

Naturopathic Medicine Committee

Response to the Identified Issues, Background, and Recommendations

Joint Sunset Review Oversight Hearing

Assembly Committee on Business and Professions
and the

Senate Committee on Business, Professions, and Economic
Development

ADMINISTRATIVE ISSUES

ISSUE #1: *Name and Placement of the Committee. Does statute establishing the Committee within the Osteopathic Medical Board accurately reflect its status as an independent regulatory entity?*

Background: When the Naturopathic Doctors Act was first enacted through SB 907 (Burton) in 2003, the regulatory entity established to administer it was a Bureau of Naturopathic Medicine under the DCA. The Act additionally required the Director of Consumer Affairs to establish an advisory council, consisting of three NDs, three physicians and surgeons, and three public members appointed by the Governor and the Legislature. Both the Bureau and its advisory committee were untethered from any other regulatory bodies, with the bureau chief reporting directly to the Director of Consumer Affairs.

When the DCA underwent a reorganization under Governor Schwarzenegger, the Bureau was abolished and replaced with the Committee, whose membership was similarly structured to the prior advisory council. The language of ABX4-20 (Strickland), which implemented this portion of the reorganization plan in 2009, provided that the Committee was both “created within” and “within the jurisdiction of” the OMBC. The bill additionally required the OMBC’s approval for the Committee to appoint its own Executive Officer and charged the OMBC with employing officers and employees to discharge the duties of the Committee.

However, it appears as though the Committee was never functionally under the direction or supervision of the OMBC. According to the Committee, the Director of Consumer Affairs was provided a legal opinion stating, “that the OMBC was in no way responsible for the actions of the Committee and the Committee was deemed, independent, solely responsible for the regulation of naturopathic medicine in California.” It also does not appear as though the OMBC and the Committee shared any significant resources.

SB 1050 (Yee) was chaptered the following year to make a number of changes to the Committee’s administrative framework. First, the bill explicitly provided that the Committee was solely responsible for the implementation of the Naturopathic Doctors Act. The bill also struck the requirement that the OMBC approve the Committee’s appointment of an Executive Officer and that the Committee would employ its own officers and employees.

Despite these changes to clarify the effective autonomy of the Committee in regulating NDs, statute

continues to refer to the Committee as being “within the Osteopathic Medical Board of California.” It would appear that this language inaccurately describes the structure Committee, which was never under the oversight or control of the OMBC. It may arguably be more accurate to retitle the Committee as a standalone board under the DCA.

Staff Recommendation: *The Committee should provide the Legislative Committees with its perspective on whether there would be any value in considering a renaming that would reflect its status as an independent regulatory body.*

Committee Response:

The Committee believes that changing the naming convention and allowing the program to be a board, would be more in line with the true independence of Committee. Since the two programs are autonomous of one another, and each have their respective board/committee members, executive leadership, and staff, continuing to keep the naturopathic program as a committee under the Osteopathic Medical Board (OMBC) would continue the illusion that the OMBC has oversight of the Committee. Further, since the two professions attempt differing legislative initiatives, it would be beneficial that the programs are separate in all matters, including changing the committee to a board and separating the two programs.

ISSUE #2: *Committee Composition. Does the current membership on the Committee appropriately balance professional expertise and public objectivity?*

Background: The Naturopathic Doctors Act provides that the Committee shall consist of nine members, including five NDs, two physicians and surgeons, and two public members. Perhaps curiously, statute counts the physician and surgeon members as “professional members” alongside the ND representatives, with only two members officially designated as being from the public. However, NDs still represent a slight majority on the Committee established to regulate them, with five NDs outnumbering the four non-NDs.

In 2015, the United States Supreme Court ruled in *North Carolina State Board of Dental Examiners v. Federal Trade Commission* that when a state regulatory board features a majority share of active market participants, any allegedly anticompetitive decision-making may not be subject to *Parker* antitrust litigation immunity unless there is “active state supervision” to ensure that all delegated authority is being executed in the interest of the public and not the private commercial interests of the members.

To date, there has been no meaningful litigation against public bodies established under California law, and it is likely that the Committee receives more than enough active state supervision to qualify for immunity. The Committee is considered only semi-autonomous, with much of its rulemaking and disciplinary activity subject to involvement by multiple other governmental entities. Its current Executive Officer is not a licensee, and the DCA has also worked to ensure that members are adequately trained in certain procedures to ensure an adequate record of deliberation for purposes of defense against any potential allegations of antitrust.

