



ENFORCEMENT COMMITTEE
MAY 21, 2015

SUBJECT: DRAFT LANGUAGE FOR PROPOSED REGULATIONS 16 CCR, DIVISION 13.9, BOARD OF PODIATRIC MEDICINE ("BPM") OF THE MEDICAL BOARD OF CALIFORNIA CONCERNING CONDUCT OF ORAL ARGUMENT

16

ACTION: ADOPT STAFF RECOMMENDATION TO ADD SECTIONS TO THE BPM REGULATIONS RELATED TO PROCEDURES FOR ORAL ARGUMENTS, AMICUS BRIEFS, AND WRITTEN ARGUMENT SUBMITTED IN RESPONSE TO AN ORDER OF NONADOPTION OR RECONSIDERATION

RECOMMENDATION

Conduct an open discussion of the proposed text for the board's regulations on procedures for oral arguments, amicus briefs, and written argument. Direct the Executive Officer to make any discussed changes with authorization to make other non-substantive changes and to commence the rulemaking process..

ISSUE

Current BPM regulations do not contain a provision for the conduct of oral argument following the non-adoption of a proposed decision as required by section 2336 of the California Business & Professions Code. Additionally, the addition of regulations relating to amicus briefs, and the written argument submitted in response to an order of nonadoption or reconsideration will provide needed guidance to future stakeholders presenting evidentiary matters before the BPM

DISCUSSION

The Division of Medical Quality, or the Medical Board ("MBC") has enacted regulations to comply with Sec. 2336.

Sec. 2336 of the Business & Professional Code, Adoption of rules to govern conduct of oral argument

The Division of Medical Quality and the California Board of Podiatric Medicine shall adopt rules, pursuant to Chapter 3.5

(commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, to govern the conduct of oral argument following nonadoption of a proposed decision. These rules shall preclude oral argument that exceeds the scope of the record of duly admitted evidence. (Attachment A)

The Board of Podiatric Medicine has not done so. Following is the regulation that the MBC adopted in Title 16, Div. 2, Art. 8 relating to the conduct of oral argument.

Sec1364.30. Procedures for the Conduct of Oral Arguments.

- (a) A party who wishes to present oral argument to the panel of the board that issued an order of nonadoption or reconsideration shall make a written request for oral argument not later than twenty (20) calendar days after the date of the notice of nonadoption or the order granting reconsideration.
- (b) An administrative law judge will preside at oral argument. The administrative law judge may sit with and assist the panel members with their closed session deliberations.
- (c) The arguments shall be based only on the existing records and shall not exceed the scope of the record of duly admitted evidence. No new evidence will be heard. The panel members may ask questions of the parties to clarify the arguments, but may not ask questions that would elicit new evidence. The administrative law judge and any panel member may ask a party to support the party's oral argument on a matter with a specific citation to the record.
- (d) The administrative law judge shall stop an attorney, a party, or a panel member of the line of questioning or argument is beyond the records or is otherwise out of order.
- (e) The administrative law judge shall offer the respondent physician an opportunity to address the panel regarding the penalty. If the respondent elects to address the panel regarding the penalty. If the respondent elects to address the panel, the administrative law judge shall place the respondent under oath.
- (f) The sequence of, and the time limitations on, oral argument are as follows:
 - (1) First – the respondent licensee and/or his or her legal counsel, who shall be limited to fifteen minutes.
 - (2) Second- the deputy attorney general, who shall be limited to fifteen minutes.

- (3) Third- the respondent licensee's rebuttal or that of his or her legal counsel, which shall be limited to five minutes
- (4) Fourth- the deputy attorney general who shall be limited to five minutes.

For consistency, it makes sense for the oral argument provisions to be the same for the MBC for BPM. Staff is recommending that BPM adopt by incorporating the language of the MBC above, with the only changes consisting of using the proper numbering of the regulation and changing the words "panel" to "board" and "panel members" to "board members." The following text of the proposed BPM regulation shows those slight modifications.

Art 13. Sec. 1364.30. 1399.730 Procedures for the Conduct of Oral Arguments.

