 L.Ed.2d 64 (1982); *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1106-1107 (9th Cir.2004).

9 10 11 As to the advertising of professional credentials, the Supreme Court has stated that credentials issued by bona fide credentialing organizations, whose standards are rigorous, objectively clear, and verifiable, cannot be inherently or actually misleading because they are statements of objective, verifiable fact, rather than statements of opinion or about quality.[4] *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 101-102, 110 S.Ct. 2281, 2288, 110 L.Ed.2d 83 (1990). However, advertising of such credentials could still potentially be misleading, requiring application of the *Central Hudson* test to any regulation of such advertising. Moreover, mere speculation about the possibility of deception

in hypothetical cases does not suffice to show that an advertisement is inherently or even potentially misleading. The state must provide evidence to show that there is a real potential that a particular advertisement or credential will mislead the public in some way. *Ibanez*, 512 U.S. at 145, 146-147, 114 S.Ct. at 2090-2091. The Court has also cautioned that the determination of whether an advertisement or credential is inherently or potentially misleading is necessarily fact-intensive and case-specific. *Id.* at 146, 114 S.Ct. at 2090.

***C. AAID and ABOI/ID Credentials: Inherently Misleading?***

Defendants do not contend that any member of the public has actually been misled by AAID or ABOI/ID credentials. Rather, defendants primarily claim that the credentials are inherently misleading, justifying a total ban. Defendants rely heavily on the Ninth Circuit's recent opinion in *American Academy of Pain Management v. Joseph*, 353 F.3d 1099 (9th Cir.2004) ("*Pain Management*"). In *Pain Management*, the Ninth Circuit upheld Business and Professions Code § 651(h)(5)(B), an analogous California statute regulating advertising of medical specialty credentials, against a First Amendment challenge brought by credentialed members of the American Academy of Pain Management ("AAPM"). Section 651(h)(5)(B) forbids California-licensed physicians from advertising that they are certified or eligible for certification by a medical specialty board unless that board is either recognized by the American Board of Medical Specialties ("ABMS") or approved by the Medical Board of California ("Medical Board") as having requirements for certification that are equivalent to those of ABMS-recognized medical specialty boards. *See id.* at 1104. However, the California Attorney General in *Pain Management* clarified that § 651(h)(5)(B) restricts only use of the term "board certified" and its equivalents. Therefore, unlike § 651(h)(5)(A), it does not restrict advertisement of credentials, such as "diplomate" or "fellow," issued by non-recognized medical specialty boards. *Id.* at 1104, 1111.

The *Pain Management* court held that an advertisement using the term "board certified" to denote a credential from a ***1214** non-ABMS-recognized medical specialty board is inherently misleading. *Id.* at 1107-1108. It observed that the term "board certified" is a term of art that has acquired and long held a precise meaning within the medical profession. Within that context, the term "board certified" means only that a doctor has been certified by a board that is a member of ABMS in one of the 23 areas of medical specialization recognized by ABMS. *Id.* at 1104-1105. "Board certified" also conveys that the doctor has achieved "a high level of specialized skill and proficiency." *Id.* at 1105. Since the California legislature defined the term "board certified" in accordance with this meaning in § 651(h)(5)(B), the Ninth Circuit held that an advertisement containing a statement that a doctor is "board certified" by a board not recognized by ABMS would be inherently misleading. *Id.* at 1108.

Defendants argue that just like § 651(h)(5)(B) in *Pain Management*, § 651(h)(5)(A) gives a "special and particular meaning to the advertising of postgraduate accreditations awarded in specific areas of dentistry." (Defs.' Mot. at 10.) Thus, according to defendants, any advertisement of credentials that does not conform to that meaning is inherently misleading. However, this argument does not adequately account for the differences between the statute and factual circumstances in *Pain Management* and the statute and factual circumstances in this case.

The statute in *Pain Management* has a far narrower regulatory scope than the statute in this case. Section 651(h)(5)(B) restricts only use of the specific term "board certified" and its equivalents, such as "certified by a board," "board eligible," and "eligible for board certification." *Pain Management*, 353 F.3d at 1104-1105 n. 3, 1111. By contrast, § 651(h)(5)(A) restricts advertisement of all credentials awarded by dental specialty boards, including terms like "fellow," "diplomate," and the like. The court in *Pain Management* addressed only whether use of the specific term "board certified" was inherently misleading in the context of that case-in particular, the unique, long established meaning of the term "board certified": it did not hold that any advertisement of professional credentials not authorized by statute would be, for that reason alone, inherently misleading. Such an expansive view of *Pain Management* would place it in conflict with Supreme Court precedents such as *Peel* and *Ibanez* and effectively would remove all First Amendment protection from this area by permitting state legislatures to declare that all deviations from legislatively sanctioned terms and standards were inherently misleading and, therefore, subject to outright prohibition.

The *Pain Management* court relied on a particular record demonstrating that the term "board certified" had acquired a fixed, technical meaning within the medical profession, and that the California legislature had simply codified that meaning in § 651(h)(5)(B). *Id.* at 1104-1105 (quoting *Peel*, 496 U.S. at 102 n. 11, 110 S.Ct. at 2288 n. 11). By contrast, defendants in

this case have provided scant evidence that all dental specialty credentials, or even terms such as "diplomate" or "specialist," have similarly acquired a fixed, technical meaning within the dental profession. (*See* Defs.' Mot. at 3; Neumann Decl. ¶¶ 5, 11; McGinley Decl. ¶ 4.)[5] The statute in ***1216** *Pain Management* explicitly defined the term "board certified" to accord with its historical meaning within the medical profession. *See* Cal. Bus. & Prof.Code § 651(h)(5)(B). There is no equivalent definition for "board certified," "diplomate," "fellow," or any other type of credential to be found in § 651(h)(5)(A). Nor is there evidence of a well-established, specialized meaning accorded to all dental specialty credentials in the same way that the term "board certified" has become a term of art within the medical profession.

Finally, unlike the American Academy of Pain Management, AAID and ABOI/ID are bona fide credentialing organizations whose standards are rigorous, objectively clear, and verifiable.[6] In addition to attainment of a dental degree, each credential issued by AAID and ABOI/ID requires a certain number of years of practice in implant dentistry, completion of a substantial number of hours of continuing education in implant dentistry, completion of a written examination, and presentation of a certain number of cases demonstrating proficiency in performing various types of dental implants. (Exs. in Supp. of Pls.' Mot., Ex. B.) By contrast, anyone with two years experience working with patients experiencing pain who successfully completed a two-hour, 100-question multiple choice examination could become a "board certified" member of AAPM. *Pain Management*, 353 F.3d at 1103. Moreover, there was evidence indicating that more than eighty percent of AAPM's members had not taken that examination, but rather had been grandfathered in. *Id.* The factual circumstances of *Pain Management* come very close to *Peel's* definition of a sham organization, since AAPM apparently ***1218** made little inquiry into applicants' fitness and conferred membership on applicants almost indiscriminately. AAID and ABOI/ID are in a very different position, awarding their credentials only to applicants who have fulfilled rigorous criteria that are objectively clear and verifiable. Since these credentials are representations of objectively verifiable facts, rather than statements of opinion or quality, such credentials cannot be considered inherently misleading. *Peel*, 496 U.S. at 101-102, 110 S.Ct. at 2286.

12 In light of the differences between the statute and factual circumstances in *Pain Management* and the statute and factual circumstances in this case, and *Peel's* favorable treatment of credentials like those issued by AAID and ABOI/ID, the credentials issued by AAID and ABOI/ID cannot be considered inherently misleading. It follows that § 651(h)(5)(A) cannot be sustained on the ground that it regulates only inherently misleading speech.

***D. AAID and ABOI/ID Credentials: Potentially Misleading?***

13 In *Ibanez*, the Supreme Court held that defendants seeking to uphold the validity of a commercial speech regulation must provide concrete evidence to show that there is at least a real potential that a particular advertisement will mislead the public in a particular way. *Ibanez*, 512 U.S. at 145, 146-147, 114 S.Ct. at 2090-2091. Mere speculation as to the potential for deception in hypothetical cases does not suffice. *Id.* In ***Bingham II***, the defendants presented only "conclusory, anecdotal, and speculative" evidence to show that AAID and ABOI/ID credentials carried with them a potential to mislead the public. ***Bingham II*, 100 F.Supp.2d at 1240**. The court held that by failing to produce any empirical evidence, defendants had failed to carry their burden under ***Ibanez***. ***Id.***

In this case, defendants provide two surveys to show that AAID and ABOI/ID credentials are potentially misleading. One survey ("the Cogan mall survey") was conducted at malls in various parts of California and surveyed 200 people. (Cogan Decl., Report, pp. 10-11, 13.) Respondents were shown one of four different mock-ups of a fictitious advertisement for a dentist who is a Fellow of AAID and a Diplomate of ABOI/ID (also tested as Board Certified by ABOI/ID). (*Id.*, pp. 12-13.) Two of these mock-ups contained the AAID and ABOI/ID credentials without a disclaimer, and two featured the credentials with a disclaimer.[7] (*Id.*, p. 12.) The Cogan mall survey purports to demonstrate that most members of the public mistakenly believe (1) that completion of a full-time postgraduate education program beyond the D.D.S. degree is required to earn these credentials and (2) that AAID and ABOI/ID are recognized by the ADA and the Dental Board. (*Id.*, pp. 14-26.)

The other survey ("the Kamins phone survey") was conducted by telephone and also surveyed 200 people. (Kamins Decl., Ex. 3, pp. 2-3.) Respondents were asked questions about whether they thought that AAID and ABOI/ID credentials indicate that the holder is a specialist in implant dentistry, whether a specialist in implant dentistry must complete "some form of full-time training within an accredited dental ***1217** school affiliated with a university," and whether AAID and ABOI/ID credentials imply that implant dentistry is a dental specialty

recognized by the ADA. (*Id.*, pp. 3-5.) The Kamins phone survey resulted in high levels of affirmative responses to each of the preceding questions. (*Id.*)

These two surveys are of only limited value in determining whether AAID and ABOI/ID credentials are potentially misleading. Each suffers from serious deficiencies that render its significance open to question. The Cogan mall survey is not a probability sample, since respondents were not pre-selected in a random manner from across the general population. Because of the selection bias in the sampling procedure, no reliable extrapolation can be made from the results of this convenience sample to the general population of California. (See Stokes Decl., Report, p. 2.) More significantly, both the Cogan mall survey and the Kamins phone survey asked leading and compound questions of respondents. The leading questions tend to suggest their own answer and may well have guided respondents to a particular answer.[6] (*See id.*, p. 3.) The compound questions contain two or more elements, making it impossible to determine which element the respondent addressed in his or her response. (*See id.*) The Kamins phone survey in particular asked respondents questions that were quite long and convoluted, making it unlikely that most respondents remembered the beginning of the question once the interviewer reached the end of the question and requested a response.[9] (*See id.*)

Even if the results of these surveys were deemed reliable, many of the responses are not relevant to the question at hand. Most of the questions in each survey do not measure the percentage of the general public that believes that-without regard to AAID or ABOI/ID credentials-implant dentistry is a dental specialty recognized by the ADA or the Dental Board.[10] ***1218** The surveys also do not assess the background understanding of the general public regarding how much education a specialist in implant dentistry is required to complete. It is impossible to determine what, if any, misleading effect AAID and ABOI/ID credentials have, because there is no control set against which this effect can be measured.

Finally, although the Cogan mall survey tested the effect of various disclaimers on public perceptions regarding the educational requirements for and sponsorship of AAID and ABOI/ID credentials, these results are also of little help to defendants. First, the Cogan mall survey was conducted in a manner that renders its results far from reliable. Leaving aside the fact that it is not a scientific probability survey, it also tested mall shoppers who had been to a dentist in the past two years. (Cogan Decl., Report, p. 13.) It did not target people who had been to an implant dentist, who required the services of an implant dentist, or even who knew what implant dentistry is. This is the audience that could be expected to study implant dentistry advertisements with care, and rely upon them in choosing a dentist, whereas the average mall shopper who has merely seen a general dentist in the past two years might not be so careful.

More significantly, the disclaimers that were tested did reduce public misperceptions about the educational requirements for and sponsorship of AAID and ABOI/ID credentials. The website disclaimer reduced the number of people who thought that such credentials require completion of some education beyond a general dental degree from 66% to 52%, while the ADA non-recognition disclaimer reduced this number from 78% to 50%. (*Id.*, p. 16.) Furthermore, the ADA non-recognition disclaimer reduced the number of people who thought that AAID and ABOI/ID credentials are recognized by the ADA and the Dental Board from 70% to 18%. (*Id.*, p. 20.) These numbers indicate that a carefully worded disclaimer can be quite effective at reducing the general public's confusion as to the educational requirements for and sponsorship of AAID and ABOI/ID credentials.

It is doubtful that these two surveys, standing alone, satisfy the standard articulated by the Supreme Court in *Ibanez*. However, it is not necessary to resolve this question. Assuming that these two surveys do meet the *Ibanez* threshold to demonstrate that AAID and ABOI/ID credentials are potentially misleading, § 651(h)(5)(A) can survive plaintiffs' challenge only if it satisfies the remaining three elements of the *Central Hudson* test. It does not.

***E. Is Section 651(h)(5)(A) More Extensive than Necessary to Directly and Materially Advance the State's Interest in Preventing Misleading Advertising of Professional Credentials?***

14 Even assuming that AAID and ABOI/ID credentials are potentially misleading, the statute as applied to those credentials cannot withstand scrutiny under the remaining factors of the *Central Hudson* test because the regulation, in the form of a prohibition, is more extensive than necessary to advance the State's interest in preventing misleading advertising of professional credentials.

There is no dispute that § 651(h)(5)(A) serves a substantial state interest. The Supreme Court and the Ninth Circuit have long recognized that states have a substantial interest in regulating advertising by *1219 professionals to prevent deception of the general public. *In re R.M.J.*, 455 U.S. at 202, 102 S.Ct. at 937; *Pain Management*, 353 F.3d at 1108-1109. Defendants contend that California has a substantial interest in preventing the general public from being misled that a credential awarded by a non-ADA-recognized dental specialty board has the same requirements as a credential awarded by an ADA-recognized dental specialty board. This is a substantial interest.

