



CONSUMER PROTECTION ENFORCEMENT INITIATIVE

"A Systematic Solution to a Systemic Problem"

The Department of Consumer Affairs (DCA) is the umbrella agency that oversees 19 healing arts boards that protect and serve California consumers. The healing arts boards regulate a variety of professions from doctors and nurses to physical therapists and optometrists. These licensees are some of the best in the country and provide excellent care to Californians on a daily basis. However, when a licensee violates the laws that govern his or her profession, enforcement action must be taken to protect the public.

In recent years some of DCA's healing arts boards have been unable to investigate and prosecute consumer complaints in a timely manner. In fact, some boards take an average of three years to investigate and prosecute these cases; this is an unacceptable timeframe that could put consumers' safety at risk.

DCA reviewed the existing enforcement process and found systemic problems that limit the boards' abilities to investigate and act on these cases in a timely manner. These problems range from legal and procedural challenges to inadequate resources. In response, DCA launched the Consumer Protection Enforcement Initiative (CPEI) to overhaul the enforcement process at the healing arts boards. The CPEI is a systematic approach designed to address three specific areas:

- Administrative Improvements
- Staffing and IT Resources
- Legislative Changes

Once fully implemented, DCA expects the healing arts boards to reduce the average enforcement completion timeline from 36 months to between 12 and 18 months.

I. Administrative Improvements

During the review of the enforcement process, DCA worked with the boards to identify areas that could be improved administratively to better coordinate broad enforcement objectives, improve the services provided to the healing arts boards, and establish streamlined enforcement processes and procedures that can be used by all boards. The following are some of the efforts that emerged from those discussions:

“365 Project”

DCA's Division of Investigation (DOI) embarked on a project in 2009 to strategically focus on cases that were one year or older. DOI worked closely with boards to identify the cases upon which they should focus their resources. This project has produced impressive results, and in 2009 the DOI closed 50% more cases than the comparable period in 2008.

Delegation of Subpoena Authority

One of the initial administrative changes implemented by DCA was delegating subpoena authority to each executive officer as a tool to gather evidence and interview witnesses. DCA's Legal Office conducted subpoena training for board staff, and this authority has started being exercised by boards. We expect to see increased use of subpoenas as a result of this change, and boards will be able to pursue cases that they otherwise would not have pursued.

Process Improvement

DCA and the boards are working to identify best practices for a number of enforcement processes and procedures, such as complaint intake, handling of anonymous complaints, vote by email protocols, and adjudication procedures. This effort will take advantage of the most effective practices utilized by the various boards, and entities in other states, and will ultimately shave time off all aspects of the enforcement process.

Enforcement Academy

DCA's Strategic Organization, Leadership, & Individual Development Division is developing enhanced training programs for enforcement staff. The enforcement academy will teach investigators and other enforcement staff key skills used in complaint intake, investigation procedures, case management, database use, and other areas. Never before has DCA offered such a comprehensive enforcement training program. An initial training was offered in November 2009, and the full enforcement academy will begin its regular cycle in April 2010.

Deputy Director for Enforcement and Compliance

DCA established an executive level position that reports to the Director and is responsible for regularly examining each board's enforcement program to monitor enforcement performance and compliance with all applicable requirements. This position monitors performance measures so that boards' enforcement programs can be continuously assessed for improvement.

Performance Expectations with Other Agencies

DCA has been working with the Attorney General's Office and the Office of Administrative Hearings (OAH) to establish performance agreements that will expedite the prosecution of cases. DCA and the AG's Office are developing expectations for filing accusations, setting settlement conferences, and filing continuance requests. Further, DCA is working with OAH to establish timelines for setting cases for hearings, which, once implemented, could reduce a case timeline by months.

II. Enhancing Enforcement Resources

There are 36 licensing entities under the DCA (of which are 19 healing arts boards) and, with a few exceptions, all of these programs share the resources of the Department, from Division of Investigations (DOI), to Personnel to IT Support. While the healing arts boards fall under the umbrella of DCA they are separate semi-autonomous groups overseen by board members appointed by the Governor and the Legislature. Additionally, all of the licensing entities under DCA are special fund agencies funded exclusively through fees collected through licensees with no general fund support.