Notwithstanding the legal sensitivities accompanying boards with majority professional memberships, the disproportionality for the Committee is arguably minor, with an advantage of only one additional member who is regulated by the Committee, and two of the professional members regulated by other boards. Considering the numerous benefits of having professional perspectives in deliberations by the Committee regarding the practice of naturopathic medicine, this technical imbalance is unlikely to be in

need of any further statutory change. However, the Committee should remain mindful whenever it engages in formal decision-making that may appear to serve the economic interests of licensee populations represented on the Committee.

Staff Recommendation: *The Committee should indicate whether it believes there are any concerns with its current membership structure or whether any changes should be contemplated.*

Committee Response:

The Committee does not believe there are any concerns with the current membership structure as it allows for a full and broad discussion and decision-making panel. The Committee would, nevertheless, like to preserve the option to review the structure again in the future to ensure that it continues to be an appropriate make up of members.

ISSUE #3: *Member Terms. Is the fact that the majority of committee members are currently scheduled to term out at the same time a cause for concern?*

Background: Members of the Committee each serve four-year terms, and members may not serve more than two consecutive terms. Members may continue to serve after their term's expiration date until a replacement is appointed or one year has elapsed, whichever occurs sooner. Appointments for prematurely vacated positions are initially for the remainder of the term only.

Of the nine members on the Committee, seven members completed their official terms on January 1, 2022 and are now serving within their one-year grace period. This means that an overwhelming majority of the Committee's membership will likely need to be replaced simultaneously. This could foreseeably cause instability and represent a strain on the appointments process.

Staff Recommendation: *The Committee should offer any insights or recommendations it has regarding the current term schedule for its membership and whether any potential issues could be alleviated.*

Committee Response:

The current terms for the members are problematic. With most members having the same term dates, it causes disruptions in decisions and continuity of the program. The Committee has had issues with not having the correct representative members for mandated subcommittees/advisory groups and the Committee has been unable to convene and continue our work as outlined in our strategic plan.

We would like to have our member terms staggered to ensure workflow continuity, the ability to better carry out our mission to protect the consumers of California, pursue the objectives of our strategic plan and to avoid excessive strain on the Committee and staff.

ISSUE #4: *Adequate Staffing. Does the Committee currently employ the appropriate number of staff to ensure that it is fulfilling its legislative mandates and protecting the public?*

Background: Statute provides that the Committee may appoint an Executive Officer as well as "other officers and employees as necessary to discharge the duties of the committee." Currently, the Committee is staffed by two individuals: an Executive Officer and an analyst position that was purportedly hired principally to ensure compliance with the Consumer Protection Enforcement Initiative. While the

population of active NDs is substantially smaller than the licensee populations for most other boards, this is arguably still a very low number of staff for regulatory entity under the DCA. This could potentially prove problematic in the event that there are unanticipated changes in workload or if staff members are unable to perform their duties due to customary absences or illness.

Staff Recommendation: *The Committee should inform the Legislative Committees as to whether any efforts have been made to hire additional staff and whether the current organizational structure is sufficient to ensure that the Committee is consistently functioning and performing its duties.*

Committee Response:

Prior to the COVID-19 pandemic, the Committee had intentions of attaining approval to hire an additional staff member. Due to the Committee's need to respond to the pandemic, the program's resources were redirected to continue public protection and some administrative functions were slightly affected. Although the Committee's fund has been healthy, due to current budget limitations, the Committee was restricted in their ability to bring in temporary assistance to cover the staffing deficit.

This highlighted the Executive Officer's prior concerns of not having appropriate staffing levels to provide coverage in events of unanticipated changes in workload or when staff members are unable to perform their duties due to absences or illness. Unfortunately, in the past, the Committee did not meet the criteria, such as workload data, for authorizing additional staff and the Committee was unable to support a request for the staffing and budgetary changes to our program at the time.

Currently, the Committee is looking into bringing on an additional staff member to ensure it is consistently functioning and carrying out its mandated functions and mission of protecting the public.

FISCAL ISSUES

ISSUE #5: *Fund Reserves. Considering the amount of fee revenue collected by the Committee against its program expenditures, is there a fiscal imbalance that could result in excessive reserves?*

Background: At the end of FY 2020-21, the Committee had \$726,000 in reserve, representing approximately 20 months of operating expenses. Statute generally prohibits DCA entities from having more than 24 months in reserve, and this is easily on the higher end of reserves held by licensing bodies. While the steady growth in the Committee's licensing population provides an explanation for the recent increase in fee revenue, it is unclear why there has not been any corresponding increase in expenditures.

