

Section 5 – Enforcement Program

34. What are the board's performance targets/expectations for its enforcement program? Is the board meeting those expectations?

The Board's Enforcement Unit performance targets are as follows:

Cycle Time for Case Assignment Target is 10-days.

The Board is meeting this expectation. The Board's average processing time for this metric is one (1) day across most fiscal years.

The Cases Closed at Investigation Target Time is 270-days. This captures the time from assignment to analyst and/or sworn investigator to close of investigation.

The Board has met the target time except for FY 2016-17, when the average closing time was 33-days over the Board's target.

In subsequent years the Board reported investigation closing times as follows:

- FY 2017-18 178 days
- FY 2018-19 153 days
- FY 2019-20 158 days
- FY 2020-21 112 days

The Formal Discipline Cycle Time Target is 540 days. This captures the time from receipt of complaint to investigation to imposition of discipline.

Meeting the target has varied over the years, depending upon case complexity-and/or any challenges in obtaining documents during the investigation.

- FY 2016-17 603 days
- FY 2017-18 319 days
- FY 2018-19 521 days
- FY 2019-20 528 days
- FY 2020-21 724 days

The Probation Intake Target Time is 10 days, which captures the average time from the date the licensee is placed on probation to the date the probation monitor contacts the probationer. The Board consistently meets this goal.

The Probation Violation(s) Target Time is 10 days, which captures the time from the date a violation is reported or discovered, to the date the monitor initiates appropriate action. The Board consistently meets this goal.

35. Explain trends in enforcement data and the board’s efforts to address any increase in volume, timeframes, ratio of closure to pending cases, or other challenges. What are the performance barriers? What improvement plans are in place? What has the board done and what is the board going to do to address these issues, i.e., process efficiencies, regulations, BCP, legislation?

Investigations

The Board has seen an increase in its investigations from a low of 397 in FY 2016-17 to a spike of 1,009 in FY 2020-21. Investigations can be attributed to internal controls the Board implemented for potential unlicensed practice violations stemming from delinquent renewals and address change violations.

Processing Time for AG Discipline Cases, Receipt of Complaint to Imposing Discipline

In FY 2016-17 the Board had three (3) cases that went over 1,200 days. One case involved unprofessional conduct charges by a licensee that was residing and practicing in Oregon and Washington. From the point the Board was advised of the incident until discipline was rendered by the two states the matter took two years. In the second case, adjudication of a criminal conviction took 405 days with administrative adjudication taking 616 days. In the third case, a sworn investigation took 365 days with administrative adjudication taking 536 days.

In FY 2020-21 the Board had three (3) cases that took over three (3) years from receipt of the complaint until discipline was rendered. One case took a total of 1,305 days which predominantly consisted of a sworn investigation that took 668 days. The other two cases taking 2,106 and 2,155 days respectively pertained to violations involving advanced practice services in hand therapy and physical agent modalities which required extensive records gathering and multiple reviews by an expert to render a decision on whether the practitioners deviated from standard practice.

Table 9a. Enforcement Statistics					
	FY 2016-17	FY 2017-18	FY 2018-19	FY 2019-20	FY 2020-21
COMPLAINTS					
<i>Intake</i>					
Received	241	502	499	597	895
Closed without Investigation	0	0	1	0	0
Referred to INV	241	502	498	596	894
Pending (close of FY)	0	1	1	1	1
<i>Source of Complaint</i>					
Public	35	37	29	42	44
Licensee/Professional Groups	25	16	32	32	24
Governmental Agencies	5	3	4	4	15