- (a) A party who wishes to present oral argument to the board that issued an order of nonadoption or reconsideration shall make a written request for oral argument not later than twenty (20) calendar days after the date of the notice of nonadoption or the order granting reconsideration.
- (b) An administrative law judge will preside at oral argument. The administrative law judge may sit with and assist the ~~panel members~~ board with ~~their~~ its closed session deliberations.
- (c) The arguments shall be based only on the existing record and shall not exceed the scope of the record of duly admitted evidence. No new evidence will be heard. The ~~panel~~board members may ask questions of the parties to clarify the arguments, but may not ask questions that would elicit new evidence. The administrative law judge and any ~~panel~~ board member may ask a party to support the party's oral argument on a matter with a specific citation to the record.
- (g) The administrative law judge shall stop an attorney, a party, or a ~~panel~~ board member if the line of questioning or argument is beyond the records or is otherwise out of order.
- (h) The administrative law judge shall offer the respondent doctor of podiatric medicine an opportunity to address the ~~panel~~ board regarding the penalty. If the respondent elects to address the ~~panel~~ board, the administrative law judge shall place the respondent under oath.
- (i) The sequence of, and the time limitations on, oral argument are as follows:
 - (1) First – the respondent licensee and/or his or her legal counsel, who shall be limited to fifteen minutes.

- (2) Second- the deputy attorney general, who shall be limited to fifteen minutes.
- (3) Third- the respondent licensee's rebuttal or that of his or her legal counsel, which shall be limited to five minutes
- (4) Fourth- the deputy attorney general who shall be limited to five minutes.

It is also recommended that BPM mirror the language of the two additional sections immediately following MBC's regulation regarding "oral argument." These include regulations controlling "amicus briefs" and "written argument submitted in response to an order of nonadoption or reconsideration." By mirroring these additional sections in the BPM regulations, BPM will be consistent with the MBC's regulations. This is essential as BPM matters are handled in conjunction with the Medical Board.

Sec. ~~1364.31~~. 1399.731 Amicus Briefs.

- (a) A non-party with an interest in the outcome of an administrative proceeding may be permitted to file an amicus curiae brief when ~~a panel~~ the board has nonadopted a proposed decision or has received or granted a petition for reconsideration of a decision. The filing of an amicus curiae brief regarding whether ~~a panel~~ the board should nonadopt a proposed decision is not permitted.
- (b) A person who wishes to file an amicus curiae brief shall file with the executive officer of the board a signed request, not to exceed one page, specifying the points to be argued in the brief and indicating why additional argument on those points is necessary or would be helpful to the ~~panel~~ board. The request shall be accompanied by the original and seven copies of the brief. The petitioner shall include a proof of service of the request and brief on the deputy attorney general assigned to the case. The brief shall be limited to matters contained in the records of the proceeding and shall not include or incorporate any attachments. No delay in the proceedings will be granted in order to allow an amicus curiae brief to be filed.
- (c) The executive officer shall immediately transmit the request to the president of the ~~panel~~ board. The decision whether to grant the request shall be made by the ~~panel~~ president and one member designated by the president. In the event the vote is not unanimous, the request shall be

deemed denied. The request may be granted in whole or in part or may be denied without explanation. In determining whether to grant a request to file an amicus curiae brief, the following factors, among other factors, shall be considered:

- (1) whether the matters in the brief will be helpful to the ~~panel~~ board;
 - (2) the interest of the public and public policy, including the effect of the decision on non-parties; and
 - (3) the costs to the parties to reply to the amicus curiae brief.
- (d) If the request is granted, the executive director shall then transmit a copy of the brief to each ~~panel~~ board member.
- (e) Where a decision has been nonadopted or a petition for reconsideration has been granted, a request to file an amicus curiae brief will be considered only if it is received no later than 45 days prior to the date on which oral argument is scheduled or the matter is to be considered by the ~~panel~~ board if no oral argument has been requested.

1364.32 1399.732 Written Argument Submitted in Response to an Order of Nonadoption or Reconsideration.

Written argument submitted in response to an order of nonadoption or reconsideration shall:

- (a) State each point under a separate heading or subheading summarizing the point and support each point by argument, and citation of authority if applicable; and
- (b) Support any reference to a matter in the records by a citation to the volume and page number of the record or exhibit number where the matter appears.