Staff Recommendation: *The Committee should explain why it believes its reserves have grown and why it has not had to take on new spending, such as hiring additional staff to engage in licensing and enforcement activities, as its licensee population has grown.*

Committee Response:

The Committee requested a fee increase to correct the prior fund imbalance during the 2016-17 sunset review. The Committee received the authorization to raise fees in statute and on January 1, 2019, the new fee structure was effective. Since the prior fund had been imbalanced, the program wanted to ensure that the fee increase was going to be sufficient to correct the imbalance

and allow for the addition of staffing. The Committee also needed to determine at what classification level the Committee could hire new staff, and if the program could maintain the position as fulltime and permanent. In early 2020, noting that the fee increase was adequate, the Committee attempted to request additional staffing and an augmentation of our budget. By April 2020, the Committee had a staffing issue during the pandemic and did not have resources to complete this process.

Unfortunately, in the past, the Committee did not meet the Department of Finances criteria for authorizing additional staff and the Committee was not allowed to request the staffing and budgetary changes for our program. However, the Committee is working to bring on an additional staff member with appropriate augmentation of our budget at this time and is in hopes that the request will be approved. If this request is granted, bringing on the additional staffing will correct the excessive fund reserve issue.

ISSUE #6: *Attorney General Billing Rate. Will the abrupt increase in the Attorney General's client billing rate for hours spent representing the Committee in disciplinary matters result in cost pressures for the Committee's special fund?*

Background: In July of 2019, the California Department of Justice announced that it was utilizing language included in the Governor's Budget authorizing it to increase the amount it billed to client agencies for legal services. The change was substantial: the attorney rate increased by nearly 30% from \$170 to \$220, the paralegal rate increased over 70% from \$120 to \$205, and the analyst rate increased 97% from \$99 to \$195. While justification was provided for why an adjustment to the rates was needed, the rate hike occurred almost immediately and without meaningful notice to client agencies. For special funded entities such as the Committee, unexpected cost pressures can quickly prove problematic.

Staff Recommendation: *The Committee should inform the Legislative Committees of whether it has had any fiscal challenges resulting from the increase in the Attorney General's billing rate.*

Committee Response:

Since the Attorney General's (AG) billing rate increase, the Committee has not had any formal discipline cases move forward through the AG's office, so it has not yet created any fiscal challenges.

While there may be some issues in the future, it is too early to provide feedback on any fiscal impact as a result from the increased Attorney General's billing rate at this time. There are other factors to consider such as cost recovery efforts and whether there is an increase in service levels from the AG's office (additional staffing resulting in quicker resolution of cases) which may result in fewer billable hours. The Committee will continue to monitor the AG costs to determine any fiscal challenges to our program.

LICENSING ISSUES

ISSUE #7: *Delinquent Licenses. Why is there such a substantial population of delinquent licenses?*

Background: A total of 917 NDs were actively licensed by the Committee in FY 2020/21. During that same time, a total of 139 licenses were delinquent, and the number of delinquent licenses has remained

high over the past several years. Currently, licenses are canceled only after they have been delinquent for a total of three years. It is unclear why such a large percentage of the Committee's licensing population has remained delinquent or whether this is an appropriate or normal delinquency rate.

Staff Recommendation: *The Committee should explain why it believes it has so many delinquent licensees and whether it believes that this presents any potential challenges or risk to the public.*

Committee Response:

This is an unfortunate and challenging issue. There are several reasons why a licensee allows their license to lapse and become delinquent. Specifically, when a licensee leaves the state to practice elsewhere, or chooses to retire their license, the only way this can be done is to leave their license in an expired (delinquent) status. Currently, the Committee is trying to correct this through a regulatory change with the addition of a retired status and an inactive status, with a reduced fee.

Per California Code of Regulations §4226 (d), an expired license may be renewed at any time within three (3) years after its expiration. As a condition precedent to renewal, the licensee shall be required to pay all accrued and unpaid renewal fees and any late fees.

Since the Committee uses the BreEZe licensing system which identifies all license statuses in real time and is a resource that consumers can utilize to check the status of all healthcare providers, along with the printed expiration of the license certificates, the potential challenges or risk to the public due to this identified issue is believed to be extremely low.