Furthermore, § 651(h)(5)(A) directly and materially advances this interest. The purpose of § 651(h)(5)(A) is to prevent members of the public from thinking that credentials from non-ADA-recognized dental specialty boards convey the same assurance of competence and skill as a credential from an ADA-recognized dental specialty board. The real concern of the legislature in enacting this statute was that "credentials" issued for a fee by fly-by-night, internet-based dental specialty "boards" would confuse the public into thinking that they were equivalent to a bona fide credential issued by an ADA-recognized or equivalent dental specialty board. (Pls.' Mot. at 6-7; Compl., Exs. D-J.) The legislature's solution was to ban advertisement of any credential that is not awarded by a dental specialty board that is recognized by either the ADA or the Dental Board. This solution does directly and materially advance the State's purpose. Whether it does so in a manner more restrictive than necessary is the inquiry under the last part of the *Central Hudson* test.

15 The Supreme Court has emphasized that the final element of the *Central Hudson* inquiry is not a least restrictive means analysis. *Bd. of Trs. v. Fox*, 492 U.S. 469, 479-480, 109 S.Ct. 3028, 3034-3035, 106 L.Ed.2d 388 (1989). Rather, defendants must demonstrate "a reasonable fit between the legislature's ends and the means chosen to accomplish those ends. The fit need not be perfect nor the single best to achieve those ends, but one whose scope is narrowly tailored to achieve the legislative objective." *Pain Management*, 353 F.3d at 1111 (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 632, 115 S.Ct. 2371, 2380, 132 L.Ed.2d 541 (1995)). It is within the legislature's discretion to choose between narrowly tailored means of regulating commercial speech, and a court will not second-guess such a choice. *Id.* (citing *Fox*, 492 U.S. at 479, 109 S.Ct. at 3034).

In *Pain Management*, the Ninth Circuit ruled in an alternative holding that even if the statute did not regulate only inherently misleading speech it would still survive First Amendment scrutiny under the remainder of the *Central Hudson* test. The *Pain Management* court determined that the mechanism set up by § 651(h)(5)(B) to screen use of the term "board certified" in physician advertising was narrowly tailored to achieve the State's interest in eliminating misleading uses of the term "board certified" in physician advertising. *Id.* While the court acknowledged that less restrictive alternatives existed, such as freely allowing use of the term "board certified" accompanied by a disclaimer, it applied the Supreme Court's teaching in *Fox* that the *Central Hudson* test is not a least restrictive means inquiry and recognized that the statute at issue represented a reasonable fit between the legislature's purpose and the means chosen to accomplish that purpose. *Id.*

Important to the *Pain Management* court's analysis under this part of the *Central Hudson* test was the salient fact that § 651(h)(5)(B) restricts only use of the term "board certified" and does not restrict all advertisement of credentials awarded by non-recognized medical specialty boards. *Id.* The court specifically noted that the defendants in that case had *1220 conceded that an AAPM member could advertise that he or she is a Diplomate of AAPM, but simply could not use the words "board certified" in the advertisement. *Id.*

Defendants in this case now argue that § 651(h)(5)(A) is identical in all material respects to the statute at issue in *Pain Management*, and seek to take advantage of the *Pain Management* holding free of the critical concessions offered to secure that holding. But the two statutes are clearly different. The statute in this case forbids dentists from advertising any dental specialty credential not recognized by the ADA or the Dental Board, and is therefore distinctly broader in scope than the statute in *Pain Management*. In light of this critical distinction, one that the Ninth Circuit highlighted in the *Pain Management* opinion, the outcome of the reasonable fit analysis in this case has not been foreordained by *Pain Management*.

Section 651(h)(5)(A) is not narrowly tailored and is more extensive than necessary to achieve the State's interest in preventing misleading advertising of dental specialty credentials. Prohibiting the advertising of any credential that is not recognized by the ADA or the Dental Board or awarded by a board with equivalent requirements is substantially overbroad. A disclaimer requirement would restrict far less speech than an outright

prohibition on advertising these credentials. Defendants' concern about consumer confusion as to sponsorship could be addressed by requiring a disclaimer that AAID and ABOI/ID are not recognized by or affiliated with the ADA or the Dental Board. The goal of assuring that consumers are not misled about the educational requirements for AAID and ABOI/ID credentials could be achieved by requiring advertisements to list the educational requirements for those credentials or to direct consumers to an Internet website containing that information. *See* ***Bingham II,*** **100 F.Supp.2d at 1240-1241.** At least in the context of the circumstances here, involving a legitimate professional organization and genuine credentials as opposed to a sham arrangement, these kinds of disclaimers should suffice to protect the State's interests. Defendants' own surveys accord with this conclusion.

While a court may not invalidate a statute that goes "only marginally beyond what would adequately have served the governmental interest," the statute in this case is "substantially excessive, disregarding far less restrictive and more precise means." *Fox,* 492 U.S. at 479, 109 S.Ct. at 3034 (internal quotation marks and citations omitted). Therefore, § 651(h)(5)(A) violates the First Amendment and must be invalidated.

III.

Accordingly, the court finds and declares that § 651(h)(5)(A) is unconstitutional as applied to the advertisement of AAID and ABOI/ID credentials by dentists who have not completed a formal, full-time advanced education program that is affiliated with or sponsored by a university-based dental school and is beyond the dental degree at a graduate or postgraduate level. *See* Cal. Bus. & Prof.Code § 651(h)(5)(A)(ii)(I). The court will schedule a status conference in this case to allow the parties an opportunity to address the scope and timing of the injunctive relief plaintiffs have requested so that defendants may have an opportunity to develop an appropriate disclaimer. Plaintiffs' motion for summary judgment is GRANTED, and defendants' motion for summary judgment is DENIED.

IT IS SO ORDERED.

**Footnotes**

1 "Implant dentistry consists of the placing of devices for attaching artificial replacement teeth to the same bones to which natural teeth are anchored.... According to the AAID, unlike most current forms of dentures, which sit on top of the gums or are attached to existing teeth, implants may be inserted into the bone, functioning like an artificial tooth root, or may be placed directly against the bone to support a dental prosthesis." ***Bingham v. Hamilton,*** **100 F.Supp.2d at 1234 n. 1** (citations and internal quotation marks omitted).

2 The ADA recognizes only nine areas of dental specialization and accredits boards to award credentials in each of these areas. These nine areas are: oral and maxillofacial surgery; prosthodontics; periodontology; oral and maxillofacial radiology; oral pathology; public health dentistry; endodontics; orthodontics and dentofacial orthopedics; and pediatric dentistry. (Pls.' Mot. at 3.)

3 Claim preclusion bars relitigation of claims that were raised or could have been raised in a prior lawsuit. It requires an identity of claims, a final judgment on the merits in the prior lawsuit, and identity of, or privity between, the parties in the first and second lawsuits. *Owens v. Kaiser Found. Health Plan, Inc.,* 244 F.3d 708, 713 (9th Cir.2001). Issue preclusion bars relitigation of issues actually litigated and decided in a prior lawsuit. It requires an identity of issues, a final judgment on the merits in the prior lawsuit, a full and fair opportunity to litigate the issue in the prior proceeding, actual litigation and decision of the issue in the prior proceeding, and the necessity of that issue to support a final judgment on the merits in the prior proceeding.

4 By contrast, the Court noted that advertising of credentials "issued by an organization that had made no inquiry into [an applicant's] fitness, or by one that issued certificates indiscriminately for a price," could be inherently or actually misleading. *Peel,* 496 U.S. at 102, 110 S.Ct. at 2288. This is not the circumstance presented here.

5 Defendants provide two declarations to support their position that credentials like "diplomate" have acquired a fixed, technical meaning within the dental profession. The Neumann Declaration simply asserts that the terms

"diplomate" and "board certified" have historically been used to denote someone who has completed all the requirements of an ADA-recognized specialty certifying board. (Neumann Decl. ¶ 11.) Such conclusory statements cannot substitute for evidence establishing such a historical meaning for all dental specialty credentials. The McGinley Declaration states that the dental insurance industry in California understands the term "board certified" to designate someone who has completed the requirements for certification in an ADA-recognized dental specialty. (McGinley Decl. ¶ 4.) This declaration addresses only use of the term "board certified" and therefore says nothing about the meaning of other dental specialty credentials, such as "diplomate."

6 Defendants argue that the requirements for these credentials have changed since the decision in ***Bingham II***, and that they cannot therefore be considered objectively clear or verifiable, as those terms were used in *Peel*. (Defs.' Mot. at 11-14.) Defendants have presented some evidence that the methods of qualifying for the credentials have been altered and that some of the substantive requirements have changed in minor ways. (*See generally* Shuck Dep., Fay Decl., Ex. 1; Potts Dep., Fay Decl., Ex. 2.) None of this evidence indicates that the prerequisites for AAID and ABOI/ID credentials are not objectively clear and verifiable. They are readily accessible on the websites of AAID and ABOI/ID, and they are not susceptible to subjective manipulation. *See* http://www.aaid-implant.cnch ost.com/memberservices/credentials/AFExamRequirements.pdf (last visited August 23, 2004) (Associate Fellow requirements); http://www.aaid-implant.cnchost.com/mem berservices/credentials/FExamRequirements.pdf (last visited August 23, 2004) (Fellow requirements); http:// www.aboi.org/requirem.htm (last visited August 23, 2004) (Diplomate requirements). Furthermore, even where a credentialed AAID member has attained "Fellow" or "Diplomate" status under an older method of qualification, there is no evidence in the record to suggest that the previous requirements are substantively different or less rigorous than the current requirements. Defendants' position strongly implies that any credentialing organization whose requirements have changed in any way would not be bona fide as contemplated by the *Peel* Court. Such a proposition is altogether too broad, as it would in all likelihood exclude most credentials from the protections of the First Amendment on the ground that they are inherently misleading. In sum, nothing defendants have presented detracts from the conclusion that AAID and ABOI/ID are bona fide credentialing organizations whose requirements are rigorous, objectively clear, and verifiable. *See Peel*, 496 U.S. at 101-102, 110 S.Ct. at 2288.

7 One of the two mock-ups containing the credentials "Diplomate of [ABOI/ID]" and "Fellow of [AAID]" included a disclaimer stating that "[t]he Diplomate and Fellow designations are awarded on the achievement of certain qualifications which can be found at www.aboi.org." (Cogan Decl., Display, Ad # 1B.) One of the two mock-ups containing the credential "Board Certified by [ABOI/ID]" included a disclaimer stating that "The [ABOI/ID] is not an accrediting organization that is recognized by the [ADA] or the [Dental Board]." (*Id.*, Ad # 2B.)

8 For example, the Kamins phone survey asked the following leading questions: "Do you believe that the [ADA] recognizes implant dentistry as one of their nine sanctioned dental specialties?" "In your opinion, is part of the requirement to be considered a 'specialist in implant dentistry', the completion of some form of full-time training within an accredited dental school?" "Must this dental school be affiliated with a university?" (Kamins Decl., Ex. 3, 1st questionnaire, p. 3, questions 1, 4a, & 4b.) The Cogan mail survey asked the following leading questions: "Do you think that this dentist has or has not completed additional dental education beyond his general dental degree?" "Do you think that the [AAID] and the [ABOI/ID] are accrediting organizations recognized by the [ADA]?" "Do you think this dentist is a specialist in performing dental implants?" (Cogan Decl., Questionnaires & Instructions.)

9 For example, the Kamins phone survey asked the following question: "If a dentist promoted himself or herself as a 'fellow' of the American Academy of Implant Dentistry and has achieved the distinction of 'diplomate' of the

American Board of Oral Implantology through successful completion of experiential, educational and testing requirements, would you consider that dentist to be a 'specialist' in implant dentistry?" (Kamins Decl., Ex. 3, 1st questionnaire, p. 3, question 3.)

10 One question in the Kamins phone survey did seek to determine what percentage of the general public thinks that implant dentistry is an ADA-recognized specialty, without mention of AAID and ABOI/ID credentials, and therefore what effect the mention of AAID and ABOI/ID credentials has on that percentage. (*See* Kamins Decl., Ex. 3, pp. 4-5.) The results from this question seem to indicate that AAID and ABOI/ID credentials have relatively little effect on public perceptions about whether implant dentistry is an ADA-recognized dental specialty. Forty-three percent of respondents said that they thought implant dentistry is an ADA-recognized specialty without mention of AAID and ABOI/ID credentials, while 54.5% of respondents thought that implant dentistry is an ADA-recognized specialty once AAID and ABOI/ID credentials were mentioned. (*See id.*) This is an increase of only 11.5%, which provides little support for the proposition that AAID and ABOI/ID credentials carry with them a real, concrete potential to mislead the public about whether implant dentistry is an ADA-recognized specialty or whether AAID and ABOI/ID credentials are recognized by the ADA.

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**Potts v. Zettel**
United States Court of Appeals, Ninth Circuit. February 2, 2007 220 Fed.Appx. 559 *(Approx. 6 pages)*

220 Fed.Appx. 559
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)
United States Court of Appeals,
Ninth Circuit.

Michael L. POTTS; The American Academy of Implant Dentistry, Plaintiffs –Appellees,
v.
Charlene ZETTEL, in her official capacity as Director; Cynthia Gatlin, Executive Officer, California Dental Board; Alan Kaye, DDS, President, California Dental Board; La Donna Drury–Klein; David I. Baron; Newton Gordon, DDS; Lawrence Hyndley, DDS; Patricia Osuna, RDH; George Soohoo, DDS; Chester Yokohama, DDS; Kamran Sababi, DDS; Kevin Biggers; Brandon Hernandez, Defendants–Appellants.
Michael L. Potts; The American Academy of Implant Dentistry, Plaintiffs –Appellees,
v.
Cynthia Gatlin, Executive Officer, California Dental Board; Alan Kaye, DDS, President, California Dental Board; La Donna Drury–Klein; David I. Baron; Newton Gordon, DDS; Lawrence Hyndley, DDS; Patricia Osuna, RDH; George Soohoo, DDS; Chester Yokohama, DDS; Kathleen Hamilton, in her official capacity as director; Michael Pinkerton, Vice President, Public Member; Ariane Terlet, DDS, Defendants–Appellants,
and
Office of the Attorney General, Defendant.

Nos. 05–15324, 05–16247. Argued and Submitted Nov. 14, 2006. Filed Feb. 2, 2007.