Enforcement Staff

DCA's review of the enforcement process identified a need for more focused staff resources in the areas of investigations and complaint intake. The majority of DCA's licensing entities share the resources of DCA's overburdened DOI. Annually, DOI's 48 investigative staff members receive over 1,300 cases, in topics ranging from nurses to repossessioners to smog check stations. Having so many investigations performed by DOI has resulted in a number of problems, including loss of control over the investigation by the boards, a lack of investigators with expertise in specific licensing areas, and excessive caseloads. These problems have led to excessive turn-around times and growing backlogs. Through the 365 Project, the DOI has worked with boards to reduce the case backlog, but the current structure has revealed a need for more significant changes.

In order to increase accountability in the investigative process, DCA is working to provide boards with the authority to hire non-sworn investigators to be housed within each board. This will enhance boards' control over investigations, allow for more appropriate workload distribution, and enable investigators to develop expertise. Additionally, to coincide with process improvement efforts, some boards will increase complaint intake staff. DCA is seeking a total of approximately 140 new enforcement positions (full year equivalent) across all healing arts boards. The vast majority of these positions are investigators and investigative supervisors, and the remainder is mostly complaint intake staff. In addition to increasing staffing, DCA will ensure that staff are properly trained, monitored, and assessed so that cases are expedited as quickly as possible.

Because DCA's boards are special fund agencies, new positions will not place a drain on the General Fund and boards will pay for new staff with existing resources or with fee increases where necessary. The number of positions requested is a result of an individual assessment of each board, and assumes workload savings associated with DCA's current process improvement efforts. The Governor's Budget includes the initial phase-in of these positions beginning July 2010.

Create a New Licensing and Enforcement Database

DCA's current licensing and enforcement database systems are antiquated and impede the boards' ability to meet their program goals and objectives. Over the past 25 years, these systems have been updated and expanded, but system design and documentation have deteriorated to such an extent that it has left the systems unstable and difficult to maintain. These systems have inadequate performance measurement, data quality errors, an inability to quickly adapt to changing laws and regulations, and a lack of available public self-service options. The CPEI relies on advanced workflow capabilities and cross-entity external system communications that the aging system's technology cannot provide.

The implementation of a replacement system is needed to support enforcement monitoring, automate manual processes, streamline processes, and integrate information about licensees. DCA intends to procure a Modifiable Commercial Off-The-Shelf (or "MOTS") enterprise licensing and enforcement case management system. DCA's research has shown various MOTS licensing and enforcement systems exist that can provide intelligent case management to reduce enforcement and licensing turnaround times, detailed performance measurements, increased data quality, advanced configurability, and robust web presences for public self-service.

The Governor's Budget authorizes DCA to redirect existing funds to begin implementation of this system in FY 2010-11.

III. Statutory Changes: Putting Consumers First

Each board within DCA has a statutory mandate to hold consumer protection as its paramount objective. Over the years, boards' enforcement authorities have been slow to keep up with legal trends and changes in the professions regulated, and due process protections have grown to protect licensees above consumers. DCA believes that now is the time to re-align consumer protection laws so that they place public protection first. In 2010, the DCA will pursue legislation to help boards carry out their critical missions of protecting consumers.

Increased Suspension Authority

One of the most important roles that professional licensing boards do to protect consumers is preventing potentially dangerous individuals from practicing. The CPEI would strengthen the boards' ability to do this in a number of ways, including authorizing the DCA Director to issue an order for a licensee to cease practice or restrict practice, upon the request of a board executive officer. This authority is necessary in the most egregious cases because the standard enforcement process can take a year to complete, at best, and even the expedited process in existing law (interim suspension order) can take months to complete. This proposal would also seek the statutory authority to revoke or deny a license to an individual for acts of sexual misconduct with a patient or conviction as a felony sex offender. Additionally, the CPEI would provide for the automatic suspension of convicted felons for the duration of their sentence.

Increased Access to Critical Information

The CPEI would make improvements to the information that boards receive, so they can investigate possible violations of law. Specifically, it would prohibit the use of a gag clause in a civil settlement that would prohibit consumers or their legal counsel from filing a complaint with the appropriate board. Regulatory gag clauses are explicitly prohibited in legal malpractice settlements and there have been numerous court decisions that describe a compelling public interest in voiding regulatory gag clauses in other professions. The Center for Public Interest Law notes that the inclusion of gag clauses is an alarmingly pervasive practice that thwarts the ability of boards to carry out their consumer protection mission. The CPEI would also require court officials to report to the healing arts boards convictions and felony charges filed against the boards' licensees, and expand reporting by employers and supervisors regarding individuals who were suspended or terminated for cause.