ISSUE #8: *Fictitious Name Permits. Should the Committee be authorized to create a Fictitious Name Permit Program to ensure naturopathic practices are not violating the Moscone-Knox Act?*

Background: The Committee has requested authority to establish a Fictitious Name Permits Program during prior sunset reviews and has since reiterated this request. According to the Committee, such a program would protect the public by improving oversight of naturopathic medical practices and enhancing ownership transparency of such practices to avoid violation of Moscone-Knox Act. Under the program, an ND would submit the name of the doctor's company if the company is not the person's name and pay a fee. The Committee believes this would stop confusion between practices that use similar names. Both the MBC and the OMBC currently have similar programs.

During the Committee's prior sunset review, the Legislative Committees stated that there was insufficient justification for a new license category and fee. It was suggested that this work would be duplicative of articles of incorporation filed with the Secretary of State, could be resolved through other means, and would be of minimal value. However, the Committee continues to argue that such a program would provide an avenue to assure the naturopathic practices are not violating the Moscone-Knox Act, which is a cogent reason to reconsider the request.

Staff Recommendation: *The Committee should expand upon its request to establish a Fictitious Name Permits Program and why it believes it would allow it to better serve the public.*

Committee Response:

The Committee still believes that it is in the best interest of the public that a naturopathic corporation be tracked appropriately, and that the Committee has a pathway in which to determine

whether the naming convention is appropriate and further, does not violate current statute and regulations.

Per CCR §3674, there are certain naming conventions that naturopathic corporations must include. Additionally, CCR §3675 provides additional authority to adopt and enforce regulations to carry out the purposes and objectives of Article 7. Naturopathic Corporations. However, the Committee does not have current authority to add this type of certificate type. An FNP program would do this within statute and would provide additional benefits for consumers by improving oversight of naturopathic medical practices and enhancing ownership transparency of such practices to avoid violation of Moscone-Knox Act.

The cost would be minor as the Committee would anticipate an FNP application fee of \$60 and the annual renewal would be \$25.

ISSUE #9: Fair Chance Licensing Act. What is the status of the Committee's implementation of AB 2138 (Chiu/Low)?

Background: In 2018, AB 2138 (Chiu/Low) was signed into law, making substantial reforms to the license application process for individuals with criminal records. Under AB 2138, an application may only be denied on the basis of prior misconduct if the applicant was formally convicted of a substantially related crime or was subject to formal discipline by a licensing board. Further, prior conviction and discipline histories are ineligible for disqualification of applications after seven years, with the exception of serious and registerable felonies, as well as financial crimes for certain boards.

Because AB 2138 significantly modifies current practice for boards in their review of applications for licensure, it was presumed that its implementation would require changes to current regulations for every board impacted by the bill. It is also possible that the Committee has identified changes to the law that it believes may be advisable to better enable it to protect consumers from license applicants who pose a substantial risk to the public. However, the Committee has reported that since FY 2018/19, it has denied only once license application, and there is no reason to believe this was due to the applicant's criminal history. It is therefore not certain that AB 2138 has had a substantial impact on the Committee.

Staff Recommendation: *The Committee should provide an update on its implementation of AB 2138 and inform the Legislative Committees of whether it has had any impact on its licensing activities.*

Committee Response:

The Committee made all regulatory changes needed to ensure proper implementation of AB 2138, along with amending our initial license and renewal applications for licensure. To date, the Committee has had no issues with the implementation and have not identified any foreseeable substantial impacts on the Committee.

EDUCATION AND EXAMINATION ISSUES

ISSUE #10: Should the Pharmacology and Parenteral Therapeutics elective examination be required for license applicants under certain conditions?

Background: All applicants for licensure as an ND in California must pass both Parts I and II of the Naturopathic Physicians Licensing Examination (NPLEX). This examination is required by all other licensing states as well as most Canadian provinces. Part II of the NPLEX includes clinical elective

examinations in Minor Surgery, Pharmacology, Parenteral Therapeutics and Acupuncture; while other states require these clinical elective examinations where those services are within an ND's scope, they are not required in California as the state does not include all of those subjects within its ND scope of practice for NDs.