By becoming compliant with Sec. 2336 above, and mirroring the two additional regulatory sections, BPM will be proactive in addressing regulatory inconsistencies with those of the Medical Board. It is preferable to address the issue sooner rather than later as it is conceivable that the BPM may have instances to hold oral argument in matters where a final disciplinary decision of an administrative law judge is before the Board.

ALTERNATIVES CONSIDERED

The Board may decline to approve the recommended action and choose to let the matter of noncompliance and inconsistencies remain in effect. Such a course is not recommended and may be looked upon unfavorably during the Board's Sunset Review

scheduled for 2015-2016 year, as the board is mandated to adopt rules to govern the conduct of oral argument following non-adoption as specified by Sec. 2336 of the Business and Professions Code.

Alternately, the matter could be deferred to a later date.

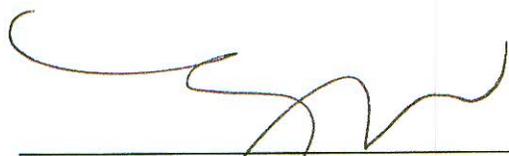
NEXT STEPS

Should the Board adopt staff's recommendation at the June 5, 2015 Board Meeting, the Executive Officer will commence the formal rulemaking process with the Office of Administrative Law.

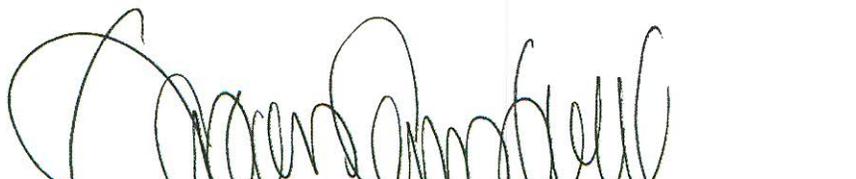
ATTACHMENTS

- A. Enforcement Committee Report to the BPM re: Proposed Regulation for Conduct of Oral Argument before the BPM, March 6, 2015, (Item #9),

Prepared by: Kathleen Cooper, JD



Kathleen Cooper, JD
Administrative Analyst



Jason S. Campbell, JD
Executive Officer



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ENFORCEMENT COMMITTEE
FEBRUARY 18, 2015

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SUBJECT: PROPOSED REGULATION FOR CONDUCT OF ORAL ARGUMENT BEFORE THE BOARD OF PODIATRIC MEDICINE ("BPM")

ACTION: ADOPT STAFF RECOMMENDATION TO DRAFT PROPOSED REGULATION CONCERNING ORAL ARGUMENT BEFORE BPM

RECOMMENDATION

Direct the Executive Officer to draft proposed regulations concerning the conduct of oral argument before the Board of Podiatric Medicine.

ISSUE

Current BPM regulations do not contain a provision for the conduct of oral argument following the non-adoption of a proposed decision as required by section 2336 of the California Business & Professions Code.

DISCUSSION

In passing Sec. 2336 of the California Business & Professions Code, the Legislature directed BPM to adopt rules governing the conduct of oral argument. Specifically the statute provides:

Sec. 2336 of the Business & Professional Code, Adoption of rules to govern conduct of oral argument

The Division of Medical Quality and the California Board of Podiatric Medicine shall adopt rules, pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, to govern the conduct of oral argument following nonadoption of a proposed decision. These rules shall preclude oral argument that exceeds the scope of the record of duly admitted evidence. (Attachment A)

The Medical Board of California has adopted Article 8, Section 1364.30, Procedures for the Conduct of Oral Arguments, and the stated procedures have not been incorporated by reference by BPM for use in BPM matters. (See Attachment B)

The Legislature has mandated in Sec. 2336 that the BPM's adopt oral argument procedures, however, this has yet to be accomplished.

Being that the Medical Board has already adopted procedures for oral argument that have been scrutinized and accepted by the Office of Administrative Law, the BPM's could incorporate by reference the procedures used by the Medical Board in Sec. 1364.30. This would allow the BPM to remain consistent with the Medical Board.