Internal	176	445	433	515	810
Other	0	1	1	4	2
<i>Conviction / Arrest</i>					
CONV Received	156	163	186	110	114
CONV Closed Without Investigation	0	0	0	0	0
CONV Referred to INV	156	163	186	110	114
CONV Pending (close of FY)	0	0	0	0	0
Average Time to Refer for Investigation (from receipt to referral for investigation)	4	1	1	1	1
Average Time to Closure (from receipt to closure at intake)	4	1	1	1	1
Average Time at Intake (from receipt of complaint and conviction to closure for referral for investigation)	4	1	1	1	1
INVESTIGATIONS					
<i>Desk Investigations</i>					
Opened	397	665	685	707	1,008
Closed	661	602	598	698	1,009
Average days to close (from assignment to investigation closure)	303	179	162	158	112
Pending Desk Investigations (close of FY)	243	288	245	345	319
<i>Non-Sworn Investigation</i>					
Opened	n/a	n/a	n/a	n/a	n/a
Closed	n/a	n/a	n/a	n/a	n/a
Average days to close (from assignment to investigation closure)	n/a	n/a	n/a	n/a	n/a
Pending Non-Sworn Investigations (close of FY)	n/a	n/a	n/a	n/a	n/a
<i>Sworn Investigation</i>					
Opened	2	15	13	8	17
Closed	3	9	9	12	18
Average days to close Sworn Investigations (from assignment to investigation closure)	333	322	359	291	275
Pending (close of FY)	2	8	14	7	6

All investigations¹	399	680	698	715	1025
Opened					
Closed					
Average days for all investigations (from start investigation to investigation closure or referral for prosecution)	303	179	162	158	112
Average days for investigation closures (from start investigation to investigation closure)	Data not available				
Average days for investigation when referring for prosecution (from start investigation to referral prosecution)	259	102	211	134	365
Average days from receipt of complaint to investigation closure	303	179	162	158	112
Pending Investigations (close of FY)	245	296	259	32	325
CITATION AND FINE					
Citations Issued	93	182	172	263	226
Average Days to Complete (from complaint receipt to citation issued)	334	246	198	201	167
Amount of Fines Assessed	\$42,585	\$60,495	\$43,930	\$63,035	\$43,406
Amount of Fines Reduced, Withdrawn, Dismissed	\$10,700	\$3,850	\$5,580	\$5,140	\$2,315
Amount Collected	\$26,662	\$43,145	\$37,590	\$48,450	\$19,346
CRIMINAL ACTION					
Referred for Criminal Prosecution	0	1	1	0	0
ACCUSATIONS					
Accusations Filed	6	23	25	9	16
Accusations Declined	0	0	0	0	0
Accusations Withdrawn	0	5	3	0	3
Accusations Dismissed	0	0	0	0	0
Average Days from Referral to Accusations Filed (from AG referral to Accusation filed)	102	114	164	161	127

¹ The summation of desk, non-sworn, and sworn investigations should match the total of all investigations.

INTERIM ACTION					
ISO & TRO Issued	0	0	0	0	0
PC 23 Orders Issued	0	0	3	0	1
Other Suspension/Restriction Orders Issued	0	0	3	7	1
Petition to Compel Examination Ordered	0	0	1	1	0
Cease & Desist or Warning Letters	32	33	23	16	12
DISCIPLINE					
AG Cases Initiated	19	47	25	25	17
AG Cases Pending (close of FY)	14	36	19	22	18
AG Cases Pending Pre-Accusation (close of FY)	11	12	7	10	6
AG Cases Pending Post-Accusation (close of FY)	1	13	11	7	11
DISCIPLINARY OUTCOMES					
License Revoked	4	4	7	7	4
License Surrendered	2	6	7	2	4
Suspension only	0	0	0	0	0
Probation with Suspension	0	0	0	1	0
Probation only	6	4	10	4	4
Public Reprimand or Public Repeval	n/a	n/a	n/a	n/a	n/a
Probationary License Issued	2	1	0	0	0
Other	1	1	1	0	0
DISCIPLINARY ACTIONS					
Proposed Decision	5	0	2	4	2
Default Decision	5	5	8	7	4
Stipulations	7	10	18	6	10
Average Days to Complete After Accusation (from date filed to closure of the case)	450	207	348	474	425
Average Days from Closure of Investigation to Imposing Formal Discipline	291	106	197	296	217
Average Days to Impose Discipline (from complaint receipt to final outcome)	603	319	521	528	724
PROBATION					
New Probationers	8	5	10	6	5
Probations Completed	5	5	3	2	5