**Synopsis**
**Background:** Dentist and national dental specialty organization brought action against officials of state dental examiners' board, challenging constitutionality of state's prohibitions upon advertising of dental specialty credentials. The United States District Court for the Eastern District of California, David F. Levi, J., 334 F.Supp.2d 1208, granted summary judgment in favor of plaintiffs, and officials appealed.

**Holdings:** The Court of Appeals held that:
1 doctrine of res judicata did not bar officials from seeking to uphold constitutionality of the statute;
2 survey evidence as to potentially misleading nature of advertisements that statute would prohibit was admissible; and
3 genuine issue of material fact existed as to whether advertising of dental specialty credentials was potentially misleading, precluding summary judgment.

Reversed and remanded.

**West Headnotes (5)**

Change View

1 **Judgment** Effect of Change in Law or Facts
Officials of state dental examiners' board were not precluded, under doctrine of res judicata, from seeking to uphold constitutionality of state's prohibitions upon advertising of dental specialty credentials, despite prior judgment finding that statute violated protection afforded to commercial speech by First Amendment,

**SELECTED TOPICS**

Judgment
Merger and Bar of Causes of Action and Defenses
Res Judicata Effect of the Prior Decision

Admissibility
Suppression of Allegedly Illegal Blood Test Evidence

Federal Civil Procedure
Judgment
Material Fact Issues

**Secondary Sources**

**§ 14:15.Same cause of action**
1 Cal. Affirmative Def. § 14:15 (2d ed.)
...Res judicata bars relitigation of the same cause of action. Many cases speak of the requirement as demanding that the causes of action be "identical." Res judicata is a complete bar only when the cause...

**§ 4409Claim Preclusion—Continuing and Renewed Conduct**
18 Fed. Prac. & Proc. Juris. § 4409 (2d ed.)
...Claim preclusion analysis may be sorely tested by disputes that arise out of a number of events. Often issue preclusion is sufficient to foreclose subsequent litigation. When issue preclusion fails, ho...

**§ 4443"On the Merits"—Admissions, Stipulations, and Consent Judgments**
18A Fed. Prac. & Proc. Juris. § 4443 (2d ed.)
...Even apart from default, preclusion questions may arise from judgments that rest on uncontested foundations. Particular issues may have been admitted in the pleadings or in response to formal requests ...

See More Secondary Sources

**Briefs**

**Respondents' Brief In Opposition**
2008 WL 33999498
Daniel MONAHAN, et al., Petitioners, v. NEW YORK CITY DEPARTMENT OF CORRECTION, et al., Respondents.
Supreme Court of the United States.
October 31, 2008
...FN* Counsel of Record Respondents, New York City Department of Correction, et al. ("respondents"), respectfully request that this Court deny the petition by petitioners, Daniel Monahan, et al. ("petiti...

**JOINT APPENDIX, VOL. II**
2008 WL 5422892
Caperton v. A.T. Massey Coal Company, Inc.
Supreme Court of the United States.
December 29, 2008
...D.C. Offut, Jr. Stephen Burchett Perry W. Oxley David E. Rich Offut, Fisher & Nord Huntington, West Virginia Bruce E. Stanley Tarek F. Abdalla Reed Smith LLP Pittsburgh, Pennsylvania Attorneys for Appe...

**Petition for a Writ of Certiorari**
2009 WL 33999497
Daniel MONAHAN, et al., Petitioners, v. NEW YORK CITY DEPARTMENT OF CORRECTIONS, et al., Respondents.
Supreme Court of the United States.
September 08, 2009
...The parties to to proceedings below were the petitioners: Daniel Monahan, Evelyn S.

where regulatory educational requirement in first action entailed "successful completion of a formal advanced education program at or affiliated with an accredited dental or medical school equivalent to at least one academic year beyond the predoctoral curriculum," and statute was subsequently amended to require "successful completion of a formal, full-time advanced education program that is affiliated with or sponsored by a university based dental school and is beyond the dental degree at a graduate or postgraduate level." U.S.C.A. Const.Amend. 1; West's Ann.Cal.Bus. & Prof.Code § 651(h)(5)(A).

1 Case that cites this headnote

2 Evidence Results of Experiments
Survey evidence was relevant as to potentially misleading nature of advertisements that state's prohibitions upon advertising of dental specialty credentials would prohibit, and, thus, was admissible in action challenging constitutionality of statute brought by dentist and national dental specialty organization, regardless of whether legislature had benefit of the surveys when it amended the statute. West's Ann.Cal.Bus. & Prof.Code § 651(h)(5)(A).

3 Evidence Acts and Statements Accompanying or Connected with Transaction or Event
Survey evidence as to potentially misleading nature of advertisements that state's prohibitions upon advertising of dental specialty credentials would prohibit fell within hearsay exception for present sense impressions of the declarant, and, thus, was admissible in dentist and national dental specialty organization's action challenging constitutionality of statute. Fed.Rules Evid.Rule 803(1), 28 U.S.C.A.; West's Ann.Cal.Bus. & Prof.Code § 651(h)(5)(A).

4 Evidence Sources of Data
Survey evidence as to potentially misleading nature of advertisements that state's prohibitions upon advertising of dental specialty credentials would prohibit were admissible as the bases of the opinions offered by officials of state dental examiners' board, in dentist and national dental specialty organization's action challenging constitutionality of statute. Fed.Rules Evid.Rule 703, 28 U.S.C.A.; West's Ann.Cal.Bus. & Prof.Code § 651(h)(5)(A).

5 Federal Civil Procedure Civil Rights Cases in General
Genuine issue of material fact existed as to whether advertising of dental specialty credentials was potentially misleading, precluding summary judgment for dentist and national dental specialty organization in their action against officials of state dental examiners' board, challenging constitutionality of state's prohibitions upon advertising of dental specialty credentials as violative of the First Amendment. U.S.C.A. Const.Amend. 1; West's Ann.Cal.Bus. & Prof.Code § 651(h)(5)(A).

Rodriguez, Cecilia Lorde, Luis Almodovar, Fred Silva, Thomas Basil, Robert Notell, Daniel Poynes, Harvey Ball, Daniel...

See More Briefs

**Trial Court Documents**

**Town of Atherton v. California High Speed Rail Authority**

2011 WL 10677730
Town of Atherton v. California High Speed Rail Authority
Superior Court of California, Sacramento County
November 10, 2011

...On October 4, 2010, Petitioners filed a Verified Petition for Peremptory Writ of Mandate and Complaint for Injunctive and Declaratory Relief ("Petition") challenging Respondent California High Speed Ra...

**DI GIORGIO CORPORATION, Plaintiff, v. INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA; National Union Fire Insurance Company of Pittsburgh Pennsylvania and Does 1 Through 100, Inclusive, Defendants.**

2002 WL 34116546
DI GIORGIO CORPORATION, Plaintiff, v. INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA; National Union Fire Insurance Company of Pittsburgh Pennsylvania and Does 1 Through 100, Inclusive, Defendants.
Superior Court of California, San Francisco County
March 19, 2002

...DEPARTMENT 304 Defendant Insurance Company of the State of Pennsylvania ("ISOP") has moved for summary adjudication of the following issue (as stated in its Notice of Motion filed herein on December 7,...

**Goldbert v. Stelmach**

2007 WL 4462323
Goldbert v. Stelmach
Superior Court of California, Los Angeles County
May 01, 2007

...[assigned for all purposes to the Honorable Richard A. Adler, Judge, dept. Y.] The demurrers of defendants YUVAL STELMACH and REM LLC to the complaint of plaintiff SHLOMO GOLDBERG came on for hearing i...

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**Attorneys and Law Firms**

*560 Ann T. Schwing, Laura J. Fowler, Esq., McDonoughm Holland and Allen, Sacramento, CA, Frank R. Recker, Esq., *561 Frank J. Recker & Assoc. LPA, Marco Island, FL, for Plaintiffs–Appellees.

Jeffrey M. Phillips, Esq., AGCA—Office of the California, Attorney General, Sacramento, CA, John M. Peterson, Jr., Esq., Howe & Hutton, Ltd., Chicago, IL, Steven P. Means, Esq., Michael Best & Friedrich LLP, Madison, WI, for Defendants–Appellants.

Appeal from the United States District Court for the Eastern District of California, David F. Levi, District Judge, Presiding. D.C. No. CV–03–00348–DFL.

Before: CANBY, COX,* and PAEZ, Circuit Judges.

**MEMORANDUM****

Defendants–Appellants Charlene Zettel et al. ("CDB") appeal the district court's summary judgment in favor of Plaintiffs–Appellees Michael Potts and the American Academy of

Implant Dentistry ("Potts") in Potts's challenge to the constitutionality of California Business & Professional Code § 651(h)(5)(A), which regulates the advertisement by dentists of membership and specialty in or credentials received from a national specialty board that is not recognized by the American Dental Association ("ADA"). *Potts v. Hamilton*, 334 F.Supp.2d 1206 (E.D.Cal.2004). Potts, who holds credentials from two non-ADA recognized boards, sought declaratory and injunctive relief, arguing that section 651(h)(5)(A) unconstitutionally restricts commercial speech. After discovery and disclosure of expert witnesses, Potts and CDB filed cross-motions for summary judgment. The district court granted summary judgment for Potts, declared section 651(h)(5)(A) unconstitutional, and enjoined CDB from enforcing it.

1 Although he does not challenge the judgment, Potts renews two arguments that he raised below to CDB's defense of the constitutionality of section 651(h)(5)(A). First, Potts argues that the final judgment in *Bingham v. Hamilton*, 100 F.Supp.2d 1233 (E.D.Cal.2000), has claim—and issue-preclusive effect. We agree with the district court that this argument lacks merit. Because the California legislature significantly amended section 651(h)(5)(A) in 2002, subsequent to the judgment in *Bingham*, neither the claim nor the issues in the instant litigation are substantially identical to those before the court in the prior case.

2 Potts also renews his objection to the survey evidence that CDB presented to prove the potentially misleading nature of the advertisements that section 651(h)(5)(A) would prohibit. The district court properly admitted this evidence over Potts's objections. The legislative record indicates that a significant motivation behind the 2002 amendment was concern over the potential of these advertisements to mislead California consumers. The survey results were probative of their potential to mislead and were therefore relevant, regardless of whether the legislature had the benefit of the surveys when it amended § 651 (h)(5)(A).

3 We also agree that the surveys were not inadmissible hearsay, because they fall within the hearsay exception in Federal Rule of Evidence 803(1), for present sense impressions of the declarant. *See* *562 *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 626–27, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) (upholding a commercial speech restriction in part based on survey evidence that demonstrated consumers' states of mind). *See also Schering Corp. v. Pfizer, Inc.*, 189 F.3d 218, 233 (2d Cir.1999); *C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1054 (5th Cir.1981).

4 Finally, the surveys were admissible under Federal Rule of Evidence 703 as the bases of the opinions offered by CDB's experts. Potts's challenge to the surveys' reliability goes to their weight, not their admissibility. *See Prudential Ins. Co. of Am. v. Gibraltar Fin. Corp. of Cal.*, 694 F.2d 1150, 1156 (9th Cir.1983) (citations omitted).

5 Commercial speech receives intermediate protection under the First Amendment. As the party seeking to enforce a restriction on commercial speech, CDB must produce evidence from which a reasonable fact finder could conclude that the advertisement of non-ADA credentials and specialties is potentially misleading; that the government has a substantial interest in regulating this speech; that section 651(h)(5)(A) directly advances this interest; and that the statute restricts no more speech than necessary. *See Central Hudson v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 570, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). [1]

CDB introduced survey, anecdotal, and legislative history evidence in support of its initial burden under *Central Hudson* to show that the speech it seeks to regulate has the potential to mislead. Although the district court properly admitted this evidence, it concluded that the "surveys are of only limited value in determining whether [the advertisements] are potentially misleading." *Potts*, 334 F.Supp.2d at 1216. Consideration of the relative weight of the parties' evidence was inappropriate at the summary judgment stage. *See Molitor v. Am. Pres. Lines, Ltd.*, 343 F.2d 217, 219 (9th Cir.1965). Because the parties' evidence created a material issue of fact regarding the potential of the advertisements to mislead, the district court erred in granting summary judgment for Potts. [2]

In the absence of a full evidentiary record, findings of fact, and conclusions of law, pursuant to Federal Rule of Civil Procedure 52(a), we are unable to determine whether the challenged statute violates Potts's commercial free speech rights, because whether and to what extent the advertisements potentially mislead the public will inform the legal analysis under the third and fourth prongs of *Central Hudson*. We therefore reverse the grant of summary judgment and remand for further proceedings consistent with this disposition. We also vacate the attorney's fees award as premature. We need not address the parties' additional arguments on appeal.

**REVERSED and REMANDED.**

**Parallel Citations**

2007 WL 412232 (C.A.9 (Cal.))

**Footnotes**

* The Honorable Emmett Ripley Cox, Senior Circuit Judge for the Eleventh Circuit Court of Appeals, sitting by designation.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

1 The First Amendment affords no protection to speech that is actually misleading. *In re R.M.J.*, 455 U.S. 191, 203, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982). We assume for the purposes of this appeal that CDB's evidence creates a material issue of fact only as to whether the advertisements have the potential to mislead.

2 CDB and Potts cross-moved for summary judgment. Contrary to CDB's assertion on appeal that it presented "undisputed" evidence of actual consumer confusion, Potts presented evidence challenging the reliability and scientific validity of CDB's data.

**End of Document**

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**§318. Chiropractic Patient Records/Accountable Billings.**

(a) Chiropractic Patient Records. Each licensed chiropractor is required to maintain all active and inactive chiropractic patient records for five years from the date of the doctor's last treatment of the patient unless state or federal laws require a longer period of retention. Active chiropractic records are all chiropractic records of patients treated within the last 12 months. Chiropractic patient records shall be classified as inactive when there has elapsed a period of more than 12 months since the date of the last patient treatment.

All chiropractic patient records shall be available to any representative of the Board upon presentation of patient's written consent or a valid legal order. Active chiropractic patient records shall be immediately available to any representative of the Board at the chiropractic office where the patient has been or is being treated. Inactive chiropractic patient records shall be available upon ten days notice to any representative of the Board. The location of said inactive records shall be reported immediately upon request.