However, NDs in California who meet certain training requirements are allowed to engage in parenteral therapy specialty (IV Therapy), which would suggest that requiring future applicants for ND licensure to pass the NPLEX Parenteral Therapeutics Elective Exam may be advisable. Further, the Committee has advocated for expanding the authority of NDs to independently prescribe medications, and recently approved a Formulary that meets the education and training as mandated by the Legislature. The Committee has suggested that, as a proactive measure, newly graduating naturopathic students applying for ND licensure in California should also be required to pass the NPLEX Pharmacology Elective Exam.

Staff Recommendation: *The Committee should provide more information regarding which elective examinations are not currently required and which it believes the Legislature should consider adding to the requirements for new licensure applicants.*

Committee Response:

The Committee currently requires the NPLEX Part I – Biomedical Science Examination, which is taken after completing the biomedical science coursework. NPLEX Part II – Core Clinical Science Examination is an integrated case-based examination, which is designed to test the skills and knowledge that an entry-level naturopathic doctor must have in order to practice safely.

Every jurisdiction that regulates naturopathic doctors requires that a candidate pass the NPLEX Part I and II. Jurisdictions that allow certain modalities, such as minor office surgery and prescriptive authorities, within their respective scope of practice, have the option to require the new elective exams as an additional assurance that the candidate is competent to provide those treatments.

Since NDs in California, under certain conditions, are allowed to prescribe and furnish drugs, and provide parenteral or intravenous (IV) therapies, the Committee would like to include the NPLEX Parenteral Therapeutics and NPLEX Pharmacology Elective Examinations as a requirement in order to provide these services. This requirement would be for new graduates and would further support the Committee's mission to protect the public by ensuring highest competencies of our licensees.

ISSUE #11: *Naturopathic Childbirth Attendance Examination. Should the American College of Nurse Midwives (ACNM) written examination be replaced with the American College of Naturopathic Obstetricians (ACNO) examination for naturopathic childbirth attendance?*

Background: Current law requires an ND to obtain a passing grade on the American College of Nurse Midwives (ACNM) written examination, "or a substantially equivalent examination approved by the committee," in order to be certified for the specialty practice of naturopathic childbirth attendance. The ACNM does not offer exams to any practitioner who does not go to one of their accredited nursing schools. Therefore, the Committee has requested that statute be amended to replace the ACNM with the American College of Naturopathic Obstetricians (ACNO), which is the standard exam for most states and has been successfully utilized to certify NDs for the practice of childbirth attendance and midwifery.

Staff Recommendation: *The Committee should provide more information about its request to update statute regarding the Naturopathic Childbirth Attendance Examination.*

Committee Response:

The American College of Nurse Midwives (ACNM) offers the written examination for midwives. When the Naturopathic Doctors Act was created, language was duplicated from the California midwives' statutes and used for the section pertaining to naturopathic childbirth attendance within the Act. Unfortunately, it wasn't until recently, when several NDs wanted to have the naturopathic childbirth attendance added to their scope, that our Committee was advised by the ACNM that they would not accept any candidates unless they completed one of their accredited nursing schools.

The Committee researched the process used by other naturopathic regulatory authorities and was advised that the American College of Naturopathic Obstetricians (ACNO) offers the standard exam and that we should make appropriate changes to remove the barrier to naturopathic childbirth attendance in California. The Committee requests this change as a technical cleanup since the ACNM cannot be taken by a naturopathic graduate. As current law stands, it creates a barrier for NDs who have the education and would like to practice naturopathic childbirth attendance in California.

ISSUE #12: *Continuing Education Course Approvers. Should the North American Naturopathic Continuing Education Accreditation Council (NANCEAC) be added as an authorized approver of continuing education courses?*

Background: The Naturopathic Doctors Act requires that all continuing education providers and classes be approved by the California Naturopathic Doctors Association (CNDA), the American Association of Naturopathic Physicians (AANP), the California Board of Chiropractic Examiners, the California Board of Pharmacy, or the Committee. Continuing education classes approved for physicians and surgeons in California are also accepted. In the Committee's most recent Strategic Plan, it agreed to add the North American Naturopathic Continuing Education Accreditation Council (NANCEAC) as an approved continuing education provider. The Committee has requested that NANCEAC be added to the statutory list of approvers.