Probationers at close of FY	21	21	24	23	19
Probationers Tolled	0	0	0	0	0
Petitions to Revoke Probation/ Accusation and Petition to Revoke Probation Filed	2	5	2	2	1
SUBSEQUENT DISCIPLINE					
Probations Revoked	1	1	1	0	1
License Surrendered	0	3	2	1	2
Additional Probation Only	0	0	0	1	1
Suspension Only Added	0	0	0	0	0
Other Conditions Added Only	0	0	0	0	0
Other Probation Outcome	0	0	0	0	0
SUBSTANCE ABUSING LICENSEES					
Probationers Subject to Drug Testing	12	10	10	10	13
Drug Tests Ordered	449	413	455	678	370
Positive Drug Tests	4	11	9	10	12
PETITIONS					
Petition for Termination or Modification Granted	1	0	0	1	1
Petition for Termination or Modification Denied	0	1	3	1	0
Petition for Reinstatement Granted	1	0	0	3	0
Petition for Reinstatement Denied	0	2	1	0	0

Table 10. Enforcement Case Aging						
	FY 2016-17	FY 2017-18	FY 2018-19	FY 2019-20	FY 2020-21	Total Cases Closed
<i>AGO Cases Closed Within:</i>						
<1 Year	5	11	14	8	5	43
1 - 2 Years	6	3	12	8	3	32
2 - 3 Years	3	2	5	4	4	18
3+ Years	3	0	4	1	3	11
Total AGO Cases Closed	17	16	35	21	15	104
<i>DOI Cases Closed Within:</i>						
0 - 1 Year	1	8	6	8	14	37
1 - 2 Years	2	0	3	4	3	12
2 - 3 Years	0	0	0	0	1	1
3 - 4 Years	0	1	0	0	0	1
4+ Years	0	0	0	0	0	0
Total DOI Cases Closed	3	9	9	12	18	51
<i>Desk Investigation Cases Closed Within:</i>						
90 Days	208	321	353	409	773	2,064
91 - 180 Days	54	141	92	115	68	470
181 days to 1 Year	79	47	98	93	54	371
1 - 2 Years	307	54	31	63	100	555
2 - 3 Years	11	29	5	3	12	60
3+ Years	2	10	19	15	2	48
Total Desk Investigation Cases Closed	661	602	598	698	1,009	3,568s

36. What do overall statistics show as to increases or decreases in disciplinary action since last review?

Not counting FY 2018-19, the Board has consistently had 16 to 18 disciplinary outcomes and applications denied so the trend is stable. In FY 2018-19 disciplinary outcomes and applications denied spiked to a total of 29 cases. We are unable to identify any specific event or business process change that resulted in the spike process in FY 2018-19.

37. How are cases prioritized? What is the board's compliant prioritization policy? Is it different from DCA's *Complaint Prioritization Guidelines for Health Care Agencies* (August 31, 2009)? If so, explain why.

The Department's *Complaint Prioritization Guidelines* was provided to the Board for consideration at their December 3, 2009, meeting. While the Board agreed with the majority of the priority levels assigned to the list of complaint categories, several of the complaint categories were elevated in priority level and two were lowered.

The Board's *Complaint Prioritization Guidelines* are included Section 13 as Attachment H.

38. Are there mandatory reporting requirements? For example, requiring local officials or organizations, or other professionals to report violations, or for civil courts to report to the board actions taken against a licensee. Are there problems with the board receiving the required reports? If so, what could be done to correct the problems?

a. What is the dollar threshold for settlement reports received by the board?

BPC Section 801.1(a) requires every state or local governmental agency that self-insures a person who holds a license, certificate, or similar authority, shall report any settlement or arbitration award over three thousand dollars (\$3,000) of a claim or action for damages for death or personal injury caused by that person's negligence, error, or omission in practice, or rendering of unauthorized professional services.

BPC Section 802 requires that every settlement, judgment, or arbitration award over three thousand dollars (\$3,000) of a claim or action for damages for death or personal injury caused by negligence, error or omission in practice, or by the unauthorized rendering of professional services, by a person who holds a license, be reported to the Board.

BPC Section 803.5(a) requires the clerk of the court to notify the Board of any filings against a licensee charging a felony. BPC Section 803.5(b) also requires the clerk of the court to notify the Board, within 48 hours after the conviction, by transmitting a certified copy of the record of conviction to the Board.

The Board also relies on subsequent arrest and subsequent conviction notification from the Department of Justice.

b. What is the average dollar amount of settlements reported to the board?

The Board received no reports under BPC Sections 801 or 802 during the reporting period.

39. Describe settlements the board, and Office of the Attorney General on behalf of the board, enter into with licensees.