Active and inactive chiropractic patient records must include all of the following:

(1) Patient's full name, date of birth, and social security number (if available);

(2) Patient gender, height and weight. An estimated height and weight is acceptable where the physical condition of the patient prevents actual measurement;
(3) Patient history, complaint, diagnosis/analysis, and treatment must be signed by the primary treating doctor. Thereafter, any treatment rendered by any other doctor must be signed or initialed by said doctor;
(4) Signature of patient;

(5) Date of each and every patient visit;

(6) All chiropractic X-rays, or evidence of the transfer of said X-rays;

(7) Signed written informed consent as specified in Section 319.1.

(b) Accountable Billings. Each licensed chiropractor is required to ensure accurate billing of his or her chiropractic services whether or not such chiropractor is an employee of any business entity, whether corporate or individual, and whether or not billing for such services is accomplished by an individual or business entity other than the licensee. In the event an error occurs which results in an overbilling, the licensee must promptly make reimbursement of the overbilling whether or not the licensee is in any way compensated for such reimbursement by his employer, agent or any other individual or business entity responsible for such error. Failure by the licensee, within 30 days after discovery or notification of an error which resulted in an overbilling, to make full reimbursement constitutes unprofessional conduct.

## §312.2. Ownership of Practice upon the Death or Incapacity of a Licensee.

In the event of the death of a chiropractic licensee, or the legal declaration of the mental incompetency of the licensee to practice, the unlicensed heirs or trustees of the chiropractor must dispose of the practice within six (6) months. At all times during that period the practice must be supervised by a licensed chiropractor. The board will consider a petition to extend this period if it is submitted within four (4) months after the death or the declaration of incompetence of the licensee, including identification of any extenuating circumstances that will prevent compliance.

California

~~XXX-XX.XXX~~ **Section 318.1 Records Retention Requirements After Death or Incapacity of a Licensed Chiropractor or Termination or Re-location of Practice; Notice Requirements.**

(a) Each licensed chiropractor who terminates his or her practice or places his or her license in an inactive status or the unlicensed heir, trustee, executor, administrator, or personal representative, ~~acting pursuant to Section 312.2~~, or the succeeding licensed chiropractor shall retain the active or inactive chiropractic patient records in existence upon date of termination of practice, or upon the death or declared incompetency of the chiropractor for at least five (5) years from the date of the termination of practice, declared incompetency or death of the chiropractor, unless state or federal laws require a longer period of retention. For the purposes of this Section, "active" patient means a patient treated within the last 12 months, and an "inactive patient" means a ~~patient when~~patient when there has elapsed a period of more than 12 months and no less than 5 years since the date of the last patient treatment.
For the purposes of this section "active and inactive chiropractic records" shall have the same meaning as defined in Section 318.

(b) Within one (1) month from the date of termination of practice, or the chiropractor's death or declared incompetency, the chiropractor who has terminated his or her practice, or the unlicensed heir, trustee, executor, administrator, or personal representative ~~acting pursuant to Section 312.2~~or succeeding licensed chiropractor shall notify all active ~~and inactive~~ patients and the Board in writing of the termination of the licensed chiropractor's practice and the location where the active ~~or inactive~~ chiropractic patient records can be found. Notice to the Board shall be provided on the form entitled "Notice of Termination of Practice and Transfer of Patient Records," (Form No. XX, New 9/14). Notice to active ~~and inactive~~ patients shall be provided via ~~first-class and~~ certified mail to the last known address. This notice shall be posted on the Board's website. Records shall be disposed of or destroyed in such a manner as to preserve the confidentiality of the information contained therein in accordance with Civil Code section 1798.81.

~~(c) At the conclusion of a fifty-nine month period of time from the date of last notification of termination of practice or the chiropractor's death or declared incompetency, the chiropractor who has terminated his or her practice or, the unlicensed executor, administrator, or personal representative acting pursuant to Section 312.2 or succeeding licensed chiropractor shall notify all active and inactive patients a second time, via certified and first-class mail, at their last known address, that the records shall be destroyed one (1) month or later from the date of mailing said notification. Records shall be disposed of or destroyed in such a manner as to preserve the confidentiality of the information contained therein in accordance with Civil Code section 1798.81~~.

(d) A licensed chiropractor who relocates his or her practice and will no longer be available to his or her former patients shall follow the procedures listed in subsections (a) and~~,~~ (b)~~, and (c)~~ above. A licensed chiropractor who relocates to a practice site no more than 20 miles away from ~~the~~ any previous practice site shall either provide written notice of such relocation one month prior to relocating to all active ~~or inactive~~ patients by first-class mail, or shall follow the procedures listed in subsection (b) ~~and (c)~~. If the patient was treated by more than one chiropractor, the patient is a patient of the practice.

(e) If a patient was younger than 18 years of age when last treated by a licensee, the chiropractic records of the patient shall be maintained until the patient reaches age 21 or for 5 years from the date of last treatment, whichever is longer.

f) A licensed chiropractor who terminates his practice, places his or her license in an inactive status or the unlicensed heir, trustee, executor, administrator, or personal representative ~~acting pursuant to Section 312.2~~ or succeeding licensed chiropractor of a deceased or legally incompetent chiropractor shall refund any part of fees paid in advance that have not been earned within one month of the termination of practice or the transfer of the practice to a succeeding licensed chiropractor.

Note: Authority cited: Section 1000-4(b), Business and Professions Code (Chiropractic Initiative Act of California (Stats. 1923, p. 1xxxviii)). Reference: Section 1000-4(b), Business and Professions Code (Chiropractic Initiative Act of California (Stats. 1923, p. 1xxxviii); ~~Sections 312.2~~, and 318, title 16, California Code of Regulations. )

BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

# NOTICE OF TERMINATION OF PRACTICE AND TRANSFER OF PATIENT RECORDS

**Do not complete this form if you are changing ownership or location**. Contact the Board for further information.

Please complete this form and forward it to the Board of Chiropractic Examiners at the address below. Include the large wall license and current renewal certificate. Please be advised this information will be available to the public on the Board's website.

**The following location will be/has terminated practice and will be transferring records:**

| Name of licensed Chiropractor | | | Chiropractic License Number | |
|---|---|---|---|---|
| Number and Street | City | | State | Zip Code |
| Month, day, and year practice will terminate | | | | |

**Patient Records will be transferred to:**

| Facility/Person's Name | | | Chiropractic License Number (if applies) | |
|---|---|---|---|---|
| Number and Street | City | State | Zip Code | Phone Number |
| Month, day, and year records will be transferred | | | | |

**Records are retained in accordance with California Code of Regulations, section 318.**

***"Each licensed chiropractor is required to maintain all active and inactive chiropractic patient records for five years from the date of the doctor's last treatment of the patient unless state or federal laws require a longer period of retention. Active chiropractic records are all chiropractic records of patients treated within the last 12 months. Chiropractic patient records shall be classified as inactive when there has elapsed a period of more than 12 months since the date of the last patient treatment."***

***All patient records shall be disposed of or destroyed in such a manner as to preserve the confidentiality of the information contained therein in accordance with Civil Code section 1798.81**

T (916) 263-5355
F (916) 327-0039
TT/TDD (800) 735-2929
Consumer Complaint Hotline
(866) 543-1311

Board of Chiropractic Examiners
901 P Street, Suite 142A
Sacramento, California 95814
www.chiro.ca.gov

BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

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# HELPFUL HINTS WHEN A CHIROPRACTIC PRACTICE CLOSES

The following provides guidance to chiropractors regarding the closure of or departure from a chiropractic practice.

It is the Board's position that due care should be exercised when closing or departing from a chiropractic practice, whether it is temporary or permanent. Not only does this ensure a smooth transition from the current chiropractor to the new chiropractor, but it also reduces the liability of "patient abandonment." Therefore, to ensure this occurs with a minimum of disruption in continuity of care, the chiropractor terminating the chiropractor-patient relationship should notify patients sufficiently in advance.

It is the patient's decision from whom to receive chiropractic care. Therefore, it is the responsibility of all chiropractors and other parties who may be involved to ensure that:

- Patients are notified of changes in the chiropractic practice. This is best done from a certified and standard letter to patients by the chiropractor explaining the change, including the final date of practice. The board also recommends placing an advertisement in a local newspaper.

- Patients are advised as to where their medical records will be stored including contact information to access them. To facilitate the transfer of treatment records to the new chiropractor, an authorization form should be included in the letter.

- Patients secure another chiropractor. If the practice is being taken over by another chiropractor, or another can be recommended, the patients can be referred to that chiropractor.

- The Board of Chiropractic Examiners is notified via form # xxx.

## ABRUPT CLOSURE DUE TO DEATH

In the unfortunate event that a chiropractor dies, the Board recommends that the family of the deceased, or their representative, contact other chiropractors in the area or the local chiropractic association to facilitate patient record transfers.

It is recommended that any chiropractor receiving records from a deceased chiropractic practice send notification to the patients to ensure continuity of care.

It is recommended that the Board of Chiropractic Examiners is notified.

Unlicensed individuals are not allowed to perform the services of a chiropractor, including owning and operating a chiropractic practice (CCR 312.1 & 312)

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# CIVIL CODE
# SECTION 1633.1-1633.17

1633.1. This title may be cited as the Uniform Electronic Transactions Act.

1633.2. In this title the following terms have the following definitions:

(a) "Agreement" means the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures given the effect of agreements under laws otherwise applicable to a particular transaction.

(b) "Automated transaction" means a transaction conducted or performed, in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract, or fulfilling an obligation required by the transaction.

(c) "Computer program" means a set of statements or instructions to be used directly or indirectly in an information processing system in order to bring about a certain result.

(d) "Contract" means the total legal obligation resulting from the parties' agreement as affected by this title and other applicable law.

(e) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(f) "Electronic agent" means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review by an individual.

(g) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.

(h) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record.

(i) "Governmental agency" means an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of the federal government or of a state or of a county, municipality, or other political subdivision of a state.

(j) "Information" means data, text, images, sounds, codes, computer programs, software, data bases, or the like.

(k) "Information processing system" means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information.

(l) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity.

(m) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(n) "Security procedure" means a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures.

(o) "Transaction" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.

1633.3. (a) Except as otherwise provided in subdivisions (b) and (c), this title applies to electronic records and electronic signatures relating to a transaction.

(b) This title does not apply to transactions subject to the following laws:

(1) A law governing the creation and execution of wills, codicils, or testamentary trusts.

(2) Division 1 (commencing with Section 1101) of the Uniform Commercial Code, except Sections 1206 and 1306.

(3) Divisions 3 (commencing with Section 3101), 4 (commencing with Section 4101), 5 (commencing with Section 5101), 8 (commencing with Section 8101), 9 (commencing with Section 9101), and 11 (commencing with Section 11101) of the Uniform Commercial Code.

(4) A law that requires that specifically identifiable text or disclosures in a record or a portion of a record be separately signed, including initialed, from the record. However, this paragraph does not apply to Section 1677 or 1678 of this code or Section 1298 of the Code of Civil Procedure.

(c) This title does not apply to any specific transaction described in Section 17511.5 of the Business and Professions Code, Section 56.11, 56.17, 798.14, 1133, or 1134 of, Section 1689.6, 1689.7, or 1689.13 of, Chapter 2.5 (commencing with Section 1695) of Title 5 of Part 2 of Division 3 of, Section 1720, 1785.15, 1789.14,

1789.16, or 1793.23 of, Chapter 1 (commencing with Section 1801) of Title 2 of Part 4 of Division 3 of, Section 1861.24, 1862.5, 1917.712, 1917.713, 1950.6, 1983, 2924b, 2924c, 2924f, 2924i, 2924j, 2924.3, or 2937 of, Article 1.5 (commencing with Section 2945) of Chapter 2 of Title 14 of Part 4 of Division 3 of, Section 2954.5 or 2963 of, Chapter 2b (commencing with Section 2981) or 2d (commencing with Section 2985.7) of Title 14 of Part 4 of Division 3 of, Section 3071.5 of, Part 5 (commencing with Section 4000) of Division 4 of, or Part 5.3 (commencing with Section 6500) of Division 4 of this code, subdivision (b) of Section 18608 or Section 22328 of the Financial Code, Section 1358.15, 1365, 1368.01, 1368.1, 1371, or 18035.5 of the Health and Safety Code, Section 662, paragraph (2) of subdivision (a) of Section 663, 664, 667.5, 673, 677, paragraph (2) of subdivision (a) of Section 678, subdivisions (a) and (b) of Section 678.1, Section 786, 10113.7, 10127.7, 10127.9, 10127.10, 10192.18, 10199.44, 10199.46, 10235.16, 10235.40, 10509.4, 10509.7, 11624.09, or 11624.1 of the Insurance Code, Section 779.1, 10010.1, or 16482 of the Public Utilities Code, or Section 9975 or 11738 of the Vehicle Code. An electronic record may not be substituted for any notice that is required to be sent pursuant to Section 1162 of the Code of Civil Procedure. Nothing in this subdivision shall be construed to prohibit the recordation of any document with a county recorder by electronic means.

(d) This title applies to an electronic record or electronic signature otherwise excluded from the application of this title under subdivision (b) when used for a transaction subject to a law other than those specified in subdivision (b).

(e) A transaction subject to this title is also subject to other applicable substantive law.

(f) The exclusion of a transaction from the application of this title under subdivision (b) or (c) shall be construed only to exclude the transaction from the application of this title, but shall not be construed to prohibit the transaction from being conducted by electronic means if the transaction may be conducted by electronic means under any other applicable law.

(g) This section shall remain in effect only until January 1, 2019, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2019, deletes or extends that date.

1633.3. (a) Except as otherwise provided in subdivisions (b) and (c), this title applies to electronic records and electronic signatures relating to a transaction.

(b) This title does not apply to transactions subject to the following laws:

(1) A law governing the creation and execution of wills, codicils,

or testamentary trusts.

(2) Division 1 (commencing with Section 1101) of the Uniform Commercial Code, except Sections 1206 and 1306.

(3) Divisions 3 (commencing with Section 3101), 4 (commencing with Section 4101), 5 (commencing with Section 5101), 8 (commencing with Section 8101), 9 (commencing with Section 9101), and 11 (commencing with Section 11101) of the Uniform Commercial Code.

(4) A law that requires that specifically identifiable text or disclosures in a record or a portion of a record be separately signed, including initialed, from the record. However, this paragraph does not apply to Section 1677 or 1678 of this code or Section 1298 of the Code of Civil Procedure.