Adequate access to medical records can shave months off the process to investigate a licensee. Medical records are used by healing arts boards' to determine whether a licensee caused harm to a patient. Any delay in an investigation of a licensee may result in a potentially dangerous licensee continuing to practice. Thus, it is essential that healing arts boards have quick access to medical records. The CPEI gives all of the healing arts boards the authority to inspect and copy, as applicable, any documents and records relevant to an investigation. In cases where a licensee fails to cooperate with an investigation, the CPEI provides boards with additional authorities to ensure compliance.

Enforcement Process Efficiencies

DCA proposes to remove unnecessary workload and costs from the enforcement process. This can be done by streamlining the appeal process for citations, permitting boards to contract with collection agencies to retrieve unpaid fines and fees, authorizing executive officers to sign default decisions and certain stipulated settlements, and allowing licensees to agree to stipulated settlements before a formal accusation is filed. These are relatively small changes that could result in significant workload savings.

Efficiency and accountability will also be improved by establishing a deadline for the Department of Justice (DOJ) to notify healing arts boards of arrests and convictions of licensees, which would greatly improve the board's ability to pursue cases in a timely manner. Additionally, it requires DOJ to serve accusations, default decisions and set hearing dates within a specified period of time.

Licensing Fees

Lastly, DCA is seeking to tie the maximum licensing fee amounts to the Consumer Price Index to keep up with inflation and ensure the boards have the resources to adequately run their enforcement programs.



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ENFORCEMENT PLAN FEBRUARY 2010

This plan is in response to a request from Paul Riches, Deputy Director for Enforcement and Compliance, Department of Consumer Affairs, for a written plan to improve the enforcement performance of the Physical Therapy Board of California within existing resources. The request asked for the inclusion of specific program improvements, planned dates of completion, a review of existing complaints, and plans to implement and place into regulation the Department of Consumer Affairs Uniform Standards for Substance Abusing Licensees.

BACKGROUND ON TYPES OF COMPLAINTS RECEIVED

Complaints against physical therapists and physical therapist assistants most often involve alleged sexual misconduct, criminal conviction (including alcohol related offenses, theft, spousal abuse and assaultive behavior), improper utilization of supportive personnel, improper patient documentation, fraudulent billing and unlicensed practice. While some complaints involve physical harm to a patient, it is rare for a case to involve the death of a patient. While PTBC has a substance abuse diversion program, disciplinary action is never deferred. The diversion program is utilized to monitor licensees who are on probation, and in rare cases to assist licenses who refer themselves to the program.

PAST & CURRENT PERFORMANCE

In order to develop an improvement plan, it is important to establish the baseline of past performance.

COMPLAINTS RECEIVED

FY	NUMBER
2005-06	350
2006-07	515
2007-08	1103
2008-09	1073
2009-10	608

CASE CLOSURE AVERAGES 2007-08 & 2008-09

Average Days to:	FY 2007-08	FY 2008-09
Close Cases With No Discipline Or Citation	118	127
Close Cases With Citations	100	132
Close Cases With Discipline (Referral to AG)	848	846

To provide an indication of the current performance of PTBC, the average number of days for cases closed, that did not require referral to the Division of Investigation of the Department of Consumer Affairs (DOI) or the Office of the Attorney General (AG), from November 1, 2009 through December 31, 2009, was 278 days.

PTBC ENFORCEMENT PLAN

FEBRUARY 2010

PTBC has an ongoing commitment process improvement. One of the motivating factors for the last several years was the inability of DOI to continue providing the level of investigative services which PTBC expected. In response, PTBC staff developed procedures for obtaining as much information as possible through an in-house desk investigation. The utilization of confidential closing letters and citations was increased when it was felt the expeditious education of the licensee as to the legal requirements for practice could provide effective consumer protection.