- a. What is the number of cases, pre-accusation, that the board settled for the past four years, compared to the number that resulted in a hearing?

The Board does not settle a case prior to the filing of an accusation in this reporting period.

- b. What is the number of cases, post-accusation, that the board settled for the past four years, compared to the number that resulted in a hearing?

Data for the number of stipulations and proposed decisions (resulting from hearings) is contained in Table 9a.

40. Does the board operate with a statute of limitations? If so, please describe and provide citation. If so, how many cases have been lost due to statute of limitations? If not, what is the board's policy on statute of limitations?

The Board has no statute of limitations for administrative violations. Board staff typically works with DCA's Division of Investigation (DOI) in matters and/or the Office of the Attorney General (AGO) to determine the viability of successfully prosecuting the case. Also, if the case is transmitted to the AGO, the Deputy Attorney General assigned to the case will advise staff if they have concerns with successfully prosecuting the case; this includes a review of a variety issues, including but not limited to, the age of the violations, mitigation, etc.

41. Describe the board's efforts to address unlicensed activity and the underground economy.

The Board continues to make unlicensed practice a priority. The vast majority of cases pertain to licensees that renew delinquent. In the event a practitioner practices on an expired license, the Board issues citations and fines if the violation was for a period less than a year. If a practitioner practices on an expired license for a year or more, an Accusation is filed against the practitioner. Typically, these Accusation cases are resolved by a Stipulated Settlement and Disciplinary Order placing the practitioner on probation for a period of three years with standard terms which include an order for cost recovery. To date, the Board has not seen a practitioner that was placed on probation for practicing on an expired license recommit a similar offense.

Since the last Sunset Report the Board has instituted internal controls pertaining to potential instances of unlicensed practice. A report is run monthly identifying licensees that have renewed delinquent. Investigations are opened and the licensee is contacted to ascertain if they practiced on an expired license.

The Board will continue to make efforts to educate and inform employers, the profession, and others with the capability of verifying the status of licenses on-line.

42. Discuss the extent to which the board has used its cite and fine authority. Discuss any changes from last review and describe the last time regulations were updated and any changes that were made. Has the board increased its maximum fines to the \$5,000 statutory limit?

Intent of Cite and Fine Authority

Business and Professions Code (BPC) Section 125.9 authorizes the Board to establish, by regulation, a system for the issuance to a licensee of a citation which may contain an order of abatement or an order to pay an administrative fine. The Board established CCR Section 4140(a), which authorizes the Board to issue citations and fines to licensees.

Further, BPC Section 148 authorizes the Board to establish, by regulation, a system for the issuance of an administrative citation to an unlicensed person who is acting in the capacity of a licensee under the jurisdiction of the Board. The Board established CCR Section 4140(b), which authorizes the Board to issue citations and fines and/or orders of abatement to unlicensed persons. This authority is exercised on a case-by-case basis when violations are not necessarily egregious enough to warrant discipline and a lesser form of action is appropriate.

Pursuant to CCR Section 4141(a) fines range from \$50 to \$5,000. The following factors are considered:

1. Gravity of the violation.
2. History of previous violations involving the same or similar conduct;
3. Length of time that has passed since the date of the violation;
4. Consequences of the violation, including potential for harm to consumer, the good or bad faith exhibited by the cited individual;
5. Evidence that the violation was willful;
6. The extent to which the individual cooperated with the board's investigation;
7. The extent to which the individual has remediated any knowledge and/or skills deficiencies; or
8. Any other mitigating or aggravating factors.

Changes Since Last Sunset Review

There have been no regulatory amendments to the Citation and Fine authority since the last Sunset Review.

Increase of Citation Fine to \$5,000

The Board increased its maximum fines to the \$5,000 statutory limit, effective August 19, 2011. Class "A" citations may be issued under specific circumstances that are more serious in nature and/or resulted in or had significant potential for consumer harm. Violations include, but are not limited to failing to provide direct in-sight supervision of an aide when the aide performed a client related task that resulted in harm to a consumer, failing to provide adequate supervision to an occupational therapy assistant that resulted in harm to the patient, fraudulent billing, as well as other violations.

43. How is cite and fine used? What types of violations are the basis for citation and fine?

A citation and fine, is similar to a ticket and an alternative means by which the Board can address violations that do not warrant formal discipline against the license.