(c) This title does not apply to any specific transaction described in Section 17511.5 of the Business and Professions Code, Section 56.11, 56.17, 798.14, 1133, or 1134 of, Section 1689.6, 1689.7, or 1689.13 of, Chapter 2.5 (commencing with Section 1695) of Title 5 of Part 2 of Division 3 of, Section 1720, 1785.15, 1789.14, 1789.16, or 1793.23 of, Chapter 1 (commencing with Section 1801) of Title 2 of Part 4 of Division 3 of, Section 1861.24, 1862.5, 1917.712, 1917.713, 1950.6, 1983, 2924b, 2924c, 2924f, 2924i, 2924j, 2924.3, or 2937 of, Article 1.5 (commencing with Section 2945) of Chapter 2 of Title 14 of Part 4 of Division 3 of, Section 2954.5 or 2963 of, Chapter 2b (commencing with Section 2981) or 2d (commencing with Section 2985.7) of Title 14 of Part 4 of Division 3 of, Section 3071.5 of Part 5 (commencing with Section 4000) of Division 4 of, or Part 5.3 (commencing with Section 6500) of Division 4 of this code, subdivision (b) of Section 18608 or Section 22328 of the Financial Code, Section 1358.15, 1365, 1368.01, 1368.1, 1371, or 18035.5 of the Health and Safety Code, Section 662, 663, 664, 667.5, 673, 677, 678, 678.1, 786, 10086, 10113.7, 10127.7, 10127.9, 10127.10, 10192.18, 10199.44, 10199.46, 10235.16, 10235.40, 10509.4, 10509.7, 11624.09, or 11624.1 of the Insurance Code, Section 779.1, 10010.1, or 16482 of the Public Utilities Code, or Section 9975 or 11738 of the Vehicle Code. An electronic record may not be substituted for any notice that is required to be sent pursuant to Section 1162 of the Code of Civil Procedure. Nothing in this subdivision shall be construed to prohibit the recordation of any document with a county recorder by electronic means.

(d) This title applies to an electronic record or electronic signature otherwise excluded from the application of this title under subdivision (b) when used for a transaction subject to a law other than those specified in subdivision (b).

(e) A transaction subject to this title is also subject to other applicable substantive law.

(f) The exclusion of a transaction from the application of this title under subdivision (b) or (c) shall be construed only to exclude the transaction from the application of this title, but shall not be

construed to prohibit the transaction from being conducted by electronic means if the transaction may be conducted by electronic means under any other applicable law.

(g) This section shall become operative on January 1, 2019.

1633.4. This title applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after January 1, 2000.

1633.5. (a) This title does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

(b) This title applies only to a transaction between parties each of which has agreed to conduct the transaction by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct. Except for a separate and optional agreement the primary purpose of which is to authorize a transaction to be conducted by electronic means, an agreement to conduct a transaction by electronic means may not be contained in a standard form contract that is not an electronic record. An agreement in such a standard form contract may not be conditioned upon an agreement to conduct transactions by electronic means. An agreement to conduct a transaction by electronic means may not be inferred solely from the fact that a party has used electronic means to pay an account or register a purchase or warranty. This subdivision may not be varied by agreement.

(c) A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. If a seller sells goods or services by both electronic and nonelectronic means and a buyer purchases the goods or services by conducting the transaction by electronic means, the buyer may refuse to conduct further transactions regarding the goods or services by electronic means. This subdivision may not be varied by agreement.

(d) Except as otherwise provided in this title, the effect of any of its provisions may be varied by agreement. The presence in certain provisions of this title of the words "unless otherwise agreed," or words of similar import, does not imply that the effect of other provisions may not be varied by agreement.

1633.6. This title shall be construed and applied according to all of the following:

(1) To facilitate electronic transactions consistent with other applicable law.

(2) To be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices.

(3) To effectuate its general purpose to make uniform the law with respect to the subject of this title among states enacting it.

1633.7. (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(c) If a law requires a record to be in writing, an electronic record satisfies the law.

(d) If a law requires a signature, an electronic signature satisfies the law.

1633.8. (a) If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, that requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record.

(b) If a law other than this title requires a record to be posted or displayed in a certain manner, to be sent, communicated, or transmitted by a specified method, or to contain information that is formatted in a certain manner, all of the following rules apply:

(1) The record shall be posted or displayed in the manner specified in the other law.

(2) Except as otherwise provided in paragraph (2) of subdivision (d), the record shall be sent, communicated, or transmitted by the method specified in the other law.

(3) The record shall contain the information formatted in the manner specified in the other law.

(c) If a sender inhibits the ability of a recipient to store or print an electronic record, the electronic record is not enforceable against the recipient.

(d) The requirements of this section may not be varied by

agreement, except as follows:

(1) To the extent a law other than this title requires information to be provided, sent, or delivered in writing but permits that requirement to be varied by agreement, the requirement under subdivision (a) that the information be in the form of an electronic record capable of retention may also be varied by agreement.

(2) A requirement under a law other than this title to send, communicate, or transmit a record by first-class mail may be varied by agreement to the extent permitted by the other law.

1633.9. (a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(b) The effect of an electronic record or electronic signature attributed to a person under subdivision (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.

1633.10. If a change or error in an electronic record occurs in a transmission between parties to a transaction, the following rules apply:

(1) If the parties have agreed to use a security procedure to detect changes or errors and one party has conformed to the procedure, but the other party has not, and the nonconforming party would have detected the change or error had that party also conformed, the conforming party may avoid the effect of the changed or erroneous electronic record.

(2) In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the prevention or correction of the error and, at the time the individual learns of the error, all of the following conditions are met:

(i) The individual promptly notifies the other person of the error and that the individual did not intend to be bound by the electronic record received by the other person.

(ii) The individual takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy

the consideration received, if any, as a result of the erroneous electronic record.

(iii) The individual has not used or received any benefit or value from the consideration, if any, received from the other person.

(3) If neither paragraph (1) nor (2) applies, the change or error has the effect provided by other law, including the law of mistake, and the parties' contract, if any.

(4) Paragraphs (2) and (3) may not be varied by agreement.

1633.11. (a) If a law requires that a signature be notarized, the requirement is satisfied with respect to an electronic signature if an electronic record includes, in addition to the electronic signature to be notarized, the electronic signature of a notary public together with all other information required to be included in a notarization by other applicable law.

(b) In a transaction, if a law requires that a statement be signed under penalty of perjury, the requirement is satisfied with respect to an electronic signature, if an electronic record includes, in addition to the electronic signature, all of the information as to which the declaration pertains together with a declaration under penalty of perjury by the person who submits the electronic signature that the information is true and correct.

1633.12. (a) If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record, if the electronic record reflects accurately the information set forth in the record at the time it was first generated in its final form as an electronic record or otherwise, and the electronic record remains accessible for later reference.

(b) A requirement to retain a record in accordance with subdivision (a) does not apply to any information the sole purpose of which is to enable the record to be sent, communicated, or received.

(c) A person may satisfy subdivision (a) by using the services of another person if the requirements of subdivision (a) are satisfied.

(d) If a law requires a record to be retained in its original form, or provides consequences if the record is not retained in its original form, that law is satisfied by an electronic record retained in accordance with subdivision (a).

(e) If a law requires retention of a check, that requirement is satisfied by retention of an electronic record of the information on the front and back of the check in accordance with subdivision (a).

(f) A record retained as an electronic record in accordance with

subdivision (a) satisfies a law requiring a person to retain a record for evidentiary, audit, or like purposes, unless a law enacted after the effective date of this title specifically prohibits the use of an electronic record for a specified purpose.

(g) This section does not preclude a governmental agency from specifying additional requirements for the retention of a record subject to the agency's jurisdiction.

1633.13. In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.

1633.14. (a) In an automated transaction, the following rules apply:

(1) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.

(2) A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance.

(b) The terms of the contract are determined by the substantive law applicable to it.

1633.15. (a) Unless the sender and the recipient agree to a different method of sending that is reasonable under the circumstances, an electronic record is sent when the information is addressed properly or otherwise directed properly to the recipient and either (1) enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender, or (2) enters a region of an information processing system that is under the control of the recipient.

(b) Unless the sender and the recipient agree to a different method of receiving that is reasonable under the circumstances, an electronic record is received when the electronic record enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent, in a form capable of being processed by that system, and from which the recipient is able to retrieve the

electronic record.

(c) Subdivision (b) applies even if the place the information processing system is located is different from the place the electronic record is deemed to be received under subdivision (d).

(d) Unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be sent from the sender's place of business and to be received at the recipient's place of business or, if the recipient is an individual acting on his or her own behalf, at the recipient's place of residence. For purposes of this subdivision, the following rules apply:

(1) If the sender or recipient has more than one place of business, the place of business of that person is the place having the closest relationship to the underlying transaction.

(2) If the sender or the recipient does not have a place of business, the place of business is the sender's or recipient's residence, as the case may be.

(e) An electronic record is received under subdivision (b) even if no individual is aware of its receipt.

(f) Receipt of an electronic acknowledgment from an information processing system described in subdivision (b) establishes that a record was received but, by itself, does not establish that the content sent corresponds to the content received.

(g) If a person is aware that an electronic record purportedly sent under subdivision (a), or purportedly received under subdivision (b), was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law. Except to the extent permitted by the other law, this subdivision may not be varied by agreement.

1633.16. If a law other than this title requires that a notice of the right to cancel be provided or sent, an electronic record may not substitute for a writing under that other law unless, in addition to satisfying the requirements of that other law and this title, the notice of cancellation may be returned by electronic means. This section may not be varied by agreement.

1633.17. No state agency, board, or commission may require, prohibit, or regulate the use of an electronic signature in a transaction in which the agency, board, or commission is not a party unless a law other than this title expressly authorizes the requirement, prohibition, or regulation.

BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

# APPLICATION FOR EXPERT CONSULTANT

**Board of Chiropractic Examiners**
**901 P Street, Suite 142A**
**Sacramento, California 95814**
**916-263-5355**

Complete each section and attach your curriculum vitae/resume. If you need additional space you may attach a separate sheet. **PLEASE TYPE OR PRINT LEGIBLY**

## SECTION 1 –APPLICANT INFORMATION

| | | |
|---|---|---|
| NAME:<br>(Last, First, Middle) | | CHIROPRACTIC LICENSE NO.: |
| BUSINESS ADDRESS: | | |
| CITY: | STATE: | ZIP Code: |
| TELEPHONE NUMBERS (include area code)<br>Office:<br>Mobile:<br>FAX: | EMAIL ADDRESS:<br><br>WEBSITE ADDRESS(ES): | |

## CURRENT EMPLOYMENT INFORMATION

| | | |
|---|---|---|
| EMPLOYER: | | |
| ADDRESS: | | |
| CITY | STATE | ZIP Code |
| TELEPHONE NUMBERS (include area code)<br>Office:<br>FAX: | EMAIL ADDRESS: | |
| POSITION: | HOW LONG?: | |

## COLLEGE EDUCATION

| | | |
|---|---|---|
| COLLEGE/UNIVERSITY: | | |
| CITY | STATE | ZIP Code |
| DEGREE EARNED: | YEAR COMPLETED: | |

## PROFESSIONAL EDUCATION

| | | |
|---|---|---|
| CHIROPRACTIC COLLEGE: | | |
| CITY | STATE | ZIP Code |
| DEGREE: | DATE COMPLETED: | |

## SECTION 2 –PROFESSIONAL QUALIFICATIONS

| | |
|---|---|
| Year of Initial Licensure:<br><br>Current Status of License (i.e., active; inactive): | Are you actively treating patients? YES ☐ NO ☐<br><br>What percentage of time, per month? |

Have you ever been employed by or provided services to the Board? YES ☐ NO ☐
If so, when and what services did you provide?

Are you board-certified or board-eligible in any of the chiropractic diplomate programs? YES ☐ NO ☐

If yes, attach a copy of each certification or eligibility.

Have you, at any time in the past two years, worked for an insurance carrier, self-insured plan, third party administrator, or chiropractic claims review company? YES ☐ NO ☐

If yes, attach a description of the services you provided and your employment relationship with the above-mentioned entities.

Are you a State of California Qualified Medical Evaluator? YES ☐ -QME Cert No.: _____ NO ☐
If yes, attach a copy of the certificate.

## SECTION 3 –COURT EXPERT WITNESS EXPERIENCE

Have you testified in court as an Expert witness as a Doctor of Chiropractic?
YES ☐ I have this experience No ☐ I do NOT have this experience

Do you have knowledge and experience with presenting testimony in court or arbitrations as an expert in medical and legal proceedings?
YES ☐ I have this experience No ☐ I do NOT have this experience

Do you have knowledge of and ability to interpret current laws and regulations in Expert testimony?
YES ☐ I have this experience No ☐ I do NOT have this experience

If yes, to any question in this section, how many times have you testified as an Expert witness within the last 3 years from date of this application: _____ and the approximate date of last Expert court testimony: _____

You may describe your court experience on a separate attachment if necessary.

## SECTION 4 –ACADEMIC APPOINTMENTS

Have you ever held any academic appointments at any college or university? YES ☐ NO ☐
If yes, attach a description of each appointment and your job duties.

## SECTION 5 –PUBLICATIONS

Please list all published articles and texts which you have written:

_____

_____

_____

_____

Have you developed or assisted in the development of chiropractic statutes, regulations, and/or guidelines?
YES ☐ NO ☐ If yes, attach a description of each experience.