Staff Recommendation: *The Committee should provide any language that it believes would be necessary to accommodate its request to add an additional continuing education approver.*

Committee Response:

The Committee would like to amend Business and Professions Code section 3635 (b) to include the following:

The continuing education requirements of this section may be met through continuing education courses approved by the committee, the California Naturopathic Doctors Association, the North American Naturopathic Continuing Education Accreditation Council, the American Association of Naturopathic Physicians, the California State Board of Pharmacy, the State Board of Chiropractic Examiners, or other courses that meet the standards for continuing education for licensed physicians and surgeons in California. All continuing education providers shall comply with section 3635.2. Continuing education providers shall submit an annual declaration to the committee that

their educational activities satisfy the requirements described in section 3635 .2 and the committee shall maintain a list of these providers on its Internet website.

ENFORCEMENT ISSUES

ISSUE #13: *Additional Title Protection. Should more general terms such as “naturopath” and “naturopathic” be reserved for use only by NDs?*

Background: The Naturopathic Doctors Act provides that only licensees of the Committee may refer to themselves as a “naturopathic doctor,” an ND, or “or other titles, words, letters, or symbols with the intent to represent that he or she practices, is authorized to practice, or is able to practice naturopathic medicine as a naturopathic doctor.” However, the Act does not limit the ability to generally use variations of the root word “naturopath,” providing that it “permits, and does not restrict, the use of the following titles by persons who are educated and trained” as a “naturopath,” “naturopathic practitioner,” or “traditional naturopathic practitioner.” These practitioners are not under the jurisdiction of any state agency; some naturopaths have proposed the establishment of a registry to ensure compliance with basic educational standards and competency requirements.

Therefore, while only a licensed ND may take advantage of the scope of practice that comes with licensure in California, anyone may advertise themselves as a naturopath or a practitioner of naturopathy. The Committee believes that this can be very confusing for the public, who may not appreciate the distinction between an ND and an unlicensed naturopath. According to the Committee, approximately 71 percent of its enforcement activities involve unlicensed practice, and a substantially large percentage of its complaints are not against its ND licensees but against others using the naturopathic title.

The Committee has previously recommended that title protection be expanded to include all derivations of the term “naturopath,” though this reform was not successfully enacted during its prior sunset review. However, it is understood that this change would draw ire from many who consider themselves to practice a healing art that is closer to the original form of naturopathy popularized by Dr. Benedict Lust. Arguably, this “traditional naturopathic practice” predated the integrative form now practiced by NDs, and therefore depriving those practitioners of their claim to the term “naturopath” could be seen unjust.

However, there is little doubt that expanding title protection would provide clarity to consumers and ease the Committee’s enforcement challenges. The Committee believes that unlicensed naturopaths could instead adopt other available titles such as “holistic health practitioner.” The Committee has argued that additional title protection for NDs would place them more in line with other health care providers and would be consistent with other states. It is therefore appropriate to continue the discussion during the Committee’s present sunset review.

Staff Recommendation: *The Committee should provide the Legislative Committees with more information and data regarding why it believes it is important to expand title protection; work to address opposition from the traditional naturopathic practitioner community; and opine on whether there are any alternative policies for improving state oversight of unlicensed naturopaths.*

Committee Response:

The Naturopathic Doctors Act allows for the use of the terms, “naturopath”, “naturopathic practitioner”, and “traditional naturopathic practitioner” by those who are educated and trained as such. However, there is no educational standard for these titles and therefore no way to evaluate or track who meets the criteria for being “educated and trained”.

During enforcement interviews with individuals who consider themselves naturopaths, many of them believe that they are allowed to provide diagnosis and offer diagnostic testing (through means such as live blood analysis, iridology, and electro dermal screening), none of which can be used as a diagnostic tool by unlicensed individuals, yet most lay naturopaths advertise these services on their websites.

Further, when tracking the unlicensed enforcement cases, most complainants advise the Committee that they were not advised of the individuals unlicensed status and most believe that they were seeing a licensed ND. Upon investigating these complaints, we request copies of the written statement the unlicensed individuals must provide to their clients, which shall also be signed by the client acknowledging that they were made aware of the unlicensed status. Most of the respondents cannot produce this document set forth in CA Business and Professions Code §2053.6 and §3644(d)(2), placing them in direct violation of the Medical Practice Act and the Naturopathic Doctors Act.

The Committee staff has had a few meetings with members of the California Naturopathic Association (CNA), which is the association for the unlicensed naturopaths. During these meetings, CNA members discussed a possibility of creating some type of registration or tracking mechanism for the unlicensed naturopaths. They believe this would assist in ensuring that unlicensed naturopaths meet the education and training in order to use the titles allowed in CA Business and Professions Code §3645.