CCR Section 4140 gives the Executive Officer the authority to issue citations with or without fines and abatement orders for violations of the Occupational Therapy Practice Act, violations of the California Code of Regulations adopted by the Board, or other statutes or regulations for which the Board has authority to issue a citation. Section 4141 sets fine amounts of \$50 up to \$2,500 for the least egregious violations.

However, Section 4141(a) sets forth larger fine limits for the more substantial violations. For instance, violations that present a threat to health and safety of another person, unlicensed practice for more than one year or involve multiple violations of the Practice Act, or involve a violation or violations of fraudulent billing, a citation may include a fine up to \$5,000.

A large number of citations and fines are issued for minor address change reporting violations or continuing education audit violations. Fines assessed for such violations typically range from \$50 to \$250, depending upon factors as specified in CCR Section 4141. Factors considered when determining a fine amount are the nature and severity of the violation, evidence that the violation was willful, and extent to which the licensee has cooperated with the Board.

44. How many informal citation review conferences and Administrative Procedure Act appeals of a citation or fine have been requested in the last four fiscal years?

Citations Appeals Data in Figure 1 below lists, by license type, the number of citations issued and the number of informal and formal appeals that were requested.

Figure 1. Citations Appeals Data				
	FY 2017-18	FY 2018-19	FY 2019-20	FY 2020-21
Number of Citations Issued to OTs	141	323	225	176
Informal Citation Review Conference Requested by OTs	23	19	19	24
Administrative Hearing Requested by OTs	4	3	2	2
Number of Citations Issued to OTAs	49	46	43	62
Informal Citation Review Conference Requested by OTAs	1	5	3	4

Administrative Hearing Requested by OTAs	0	0	0	0
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45. What are the five most common violations for which citations are issued?

The five most common violations for which citations are issued, include:

- Failing to complete continuing education required for renewal
- Practicing on an expired license
- Failure to cooperate in a Board investigation
- Failing to provide an address change
- Failure to disclose a conviction on an application.

However, with passage of AB 2138, effective July 1, 2020, applicants for licensure are no longer required to report convictions to the Board. Therefore, *Failure to Disclose* is no longer a violation effective FY 2020-21.

46. What is average fine pre- and post- appeal?

The Board doesn't have average fine data available. However, listed below shows the total fines assessed by fiscal year followed by the total fines post-appeal.

Figure 2. Citation Fine Details – OTs				
	FY 2017-18	FY 2018-19	FY 2019-20	FY 2020-21
Number of Citations Issued to OTs	141	323	225	176
Total Fines Assessed to OTs <i>Pre-appeal</i>	\$47,470	\$38,735	\$53,740	\$32,520
Total Fines Assessed <i>Post-appeal</i>	\$34,660	\$27,200	\$46,346	\$29,275

Figure 3. Citation Fine Details - OTAs				
	FY 2017-18	FY 2018-19	FY 2019-20	FY 2020-21
Number of Citations Issued to OTAs	49	46	43	62
Total Fines Assessed to OTAs <i>Pre-appeal</i>	\$13,320	\$15,920	\$8,945	\$10,201
Total Fines Assessed <i>Post-appeal</i>	\$12,270	\$12,770	\$8,660	\$9,861

47. Describe the board’s use of Franchise Tax Board intercepts to collect outstanding fines.

The Board utilizes the Franchise Tax Board’s (FTB) Intercept Program to attempt collection of any outstanding fines. Under this program, income tax refund or lottery winnings can be seized and sent to the Board as payment of monies owed.

Respondents who fail to pay an uncontested fine are sent a series of demand letters when an account is delinquent. If a fine is not contested and full payment is not made within 30 days of the issuance of a fine, or if the respondent fails to contact the Board to make payment arrangements, the Board will send the first demand letter. The Board will send a second notice about 35 days after the first demand letter was sent.

If no response is received after the second letter is sent, a third and final notice will be sent, via regular and certified mail, notifying the individual that the unpaid item will be sent to the FTB and that any tax refunds or lottery winnings will be intercepted and sent to the Board. The FTB will continue to intercept tax refunds and lottery winnings until payment in full has been made. In addition to the FTB action, California Code of Regulation (CCR) Section 4140 (d) states that the full amount of an assessed, non-contested fine shall be added to the fee for renewal of the license and the license won’t be renewed without payment of the both the renewal fee and the fine.