## SECTION 6 –KNOWLEDGE AND EXPERIENCE

**For each phrase listed below, please mark the statement that most accurately represents the depth of your knowledge and experience in the field of Chiropractic:**

A. Knowledge and skill in case review of medical records (including x-rays) for the purpose of medical and legal proceedings.
- ☐ I have extensive knowledge and experience *
- ☐ I have some knowledge and experience
- ☐ I have minimal knowledge and experience
- ☐ I have no knowledge and experience

B. Knowledge of and ability to interpret current chiropractic laws and regulations, including standard of care.
- ☐ I have extensive knowledge and ability *
- ☐ I have some knowledge and ability
- ☐ I have minimal knowledge and ability
- ☐ I have no knowledge and ability

C. Knowledge and experience rendering opinion or summary of findings regarding treatment utilization or questionable billing issues.
- ☐ I have extensive knowledge and experience *
- ☐ I have some knowledge and experience
- ☐ I have minimal knowledge and experience
- ☐ I have no knowledge and experience

D. Knowledge and experience in performing case management / peer review evaluations regarding the professional conduct of licensees as required by chiropractic related law.
- ☐ I have extensive knowledge and experience *
- ☐ I have some knowledge and experience
- ☐ I have minimal knowledge and experience
- ☐ I have no knowledge and experience

E. Knowledge and experience in reviewing chiropractic laws and regulations and rendering written opinions relating to the review of chiropractic related laws and regulations.
- ☐ I have extensive knowledge and experience *
- ☐ I have some knowledge and experience
- ☐ I have minimal knowledge and experience
- ☐ I have no knowledge and experience

***If you have checked the boxes indicating extensive knowledge and experience, provide explanation on a separate sheet.**

## SECTION 7 –REFERENCES

**List two professional references who can verify your knowledge and ability to perform the necessary functions of an Expert for the Board:**

| Name: (Last, First) | | Relationship: |
|---|---|---|
| Company | | Telephone No.: |
| Address: | | |
| City: | State: | ZIP Code: |
| Name: (Last, First) | | Relationship: |
| Company | | Telephone No.: |
| Address: | | |
| City: | State: | ZIP Code: |

## SECTION 8 –DISCIPLINARY INFORMATION

Have you ever been involved in a malpractice lawsuit or arbitration proceeding related to your treatment of a patient?
YES ☐ NO ☐
If yes, attach an explanation on a separate attachment, for each lawsuit or arbitration complaint.

Are there currently any medical malpractice lawsuits or arbitration claims pending against you?
YES ☐ NO ☐
If yes, attach an explanation on a separate attachment, for each lawsuit or arbitration complaint.

Has your professional liability insurance coverage ever been denied, limited, or cancelled by the action of any insurance company?
YES ☐ NO ☐
If yes, attach an explanation on a separate attachment, for each occurrence.

**Be sure to answer all questions. If you answer "yes" to any of the following, attach an explanation on a separate piece of paper.**

**(A)** Has your chiropractic license (in this state or another state) or any health related professional licensing or disciplinary body in any state, territory or foreign jurisdiction, or any branch of the military, denied, limited, placed on probation, restricted, suspended, cancelled or revoked any professional license, certificate, or registration granted to you, or imposed a fine, reprimand, or taken any other action against you?
YES ☐ NO ☐

**(B)** Has your participation in any private, state, or federal health insurance program ever been the subject of disciplinary action? YES ☐ NO ☐

**(C)** Has any other type of professional sanction, discipline, or other adverse action ever been taken against you? YES ☐ NO ☐

**(D)** Have you ever been the subject of an investigation by any private, state, or federal health insurance program? YES ☐ NO ☐

**(E)** Have you ever been convicted of a misdemeanor or felony or are you currently under indictment for any alleged criminal activities? YES ☐ NO ☐

**(F)** Have you ever been the subject of an administrative, civil, or criminal complaint or investigation regarding sexual misconduct? YES ☐ NO ☐

**(G)** Have you ever voluntarily surrendered a professional license, staff privileges or consented to a limitation of the same pending a review or investigation? YES ☐ NO ☐

**(H)** Are there any other issues that should be disclosed that may have an adverse impact on your ability to deliver effective and objective professional services? YES ☐ NO ☐

## SECTION 9 –PERSONAL SUMMARY

**Why do you feel you are qualified to be an expert witness for the Board? If you need additional space you may attach a separate sheet.**

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

## SECTION 10 –AFFADAVIT

**Please Read and Initial each Paragraph**

I hereby certify that I have not knowingly withheld any information that might adversely affect my appointment as an expert reviewer and the answers given by me are true and correct to the best of my knowledge. I further certify that I, the undersigned applicant, have personally completed this application. _____

I hereby authorize the Board to thoroughly investigate all of the information I have provided on this application, including attachments, as well as my references, work record, education and other matters related to my suitability for appointment as an expert and, further, authorize the references I have listed to disclose to the Board any and all letters, reports and other information related to my work records, without giving me prior notice of such disclosure. In addition, I hereby release the Board, my current and former employers and all other persons, corporations, partnerships and associations from any and all claims, demands or liabilities arising out of or in any way related to such investigation or disclosure. _____

**I hereby certify under penalty of perjury under the laws of the State of California that all**

statements, answers and representations in this application, including all attachments, are true and accurate.

Signature of Applicant: _____ Date: _____

# State of California
# Board of Chiropractic Examiners

# Guidebook for Expert Consultants

**September 2014**

# TABLE OF CONTENTS

**SECTION I** INTRODUCTION TO THE CALIFORNIA BOARD OF CHIROPRACTIC EXAMINERS

**SECTION II** ELIGIBILITY CRITERIA AND COMPETENCY REQUIREMENTS FOR EXPERT CONSULTANTS

**SECTION III** DEFINITIONS

**SECTION IV** GUIDELINES FOR EXPERT CONSULTANTS

- Frequently Asked Questions
- Instructions
- Immunity From Liability
- Representation of Legal Counsel
- Confidentiality and Conflict of Interest
- Investigations And Disciplinary Process
- Stages Of Expert Review
  - A. Investigative Review
  - B. Hearing Testimony
- Section 317 re Unprofessional Conduct
- Types Of Evaluations
  1. Quality Of Care
  2. Sexual Misconduct
  3. Excessive Treatment Violations
  4. General Unprofessional Conduct

**SECTION V** THE OPINION ITSELF

- A. Contents
- B. Violations vs. Mitigation
- C. Injury Is Not Essential
- D. Evaluation And Credibility
- E. Assess Standard As Of Time Of Violation
- F. Objectivity

**SECTION VI** COMPENSATION

- A. Initial Evaluation
- B. Consultation With Deputy Attorney General
- C. Testimony At Hearing
- D. Miscellaneous Expenses

**SECTION VII** SAMPLE EXPERT OPINION

**SECTION VIII** SERVING AS AN EXPERT CONSULTANT

# Section I

## INTRODUCTION

The State Board of Chiropractic Examiners (Board) is an administrative agency created by the Chiropractic Initiative Act of 1922. The Board's paramount responsibility is to protect California consumers from the fraudulent, negligent, or incompetent practice of chiropractic care. Among its many duties, the Board investigates and disciplines chiropractors for unprofessional conduct to protect the public from incompetent, negligent, dishonest or impaired chiropractors. Your role as an expert consultant is extremely important in identifying whether a deviation from the chiropractic standard of care or unprofessional conduct has occurred and in serving as an expert consultant at any hearing that may result from your expert assessment.

These guidelines introduce you to the administrative disciplinary process and define the Board's expectations of the expert review you have been asked to provide, your responsibilities, your legal protection, your compensation, and your testimony if necessary.

As an expert consultant, which is the first stage of this process for yourself and perhaps the only stage (besides attendance at mandatory Expert training), you will be provided with the complaint, patient records, and certain other information, including any interviews with patients, subsequent treating chiropractors or other licensed health care providers, other witnesses, and any statements of the chiropractor who is the subject of the investigation. You will NOT be provided a copy of any report prepared by another Board expert consultant to avoid the appearance of tainting your evaluation. You will be asked on the basis of your review of the documentation provided to render your professional assessment of the care rendered by the subject chiropractor to the patient or patients involved and other conduct relating to the practice of chiropractic.

You are neither asked, nor should you try, to determine what discipline should be imposed upon the subject chiropractor. Your opinion must be based solely upon the information provided to you by the Board; however, whenever possible you should refer to chiropractic texts and other authoritative reference materials that help define accepted standards. Your opinion should be based upon your knowledge of the standard of care or compliance with professional conduct standards, based upon your education, training, and experience and not upon the manner in which you personally practice chiropractic care.

If you have prior knowledge of the subject chiropractor or if you feel you cannot be objective in your assessment for any other reason, please immediately contact the Board representative who sent you the materials. Also, if you are in need of any additional documents or the records provided to you appear incomplete, please contact the Board representative who will attempt to resolve the issue.

**In some cases, you will be required to testify in person as to your opinions in administrative hearings held before an administrative law judge and be subject to**

**cross-examination by the respondent regarding your opinions. In these instances, you will be considered an expert witness and will be required to make time to meet with the Deputy Attorney General (DAG) assigned to prosecute the matter in advance of the hearing to prepare for the hearing.**

The Board appreciates your cooperation in lending your expertise and experience to accomplish this important work. The Board recognizes that you play a vital role and your objective performance will reflect well on the Board and the profession.

# Section II

## CRITERIA/COMPETENCY REQUIREMENTS FOR EXPERT CONSULTANTS

Effective September 2014, Board Expert Consultants must certify or declare under penalty of perjury on the Expert Consultant application for appointment that he or she:

A. Has not been employed by any insurance company or chiropractic review service within two (2) years prior to their appointment or use as a Board expert.

B. Has experience providing written review and evaluation of the professional competence, standard of patient care, or conduct of licensees in relationship to the requirements of law and regulations.

C. Has an active California license in good standing with no statement of issues or prior or pending disciplinary actions, which may deem or impact that license status as revoked, restricted, interim suspended, suspended, or probationary in nature from the state licensing board.

D. Has possessed an active California license for a minimum of five (5) years.

E. Has not sustained a misdemeanor or felony conviction related to the practice of chiropractic, including crimes of fraud or moral turpitude.

F. Has experience providing Expert witness testimony in court.

G. Will not use their status as an Expert to promote themselves in advertisements.

H. Will not use the Board as a reference, or in any way indicate that they are endorsed by the Board.

I. Will not state nor imply that they are an employee or representative of the Board other than when they are testifying as a witness on a case for which they are acting in the capacity of an expert.

# Section III
# DEFINITIONS

The following terms are used throughout this guide and have specific legal meaning:

**"Negligence"** is the failure to exercise the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful chiropractors would possess and use in similar circumstances.[1]

If a chiropractor is a specialist, then "negligence" is the failure to exercise the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful chiropractic specialists (in the same specialty) would possess and use in similar circumstances.[2]

Under California law, a "single act of negligence" does not constitute grounds for discipline of a professional license, however, "repeated acts of negligence" does constitute grounds for discipline of a professional license.

**"Standard of Care" and "Standard of Practice"** are terms used in evaluating the negligence of a chiropractor. The term "standard of care" and "standard of practice" are used interchangeably, however, for purpose of this document and your report, please use the term "standard of care." The standard of care requires that the chiropractor exercise that degree of skill, knowledge, and care ordinarily possessed by members of his or her profession under similar circumstances.[3]

**"Gross Negligence"** an extreme departure from the ordinary standard of care.[4]

**"Incompetence"** means an absence of qualification, ability or fitness to perform a prescribed duty or function. Incompetence is distinguishable from negligence in that one may be competent or capable of performing a given duty but was negligent in performing that duty.

Thus, a single act of negligence may be attributable to remissness in discharging known duties, rather than incompetence respecting the proper performance.[5]

**"Scope of Practice"** refers to the range of services that can be provided by a chiropractor under the Chiropractic Initiative Act. The scope of practice is found in Sections 7 and 16 of the Initiative Act, Section 302 and 306 of the regulations, and in several California court decisions.

**"Administrative Procedure Act"** is the California law that governs all Board disciplinary cases against a chiropractor.

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1 California Civil Jury Instructions CACI 501, 2003.
2 California Civil Jury Instructions CACI 502, 2003.
3 Barris v. County of Los Angeles, 20 Cal.4th 101, 83 Cal.Rptr.2d 145 (1999).
4 Kearl, v. Board of Medical Quality Assurance, 189 Cal.App3d 1040 (1986); City of Santa Barbara v. Superior Court, 41 Cal.4th 747, 62 Cal.Rptr3d 527 (2007).
5 Kearl.

**"Administrative Law Judge" or "ALJ"** presides at all administrative hearings before the Board.

**"Deputy Attorney General" or "DAG"** is the attorney that represents the Board's Executive Officer who is the "complainant" in all disciplinary cases. DAGs are employed by the California Attorney Generals Office.

# Section IV

# GUIDELINES FOR EXPERT CONSULTANTS

## *FREQUENTLY ASKED QUESTIONS*

**1. Will I have to testify?**

Possibly. If the case is submitted for disciplinary action and a stipulated agreement is not reached, you will be called upon to provide expert testimony before an ALJ. However, the majority of cases are settled before a hearing is held.

**2. How much will I be paid?**

The expert is paid $100 per hour for record review and a maximum of $600 per half day and $1200 per full day of testimony at an administrative hearing. You will also be compensated for other expenses you may incur, (i.e., parking, postage or travel, if applicable) in accordance with state law (effective July 1, 2008).

**3. How soon will I be paid?**

Generally speaking you should receive payment for your services within 4 to 6 weeks following receipt of your billing for services rendered. Incomplete forms will delay payment so be sure to provide your taxpayer identification number and signature. It is also important to complete the Payee Data Record form that is required by the IRS and return it with the statement.

**4. Can I be sued for expressing my opinion and if I am sued who will represent me?**

Yes. However, **Civil Code section 43.8** provides immunity from civil liability for expert consultants. If you are sued, either the Attorney Generals Office or outside counsel in the event of the conflict with the Attorney Generals Office will represent you.

**5. Should I do research?**

Yes, you should consult chiropractic texts and other authoritative reference materials that help define accepted standards and are encouraged to do so. However, it is important that you do not attempt to conduct your own investigation of the facts in the case.

**6. How soon do I need to complete the review and provide an opinion?**

The Board expects reports to be completed within 30 days of assignment; however, this may vary depending on the volume and complexity of the case. In a complicated case involving multiple patients, your review could extend beyond our 30-day time frame in which you are expected to notify the Board representative. Keep in mind that the chiropractor you are reviewing will continue to see patients until a determination is made by the Board. If this chiropractor poses a danger to patients, it is vital that you provide your opinion expeditiously so that the Board can move rapidly to protect the public.

**7. Who will see my report?**

The Subject chiropractor will be provided with a copy of your report as a part of legal discovery if an accusation is filed. In addition, if the case goes to a hearing, your report may be introduced into evidence.

**8. Can you give me a copy of a sample report?**

Yes, please see Section VII.

**9. What is the difference between negligence and gross negligence?**

See Definitions Section for full explanation.

## INSTRUCTIONS

**A.** Ensure that records, reports and materials provided for your review are kept confidential and secure.

**B.** Review the case and determine if there is any reason you cannot provide an opinion because of a professional or personal relationship with any subject, witness, or patient.

**C.** If for any reason you determine that you cannot complete the review or provide an opinion, please let us know immediately and the case will be reassigned.