BPM matters are handled in conjunction with the Medical Board and it is best practice to remain consistent in procedural matters if there is no compelling reason to distinguish the BPM's procedures from those of the Medical Board. After reviewing the applicable statutes and regulations, staff has not found any reason to remain noncompliant with the legislature's mandate as stated above, or to distinguish the procedural rules from those of the Medical Board.

ALTERNATIVES CONSIDERED

The Board may decline to approve the recommended action and choose to let the matter of noncompliance remain in effect. Such a course is not recommended and may be looked upon unfavorably during the Board's Sunset Review scheduled for 2015-2016 year.

Alternately, the matter could be deferred to a later date. However, it is preferable to address the issue sooner rather than later as it is conceivable that the Board may again have an instance to hold oral argument before the body in the foreseeable future given that only one vote of the Board—rather than two—is required to defer a final disciplinary decision of an administrative law judge until consideration and discussion by the Board as a whole.

NEXT STEPS

Should the Board adopt staff's recommendation at the March 5, 2015 Board Meeting, the Executive Officer will begin drafting proposed regulations concerning the conduct of oral argument before BPM and return to Committee in May with proposed language.

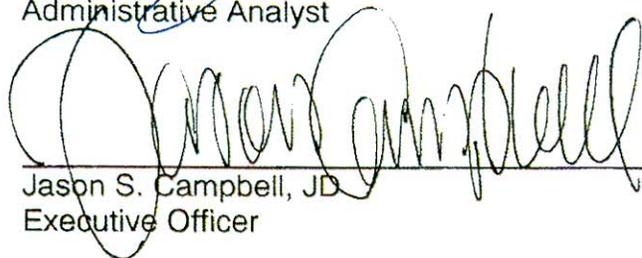
ATTACHMENTS

- A. California Business & Professions section 2336, Adoption of rules to govern conduct of oral argument
- B. Title 16, section 1364.30 California Code of Regulations - Procedures for the Conduct of Oral Arguments

Prepared by: Kathleen Cooper, JD



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Administrative Analyst



Jason S. Campbell, JD
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California.
LEGISLATIVE INFORMATION

Code: Section: ⓘ

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BUSINESS AND PROFESSIONS CODE - BPC

DIVISION 2. HEALING ARTS [500 - 4999.129] (*Division 2 enacted by Stats. 1937, Ch. 399.*)

CHAPTER 5. Medicine [2000 - 2521] (*Chapter 5 repealed and added by Stats. 1980, Ch. 1313, Sec. 2.*)

ARTICLE 13. Medical Adjudication [2330 - 2337] (*Article 13 repealed and added by Stats. 1993, Ch. 1267, Sec. 32.*)

2336. The Division of Medical Quality and the California Board of Podiatric Medicine shall adopt rules, pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, to govern the conduct of oral argument following nonadoption of a proposed decision. These rules shall preclude oral argument that exceeds the scope of the record of duly admitted evidence.

(Added by Stats. 1995, Ch. 708, Sec. 10.3. Effective January 1, 1996.)

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§ 1364.30. Procedures for the Conduct of Oral Arguments.

16 CA ADC § 1364.30

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS

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 8. Oral Arguments; Amicus Briefs (Refs & Annos)

16 CCR § 1364.30

§ 1364.30. Procedures for the Conduct of Oral Arguments.

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- (4) Fourth -the deputy attorney general, who shall be limited to five minutes.

Note: Authority cited: Sections 2018 and 2336, Business and Professions Code. Reference: Section 2336, Business and Professions Code.

HISTORY

1. New article 8 (section 1364.30) and section filed 12-22-98; operative 1-21-99 (Register 98, No. 52).
2. Editorial correction inserting inadvertently omitted article 8 heading (Register 99, No. 33).
3. Amendment of article heading filed 4-7-2000; operative 5-7-2000 (Register 2000, No. 14).
4. Amendment of subsections (a), (c) and (e) filed 5-7-2008; operative 6-6-2008 (Register 2008, No. 19).

This database is current through 1/23/15 Register 2015, No. 4

16 CCR § 1364.30, 16 CA ADC § 1364.30

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