Cost Recovery and Restitution

48. Describe the board’s efforts to obtain cost recovery. Discuss any changes from the last review.

Table 11. Cost Recovery				
	FY 2017-18	FY 2018-19	FY 2019-20	FY 2020-21
Total Enforcement Expenditures	\$844k	\$896k	\$962k	\$944k
Potential Cases for Recovery *	4	10	6	5
Cases Recovery Ordered	4	10	6	5
Cost Recovery Ordered	10	19	35	26
Amount Collected	9	9	19	11

Consistent with prior years, cost recovery ordered fluctuates with the number of cases finalized; cost recovery collected is spread out over the probation period.

49. How many and how much is ordered by the board for revocations, surrenders and probationers? How much do you believe is uncollectable? Explain.

The Board requests recovery of its costs for all cases against licensees relating to revocations, surrenders, and probation; the Board cannot request its costs in investigating or enforcing cases against applicants.

However, not all licensees are ordered to reimburse the Board *all* of its costs. An administrative law judge may only order a *portion* of the Board’s costs or to facilitate a stipulated agreement, cost recovery in an amount less than the total costs may be agreed to.

Amounts for potential cases, cases ordered, and the ranges of cost recovery that has been ordered and received are reflected by fiscal year in Table 11, Cost Recovery.

50. Are there cases for which the board does not seek cost recovery? Why?

The Board does not seek cost recovery in cases denying an applicant licensure. BPC Section 125.3(a) authorizes the Board to seek recovery of its costs in the investigation and prosecution in cases against licensees; cost recovery does not apply to applicants for licensure.

51. Describe the board's use of Franchise Tax Board intercepts to collect cost recovery.

The Board uses the Franchise Tax Board's Intercept Program to attempt collection of any outstanding cost recovery orders. Under this program, tax returns or lottery winnings can be seized and sent to the Board as payment of monies owed. Respondents who failed to pay the ordered cost recovery are sent Demand Letters when an account is 30 days delinquent. If payment in full is not made within 30 days or if the respondent fails to contact the Board to make payment arrangements, the Board will send a second notice at 60 days delinquent. If no response is received from the first or second letters, a third and final notice will be sent, regular and certified mail, notifying the individual that his/her file will be sent to FTB and that any tax refunds or lottery winnings will be intercepted and sent to the Board. The FTB will continue to intercept tax refunds and lottery winnings until payment in full has been made. In addition to the FTB action, California Code of Regulation (CCR) Section 4140 (d) states that the full amount of an assessed, non-contested fine shall be added to the fee for renewal of the license and the license won't be renewed without payment of the both the renewal fee and the fine.

52. Describe the board's efforts to obtain restitution for individual consumers, any formal or informal board restitution policy, and the types of restitution that the board attempts to collect, i.e., monetary, services, etc. Describe the situation in which the board may seek restitution from the licensee to a harmed consumer.

The Board requests cost recovery in all cases in which it is authorized to seek cost recovery. The Board's Enforcement Unit requests and ensures that each Accusation prepared by the Office of the Attorney General incorporates a request for cost recovery with reference to the applicable statute, Business and Professions Code Section 125.3. Upon receipt of a Proposed Decision, the Board reviews it to ensure it contains a finding by the administrative law judge regarding the reasonableness of the costs of investigation and prosecution of the case. If the Board ever received a Proposed Decision that failed to provide such a finding, it likely would be remanded back to the administrative law judge to incorporate a finding regarding the Board's costs.

Cases that have been resolved by a Stipulated Settlement have included an order for full or partial costs, depending on the nature and severity of the violation, the respondent's prior disciplinary record, mitigating evidence, the extent to which the respondent has cooperated with the Board and recognized and demonstrated a willingness to correct and/or take steps to prevent reoccurrence of their wrongdoing.

Efforts have not changed since the last sunset review as the Board continues to request restitution in those cases that warrant restitution for those harmed by a licensee’s actions.

Table 12. Restitution (dollars listed in thousands)					
	FY 2016-17	FY 2017-18	FY 2018-19	FY 2019-20	FY 2020-21
Amount Ordered	0	0	0	150	0
Amount Collected	0	0	0	3	10