**D.** Keep track of dates and hours spent reviewing.

**E.** Do not mark on the copy of the records provided to you.

**F.** Do not contact the Subject or patients.

**G.** Do not discuss the case with outside third parties. You may use an office assistant or transcriptionist to assist you in the preparation of your report.

**H.** Do not perform any investigation on your own, i.e., attempting to obtain additional records or interviewing participants in the case. If you feel the file is incomplete, please contact the enforcement staff at the Board.

**I.** Do not offer any recommendation about the appropriate disciplinary action for the Subject.

**J.** Do not make a copy of the records.

**K.** Do not destroy any of the materials provided to you.

**L.** Remember to date and sign your opinion.

**M.** Enclose a current curriculum vitae with your report. Fourteen (14) days before the hearing, if a hearing is scheduled, you need to send an updated curriculum vitae to the DAG assigned to the case.

**N.** When your review is completed, please return your report along with the documents unmarked and in bate-stamped order, confidentiality and conflict of interest agreement, statement for services, and current curriculum vitae. It is necessary for you to retain the report until the case is final in the event you need to review it for either a meeting with the DAG or in preparation for a hearing.

**O.** If you have questions or concerns, contact the Board's enforcement manager or Executive Officer.

## IMMUNITY FROM LIABILITY and LEGAL REPRESENTATION

**Civil Code Section 43.8** states, in pertinent part:

". . . . there shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any person on account of the communication of information in the possession of such person to any hospital, hospital medical staff, . . . professional licensing board or division, committee or panel of such licensing board, the Senior Assistant Attorney General of the Health Quality Enforcement Section appointed under section 12529 of the Government Code, peer review committee, . . . when such communication is intended to aid in the evaluations of the qualifications, fitness, character . . . of a practitioner of the healing arts . . . . "

This statutory provision provides for immunity from civil liability for expert consultants and expert witnesses acting within the scope of their duties in evaluating and testifying in cases before the Board. Should any problems arise in this area or if you are served a lawsuit related to your participation in this process, you should immediately contact Board staff. Failure to do so may result in a default decision being taken against you.

Section 306.2 of the regulations provides that the Board through the Attorney Generals

Office shall provide legal representation under specified conditions. This section reads:

"If a person, not a regular employee of the board, is hired or is under contract to provide expertise or to perform investigations for the Board of Chiropractic Examiners in the evaluation of the conduct of a licensee or administration of a board examination, and such person is named as a defendant in a civil action directly resulting from opinions rendered, statements made, investigations conducted or testimony given, the board shall provide for representation required to defend the defendant in that civil action. The board shall not be liable for any judgment rendered against that person. The Attorney General shall be utilized in those civil actions."

## CONFIDENTIALITY AND CONFLICT OF INTEREST

As an expert consultant to the Board, you must safeguard the confidentiality of the records delivered to you for review and protect the identity of the patients, complainants and chiropractors involved. If you have prior knowledge of the subject chiropractor or if you feel you cannot be objective in your assessment for any other reason, please immediately contact the Board representative who sent you the materials. You will be given materials to review, including relevant patient records and investigative materials. You are obligated not to divulge any information contained in these materials to other parties. The obligation to preserve confidentiality also extends to any assistant you may utilize in the preparation of your report. You will be required to sign a confidentiality and conflict of interest agreement form on each case you review.

## INVESTIGATIONS AND THE DISCIPLINARY PROCESS

The Board is responsible for investigating and bringing disciplinary action against the professional licenses of chiropractors suspected of violations of the Chiropractic Initiative Act of California, the California Code of Regulations, and other applicable laws and regulations.

The Board's hearings are conducted in accordance with the Administrative Procedure Act **(Government Code § 11150 et seq.)**. Its investigations are conducted pursuant to **Government Code sections 11180 though 11191**.

The Board, through the Executive Officer and investigative staff, identifies and takes appropriate action against chiropractors who commit unprofessional conduct, including acts or omissions evidencing repeated negligence, gross negligence, or incompetence, practicing under the influence of drugs or alcohol, practicing while mentally or physically impaired affecting competence, fraudulently billing patients or health insurance companies, clearly excessive treatment or use of diagnostic procedures, altering or creating false records, sexual misconduct, criminal acts and other conduct that endangers the health, welfare, or safety of the public.

The Board Members are not involved in the investigatory, expert review, or decision as to whether an accusation should be filed.

Consequently, you should NEVER contact any Board Member regarding any aspect of any case even after you have completed your opinion.

The purpose of the disciplinary process is not to punish as in the criminal justice system but to protect California consumers by ensuring that quality chiropractic care is provided by licensed chiropractors.

Standard investigations in quality of care cases include obtaining all relevant patient records, conducting interviews with witnesses, including the affected patient or patients, and obtaining any additional information. In insurance fraud cases, billing records and insurance claims are obtained. At times, information is found that goes far beyond the original complaint. After the documentary and interview evidence is obtained, the case is reviewed by the Board to determine if an evaluation by an expert consultant is necessary. If so, Board staff sends the case to an expert consultant who is qualified to render an opinion as to whether a departure from the standard of care occurred.

After the expert consultant submits his or her report, the Board makes a determination if the matter should be submitted to the Attorney General's Office to determine whether sufficient evidence exists to file an accusation against the subject chiropractor for unprofessional conduct.

If it is determined that sufficient evidence exists, an accusation is prepared and served upon the subject chiropractor, and he or she is given the opportunity to contest the charges.

In a majority of cases, the case is settled between the parties. However, if the case is not settled, a hearing is held before an Administrative Law Judge (ALJ) of the Office of Administrative Hearings. The hearing may last from one day to several weeks, depending upon the complexity of the case and the defense. Both sides may call expert witnesses to support their views. This makes it incumbent upon the expert consultant to ensure the utmost care is taken when reviewing cases. The ALJ hears evidence against and for the subject chiropractor and renders a proposed written decision that is submitted to the Board Members for adoption as its decision in the matter. If the Board members adopt the proposed decision, it becomes final; if the Board members do not adopt the proposed decision, the administrative record is ordered including the transcript from the hearing, the exhibits, and other documents. The Board members then decide the case themselves based upon the administrative record and the disciplinary guidelines. The Subject chiropractor may petition for reconsideration if dissatisfied with the decision or proceed to take a writ of mandate to the appropriate Superior Court contesting the decision.

## STAGES OF EXPERT REVIEW

### A. Investigative Review

After the investigator assigned to a case has completed his or her investigation, the case is reviewed by a Board reviewer who then makes a recommendation as to whether or not a full expert evaluation is warranted. If the Executive Officer agrees that an expert evaluation is necessary, that is where you come into the process.

You, the expert consultant at this point, will be contacted by the Board and will be

asked to review the case. Information will be provided to you that should be sufficient for you to determine whether you will be able to devote the necessary time to the matter and prepare an expert report in a timely manner. If you agree to review the case, you will be provided with the case file that includes all necessary documents, statements, and other evidence to render your opinion. Your review should include an assessment of all relevant aspects of chiropractic care with strict attention to information provided in the file. If you should require any other information or something is not clear, you should contact the Board's representative, and every effort will be made to provide you with the information necessary.

You must remember that at this stage, the review is primarily concerned with whether the facts as presented constitute unprofessional conduct. You are not asked to be an advocate for the Board, the chiropractor, or the patient. Your evaluation should be objective, well reasoned and impartial because it is the primary factor in deciding whether the case is submitted for disciplinary action.

The Board is not interested in using your services to advocate a position, make an example of a licensee or punish a licensee. The Board only wants you to provide an objective evaluation so that it can determine if public protection warrants the filing of disciplinary charges. Your evaluation may also result in the issuance of a lesser enforcement action such as a citation.

## B. Hearing Testimony

Once the case is submitted for disciplinary action, and an accusation is filed, you may be called upon to provide expert testimony, should the case go to a hearing. The majority of cases are settled before a hearing is held.

If a case is set for hearing, the Deputy Attorney General (DAG) assigned to prosecute the case will meet with you, perhaps several times, to review your expert opinion. You will be asked to educate the DAG in the details of your opinion and to assist in the presentation of that opinion in the clearest and most concise manner possible. You may also be asked to assist in reviewing the opinions of the opposing experts and in preparing cross-examination questions for them.

During the hearing, you will be called as the Board's expert witness to testify concerning your opinion and the reasons for your opinion. You will be asked questions by the DAG and by the subject chiropractor or his or her attorney if the chiropractor is represented by counsel. The total time taken for your testimony at the hearing varies with the complexity of the case. The subject chiropractor will have been provided with copies of any written opinions you have submitted during the investigative stage of the case. You should always provide truthful testimony even if it is contrary to the interests of the Board. You may also be asked to evaluate the opinions expressed by respondent's expert at hearing because oftentimes respondents' experts fail to prepare a written opinion.

## REGULATION SECTION 317 "UNPROFESSIONAL CONDUCT"

**The following are the primary laws that are used when an expert consultant is evaluating a case. However, you should be familiar as an expert in the field with all applicable laws relating to the practice of chiropractic.**

Section 317 referred to above under "Quality of Care" includes other acts that constitute unprofessional conduct. This section reads:

The Board shall take action against any holder of a license who is guilty of unprofessional conduct which has been brought to its attention, or whose license has been procured by fraud or misrepresentation or issued by mistake.

Unprofessional conduct includes, but is not limited to, the following:

(a) Gross negligence;
(b) Repeated negligent acts;
(c) Incompetence;
(d) The administration of treatment or the use of diagnostic procedures which are clearly excessive as determined by the customary practice and standards of the local community of licensees;
(e) Any conduct which has endangered or is likely to endanger the health, welfare, or safety of the public;
(f) The administration to oneself, of any controlled substance, or the use of any dangerous drug or alcoholic beverages to the extent or in a manner as to be dangerous or injurious to oneself, or to any other person or to the public, or to the extent that the use impairs the ability of the person to conduct with safety to the public the practice authorized by the license;
(g) Conviction of a crime which is substantially related to the qualifications, functions or duties of a chiropractor;
(h) Conviction of any offense, whether felony or misdemeanor, involving moral turpitude, dishonesty, physical violence or corruption. The board may inquire into the circumstances surrounding the commission of the crime in order to fix the degree of discipline or to determine if such conviction was of an offense involving moral turpitude, dishonesty, physical violence or corruption. A plea or verdict of guilty, or a plea of nolo contendre is deemed to be a conviction within the meaning of the board's disciplinary provisions, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code. The board may order a license to be suspended or revoked, or may decline to issue a license upon the entering of a conviction or judgement in a criminal matter.
(i) The conviction of more than one misdemeanor or any felony involving the use, consumption, or self-administration of any dangerous drug or alcoholic beverage, or any combination of those substances
(j) The violation of any of the provisions of law regulating the dispensing or administration of narcotics, dangerous drugs, or controlled substance;
(k) The commission of any act involving moral turpitude, dishonesty, or corruption, whether the act is committed in the course of the individual's activities as a license holder, or otherwise;
(l) Knowingly making or signing any certificate or other document relating to the

practice of chiropractic which falsely represents the existence or nonexistence of a state of facts;

(m) Violating or attempting to violate, directly or indirectly, or assisting in or abetting in the violation of, or conspiring to violate any provision or term of the Act or the regulations adopted by the board thererunder;

(n) Making or giving any false statement or information in connection with the application for issuance of a license;

(o) Impersonating an applicant or acting as a proxy for an applicant in any examination required by the board for the issuance of a license or certificate;

(p) The use of advertising relating to chiropractic which violates section 17500 of the Business and Professions Code;

(q) The participation in any act of fraud or misrepresentation;

(r) Except as may be required by law, the unauthorized disclosure of any information about a patient revealed or discovered during the course of examination or treatment;

(s) The employment or use of persons known as cappers or steerers to obtain business;

(t) The offering, delivering, receiving or accepting of any rebate, refund, commission, preference, patronage, dividend, discount or other consideration as compensation or inducement for referring patients to any person;

(u) Participation in information or referral bureaus which do not comply with section 317.1 of the regulations.

***(v)*** Entering into an agreement to waive, abrogate, or rebate the deductible and/or co-payment amounts of any insurance policy by forgiving any or all of any patient's obligation for payment thereunder, when used as an advertising and/or marketing procedure, unless the insurer is notified in writing of the fact of such waiver, abrogation, rebate, or forgiveness in each such instance. ***(Subdivision contains actual waiver language)***

(w) Not referring a patient to a physician and surgeon or other licensed health care provider who can provide the appropriate management of a patient's physical or mental condition, disease or injury within his or her scope of practice, if in the course of a diagnostic evaluation a chiropractor detects an abnormality that indicates that the patient has a physical or mental condition, disease, or injury that is not subject to appropriate management by chiropractic methods and techniques. This subsection shall not apply where the patient states that he or she is already under the care of such other physician and surgeon or other licensed health care provider who is providing the appropriate management for that physical or mental condition, disease, or injury within his or her scope of practice.

(x) The offer, advertisement, or substitution of a spinal manipulation for vaccination.

## TYPES OF EVALUATION

Because there are many possible violations of the laws governing the practice of chiropractic, evaluations of cases vary with the subject matter of the possible unprofessional conduct. Listed are the major kinds of evaluations you may be asked to prepare.

## 1. Quality of Care

These cases involve the quality of care rendered to a patient or patients. The general question asked in this context is whether the subject chiropractor's treatment of the patient constituted gross negligence, repeated acts of negligence, or incompetence. Often, it is difficult to distinguish which of these definitions fits the treatment rendered and sometimes, the conduct described exhibits both incompetence and negligence or gross negligence for a given patient's treatment.

One departure from the standard of care is not considered unprofessional conduct unless it is an extreme departure. Your evaluation should state whether in your opinion it is negligence, repeated acts of negligence, gross negligence or incompetence. You may have situations where the subject's conduct constituted both negligence and incompetence. You should explain this in your report.

The determinations are often difficult to make, but that is why you are called upon to render your expert opinion. With your knowledge of the standards of care within the chiropractic community, especially in your area of expertise, we are asking you to render a professional opinion based upon your education, knowledge, experience, and training.

## 2. Sexual Misconduct

Section 316 of the regulations prohibits certain sexual acts both on the premises of a chiropractic business and with patients and other individuals. This section reads:

"(a) Every licensee is responsible for the conduct of employees or other persons subject to his supervision in his place of practice, and shall insure that all such conduct in his place of practice conforms to the law and to the regulations herein.