REVIEW OF EXISTING CASES

The review of existing cases is an ongoing process, not one that is only done in response to a specific report, or project by DOI to focus on older cases. In preparation for this report the review looked at not only the case specific issues, but the how the current process had impacted the length of time the case had been opened. One of the facts that was revealed was that the most time was often consumed between processes, waiting assignment at DOI or AG, awaiting a hearing at the Office of Administrative Hearings (OAH), not the time required to perform a specific process.

The number of cases assigned to each analyst (prior to December 2009) was often over 200. This was identified as factor which made it difficult for the analysts to keep up on the status of cases that were awaiting action at DOI and the AG.

Each analysts has been asked to create a plan to close any cases opened prior to December 2008, no later than July 1, 2010, or to identify what obstacles to closing the case exist.

PROGRAM IMPROVEMENTS

1. Reduction in the Number of Cases Assigned to Each Analyst

Four part time temporary staff have been added to the unit, two analysts and two clerical. This has enabled a reduction in the number of cases to each analyst to be reduced to approximately 100, and reduce the amount of time to review criminal convictions and process citations.

COMPLETION DATE: This change was implemented in December 2009. The continuation of the temporary staff is dependent on program savings in other areas. The Governor's Executive Order for an additional 5% in personnel savings may limit the continuation of the temporary staff.

2. Ongoing Process Improvement

While process improvement is an ongoing effort, past efforts have mostly been focused on the individual processes. Staff have been asked to look at the entire process, to not be limited by past practices, and in particular to study the time between processes where a large part of the delay occurs. It is anticipated the development of a system approach will enable tasks that were formerly performed sequentially to be done simultaneously, reducing the overall time required for the complaint process. Staff have participated in meetings which have resulted in process changes being tried.

COMPLETION DATE: Review of procedures has already begun. As this is an ongoing process there is not a specific completion date.

3. Determination of Desired Outcome

Complaints often become more complex, and consequently more time consuming as facts are revealed in the investigation process. It is not unusual for resolution of the original issue to be delayed when it is determined additional violations have occurred. Staff have been asked to focus on

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the desired outcome which is requested from the complainant. Investigations should stay focused on the original issue, and if needed a separate complaint should be opened for any violations that are discovered that are separate from the original allegations.

COMPLETION DATE: Already implemented.

4. Investigation Plan for Each Complaint.

The path of a complaint through the process varies based on the determination of facts obtained through the investigation. Because of this a time frame to complete the process for a particular complaint is rarely developed. Staff have been asked to develop an investigation plan for each complaint, a key element of which is what type of action will result in the licensee being in compliance with the law resulting in reduced risk to the consumer. If it is determined that a citation could effectively provide a safer environment for the consumer, evidence need only be developed to the preponderance standard. This could result in time and fiscal savings. The need for continuous analysis of the evidence developed to determine needed changes to the plan has also been emphasized.

Staff have also been asked to take a project management approach to each complaint. The identification of projected completion dates for major phases will make it easier to identify complaints that are taking longer than planned.

COMPLETION DATE: Staff have begun implementing the process for new complaints. Plans for existing complaints will be developed as appropriate. All enforcement staff have completed and introductory project management course.

5. Staff Development

PTBC has an ongoing commitment to staff development. The staff have participated in, or are scheduled to attend, courses by DCA specific to the enforcement process, such as the Van Write System and the subpoena process. In addition, all enforcement staff recently attended an introductory project management course offered by DCA. The participation in courses specific to the enforcement process should help improve the efficiency of the enforcement process.

COMPLETION DATE: Most staff have completed at least two of the courses. Staff development is ongoing.

DEPARTMENT OF CONSUMER AFFAIRS UNIFORM STANDARDS FOR SUBSTANCE ABUSING LICENSEES.

At the January 2010, meeting the PTBC reviewed the final version of the Standards and were advised that the utilization of the standards were required by statute, unless additional statutory authority was needed to implement a particular standard. The members passed a motion directing staff to determine what statutory changes were needed, to support legislation seeking those changes, and to proceed with regulatory changes needed to the implement the standards. The placement of the Standards into regulation has been included in the rulemaking calendar for 2010. In addition, it has been requested that DCA consider adopting the Standards as a DCA regulation. This may eliminate the need for multiple duplicate regulations, and ensure that the standards are adopted consistent with the form that has been approved.