(b) Where a chiropractic license is used in connection with any premises, structure or facility, no sexual acts or erotic behavior involving patients, patrons or customers, including, but not necessarily limited to, sexual stimulation, masturbation or prostitution, shall be permitted on said premises, structure or facility.

(c) The commission of any act of sexual abuse, sexual misconduct, or sexual relations by a licensee with a patient, client, customer or employee is unprofessional conduct and cause for disciplinary action. This conduct is substantially related to the qualifications, functions, or duties of a chiropractic license.

This section shall not apply to sexual contact between a licensed chiropractor and his or her spouse or person in an equivalent domestic relationship when that chiropractor provides professional treatment."

In this area you are asked to assess, based upon the standard of care, whether a chiropractor's relationship or conduct with a patient constitutes unprofessional conduct based on California law and the facts presented in each case.

In evaluating these cases, you are not asked to evaluate the CREDIBILITY of the complaining witness or whether the alleged statements or actions actually occurred.

This will be determined at the hearing, if one is held. For purposes of your review, you are to assume that the complainant's account of the doctor's conduct is true.

While some actions clearly constitute sexual misconduct, there are cases in which you will need to consider whether the conduct was appropriate because the doctor used an acceptable diagnostic or treatment technique.

In these cases, your evaluation should address whether the diagnostic or treatment technique is appropriate and whether the doctor used the diagnostic or treatment technique in an appropriate manner with the patient.

### 3. Excessive Treatment Violations

**California Code of Regulations Section 317** states that the "administration of treatment or the use of diagnostic procedures which are clearly excessive as determined by the customary practice and standards of the local community of licensees..." In this type of case, you are asked to state the standard of the local community of licensees concerning the number of chiropractic visits necessary to treat a certain condition and the kind and extent of diagnostic procedures necessary to diagnose the condition. Excessive treatment may also constitute gross negligence or repeated acts of negligence. The insurance industry does NOT set the standard of care, therefore whether or not an insurance company considered treatment to be excessive is irrelevant.

### 4. General Unprofessional Conduct

**Section 317** states that a chiropractor may be disciplined for unprofessional conduct, which includes, BUT IS NOT LIMITED TO certain enumerated conduct. Any unprofessional conduct which is not set forth as such in the Chiropractic Initiative Act, governing regulations, or other statutes covering the practice is referred to as "general unprofessional conduct." General unprofessional conduct reflects conduct which demonstrates an unfitness to practice chiropractic that does not fit into other categories.

In a case entailing ethical violations, you are asked to set forth the standard of conduct for a chiropractor in the circumstances described, and perhaps the underlying ethical code, and then you are asked to describe in what manner the subject chiropractor violated that standard.

# Section V

## THE OPINION ITSELF

There are Sample Expert Reports appended to this booklet at Section VI. Please refer to those when writing your report, but remember they are guidelines only, and your case and the contents of your report will necessarily differ.

### A. Contents

Your expert report should contain:

1) An accurate listing of the records and other documents sent to you –for review. Additionally, all of the documents provided for your review will be stamped with a sequential number ("Bates Stamped.) For example, if you receive a five-page investigation report and 50 pages of patient records, each one will contain a page number stamped at the bottom of the page starting from 1 to 55. You should refer to these numbers whenever you reference a document in your evaluation. This will assist the DAG who will later review your report. It will also ensure that your testimony before an administrative law judge will be organized and time-efficient.

2) The substance of the opinion, which should consist of the following for each patient, if there is more than one patient:

   a. Do a summary of the patient's case, including relevant patient history and presenting complaint. Describe the subject chiropractor's treatment, and any subsequent treatment. Summarize the facts of the treatment and the findings.

   b. State the standard of care for the treatment of such a patient. Remember to state the standard of care for the community of chiropractors, not just the way in which you personally would treat such a patient. The standard reflects what a reasonable chiropractor would do under the circumstances.

   c. Specifically describe any departures from the standard of care and explain why. Each finding of a departure from the standard of care should be specifically described.

   d. State your opinion as to whether the overall care of this patient constitutes no departure, a departure, an extreme departure, a lack of knowledge or ability, excessive treatment, excessive use of diagnostic procedures, sexual misconduct, and so on, or any combination. You must also state the basis for each opinion.

## B. Violation vs. Mitigation

In writing your report, you are asked to summarize the treatment rendered and the findings of the subject chiropractor. In preparing your summary, you may have identified certain factors that could have hampered accurate treatment. Please remember that it is your obligation to state the standard of care and the departure therefrom.

Mitigation is defined as an abatement or diminution of penalty or punishment imposed by law. Although there are instances where mitigating circumstances are relevant to the imposition of any penalty, those factors will be considered by the trier of fact. Therefore, you are asked to refrain from commenting whether the subject chiropractor should or should not be punished because of certain mitigating or aggravating factors.

The actual discipline to be imposed on the chiropractor is the province of the trier of fact, and you are not expected to prescribe or recommend any discipline in the case.

## C. Injury Is Not Essential

The primary focus in an expert review is whether there has been a departure from the standard of care of chiropractic, not whether the patient has been injured. Although the potential for injury because of the violation of the standard of care may be relevant to a determination of the degree of departure, actual injury is not required to establish unprofessional conduct. Also, just because there was no injury does not mean there was no departure from the standard of care. Conversely, injury to a patient in and of itself may not constitute violation of the standard of care.

## D. Evaluation and Credibility

In many cases, the significant facts will not be in dispute. However in some cases, (such as sexual misconduct or allegation of assault) significant facts may be disputed. For example, the patient may state that something happened, while the subject may deny that it occurred. In those cases, your opinion should not include an assessment as to the subject and witnesses credibility, but if you render an opinion as to whether certain conduct constituted unprofessional conduct you should state in your report whose statement you relied to reach that conclusion.

## E. Assess the Standard of Care as of the Time of the Violation.

The standard of care of chiropractic is constantly evolving, and so it is particularly important to be cognizant of the time that the violation occurred and assess the case in terms of the standard of care **AT THAT TIME**.

This does **not** mean, however, that if you were not in practice at the time of the violation, you are disqualified as an expert consultant. If you are aware of the standards at the time the violation occurred through your education, training and

experience, you may render an opinion on the case.

### F. Objectivity

In performing your review, you should maintain objectivity, and view the assigned case without regard to any other legal activity that may surround it. In specific, you should ignore the existence, non-existence or magnitude of any civil judgments or settlements involving the case. Since you may not be reviewing the same documents that were used to support or refute a civil case, no attention should be paid to any past adjudicatory history. The expert consultant should focus on the patient records and other case records, not on the reports, depositions or other testimony of other expert witnesses. However, you may review deposition testimony of patients or non-expert witnesses.

# Section VI

# COMPENSATION

The Board staff will provide you with a form entitled "Expert Chiropractic Consultant Statement of Services" and a form entitled "Payee Data Record" for use in billing for services which you render to the Board as an expert consultant. You will be asked to fill out the Statement of Services form **COMPLETELY** for each case that you review and you may be required to fill out more than one Statement of Services form during the course of a case. Failure to fill out the form completely will delay your compensation. The Payee Data Record is only required to be completed annually.

### A. Initial Evaluation

You will be compensated at the rate of $100 per hour for your evaluation and expert report. Please record the hours worked on the case for each DAY for your eventual billing.

The Board keeps its accounts by Fiscal Year, which begins July 1 through June 30. Please do not submit bills for two Fiscal Years on one form. Instead, use a separate form for each Fiscal Year.

### B. Consultation with Deputy Attorney General

This includes any consultation, in person or by telephone, before the case is filed, during the pendency of the action, or in preparation for hearing. You will be compensated at the rate of $100 per hour.

### C. Testimony at Hearing

You will be compensated at the rate of $600 for a half day of testimony and $1200 for a full day of testimony.

**D. Miscellaneous Expenses**

Expenses incurred in fulfilling the various requests may be itemized on a separate sheet of paper. Mileage and parking can be charged in connection with testimony at hearings. All expenses incurred in this category must be accompanied by a receipt, excluding mileage. In the event your testimony requires an overnight stay, the Board will make the appropriate arrangements for you.

# Section VII

# SAMPLE EXPERT OPINION(S)

The attached expert consultant report samples are what the Board expects from your expert review.

These are provided for purposes of reference as to format and expression only, and in no way reflects the decisions or opinions of the Board with reference to any of the fact situations cited. You may, in fact, agree or disagree with, or have no opinions about the opinion in substance.

TERMS TO BE AVOIDED IN REPORTS

**Guilt or Innocence:** The expert consultant's role is to determine whether, and in what manner, a chiropractor's actions depart from the standard of care, or demonstrate a lack of knowledge or ability.

**Judgmental or subjective comments:** Your report should objectively establish what behavior was expected and how the chiropractor failed to meet the expectation. Avoid terms such as "*this guy is clearly incompetent*" or *"no-one in his right mind would do..."*

**Malpractice:** Malpractice is a term which applies to civil law (i.e., suits between individuals). The Board functions under administrative law, and its cases deal with unprofessional conduct. Also, the expert consultant should not let any information regarding malpractice filings, settlements or judgments affect their review of a case. The standards of evidence and proof for civil cases are different than for administrative cases.

**Penalties:** It is not the role of the expert consultant to propose a penalty. This will be determined at hearing, based on detailed guidelines adopted by the Board and utilized by Administrative Law Judges.

**Personalized comments:** Avoid characterizing the actions of the chiropractor in personal terms: *"She was rude and unprofessional to the patient."* Instead, describe what the expected standard was, and how the chiropractor deviated from the standard.

# Section VIII

# SERVING AS AN EXPERT WITNESS

## A. EXPERT WITNESS

You have been asked to testify at an *administrative hearing* against a chiropractor. You will be an *expert witness*. What this means is that because of your background, training and experience you can express opinions and make evaluations that a layperson could not make.

Prior to the hearing date, you will be contacted by the *Deputy Attorney General* (DAG) assigned to represent the Board and to present our case at the hearing. The DAG may arrange to meet with you to review the case, your written expert opinion, your qualifications to serve as an expert, and what you can expect at the hearing. The DAG also may ask you to review expert opinions provided by the respondent chiropractor or his or her attorney in the discovery phase of the case.

Discovery is when each side provides the other with all documents and other exhibits it will use, as well as the names of any witnesses it intends to call.

If the case is unusually complex or involves voluminous records, you may have to meet with the DAG more than once prior to the hearing.

## B. THE HEARING

The hearing afforded a chiropractor who is charged by the Board, is known as an "administrative hearing," and is conducted under the Administrative Procedure Act (APA). While an APA hearing has some things in common with a criminal trial, it also has numerous differences. In general, APA hearings are less formal than trials. The hearing will be conducted by an Administrative Law Judge (ALJ) who works for an independent state agency, not for the Board. No jury is used in APA hearings. The attorneys (or the subject chiropractor, if he or she represents him or herself) can ask questions of witnesses for both sides (direct and cross-examination). The ALJ also may choose to ask a witness questions to clarify specific points.

As with a trial, the burden of proving the case rests with the Board, which brings the accusation against the subject chiropractor on behalf of the Board's Executive Officer who is the Complainant in these cases. In an APA hearing, the standard of proof that the Board must meet when an accusation is filed against a chiropractor is *"clear and convincing evidence to a reasonable certainty"*. The standard that is used when a statement of issues (filed against an applicant) or citation is appealed is "preponderance of the evidence."

As with criminal trials, the Board presents its charges against the subject chiropractor first. The chiropractor or attorney can cross-examine each witness.

Then the chiropractor presents his or her defense, and the Board (DAG) has the opportunity to cross-examine. Each side has the opportunity to give an opening statement describing what they intend to prove and a closing statement summarizing what they have attempted to prove.

## C. YOUR TESTIMONY

Before you can give evidence, you must establish your expertise at the hearing. This is done by the DAG asking you questions about your qualifications. This process is known as *voir dire*. You may be asked about the following, or about other matters relating to your qualifications:

1. Your license status and history.
2. Your education, chiropractic education and training.
3. Your experience.
4. Any private board certification or board eligibility you have achieved.
5. The extent of your experience as it relates to the types of chiropractic care or treatment at issue in this case.
6. Your professional affiliations, memberships, staff appointments and other associations.
7. Your publications.
8. Any other information that could shed light on your qualifications to be considered an expert.
9. You probably will be asked whether you know or have any kind of business or professional relationship with the subject chiropractor.

During direct and cross-examination, you probably will be asked questions about the documents and other "exhibits" you reviewed as you prepared your expert opinion report. You should be prepared to identify any publications or resources you referred to as part of your review. You also may be asked to describe the kinds and extent of experience you have in performing the chiropractic procedures or treatments involved in the case.

It is extremely important that you be able to describe what is the *standard of care in the chiropractic community* for the type of procedure involved in the case. The term "standard of practice" or "standard of care" is set by the community of licensed chiropractors based upon their training, education and experience. This standard may change over time with new advancements in chiropractic. It will be necessary for you, as an expert witness, to articulate what the current acceptable standard is in chiropractic for various diagnosis and treatment procedures. Focus on what the standard is. Also, use lay terms whenever possible, and explain unavoidable technical terms and acronyms.

Focus on how the treatment in a particular case departed from the standard of care.

You also may need to address a charge of incompetence based on use of outmoded procedures. In some instances, you may be faced with a lack or inadequacy of patient records upon which to assess the quality of the case the patient received. Your testimony may consist of pointing out that based on the patient chart, it is not possible to determine what tests, if any were ordered, what

instructions were given the patient, what in-office procedures were done, etc. You could be asked to explain the standard of care as it relates to documenting such information in the patient record.

Be prepared to discuss the degree to which the treatment departed from the standard of care. Was the treatment a departure or an extreme departure? For more information on this, see the Guidelines For Expert Consultants in Section IV.

Very often, the other side will attempt to discredit you, belittle your qualifications, or use other techniques to raise doubts about your testimony.

You should make every effort to remain objective and detached. Try not to become defensive or to lose your professional demeanor. Your role is as a teacher, not as an advocate for the Board.

## D. AFTER THE HEARING CONCLUDES

When the hearing is completed, the ALJ will take the case under submission. He or she has 30 days to prepare a proposed decision (PD). The PD is sent to the Board, which then has 100 days to decide whether to accept the PD, reject it and substitute its own decision in the case, or modify and adopt the decision.