However, the Committee firmly stands on the belief that the use of the term with the work “naturopath” or “naturopathic” in it, leads unsuspecting consumers to have confidence that these individuals are licensed and meet the same high level of education and training requirements set forth in the Naturopathic Doctors Act. Unlicensed activity continues to be the largest makeup of enforcement cases for the Committee, currently at 71% (at time of report).

The Committee is a special-funded program, fully funded by license fees of naturopathic doctors. These fees should be used to regulate and enforce licensed naturopathic doctors and provide services to the consumers in California. Unfortunately, our resources are being expended on a group of individuals who choose not to follow the laws set forth by the Legislature and continue to benefit from the confusion of the average consumer. This is a grave public risk issue.

The Committee requests title protection by restricting terms outlined in CA BPC §3645 only for those who can meet licensure requirements. We would also like to see a title carve-out of a more appropriate title for the unlicensed group such as, “holistic health practitioner” or “holistic health professional”, which more accurately represents their education and training. The Committee desires the best resolution that provides the most protection of the consumer.

ISSUE #14: Lack of Formal Discipline. Why have there been zero cases resulting in formal discipline over the past several years, and does this represent appropriate enforcement by the Committee?

Background: From FY 2018-19 through FY 2020/21, the Committee reports that it received 163 complaints and engaged in 175 investigations. During this time period, the Committee reports that it initiated zero cases with the Attorney General and that there were zero formal disciplinary outcomes,

with no revocations, surrenders, or probationary actions taken. This may be explained by the Committee’s high enforcement workload associated with unlicensed activity, its small staff, or the nature of its licensee population. Nevertheless, it is challenging to believe that there would be absolutely no cases over three years worthy of pursuing formal discipline action, and the situation should be better understood to ensure any necessary steps are taken to galvanize the Committee’s protection of the public.

Staff Recommendation: *The Committee should explain to the Legislative Committees why it has not taken any formal disciplinary action over the past several years, whether it believes this statistic is appropriate, and whether any legislative changes would improve its ability to engage in more robust enforcement activities.*

Committee Response:

Due to the current resources and large amount of unlicensed activity, the Committee focuses on high priority enforcement cases with the greatest potential for public risk. The majority of cases against licensees are minor in nature and are normally resolved pre-investigation. Most cases involve minor advertising issues, such as “happy hour” (providing discount periods for injections for a small population of consumers) and buy-one-get-one discounts, release of medical records, and/or other cases that had no merit and were closed after investigation and medical expert consultation concluded.

There are certainly items that the Committee should take action on, including increasing the issuance of citations and fines for violations, however these still do not require formal disciplinary actions. During the pandemic, the Committee did identify an uptick in licensee complaints, including three (3) cases that necessitated formal disciplinary action*. All the cases involved licensees of the Committee. One case was high-profile, where we worked with federal and state agencies to investigate and file charges. Each of the mentioned cases will go through the Attorney General’s office for appropriate action.

The Committee is currently attempting to request approval to add a full-time, permanent staff to improve the enforcement program.

**Please note that at the time of the drafting of the Committee’s Sunset Review Report, the Committee was unsure if there were enough substantiated violations to move forward with the formal discipline process. The BreEZe system will not capture a formal discipline until the case is submitted to the AG’s office.*

PRACTICE ISSUES

ISSUE #15: *Independent Contractors. Does the new test for determining employment status, as prescribed in the court decision **Dynamex Operations West Inc. v. Superior Court**, have any unresolved implications for NDs?*

Background: In the spring of 2018, the California Supreme Court issued a decision in *Dynamex Operations West, Inc. v. Superior Court* (4 Cal.5th 903) that significantly confounded prior assumptions about whether a worker is legally an employee or an independent contractor. In a case involving the classification of delivery drivers, the California Supreme Court adopted a new test for determining if a worker is an independent contractor, which is comprised of three necessary elements:

- A. That the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
- B. That the worker performs work that is outside the usual course of the hiring entity's business; and
- C. That the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Commonly referred to as the "ABC test," the implications of the *Dynamex* decision are potentially wide-reaching into numerous fields and industries utilizing workers previously believed to be independent contractors. Occupations regulated by entities under the Department of Consumer Affairs have been no exception to this unresolved question of which workers should now be afforded employee status under the law. In the wake of *Dynamex*, the new ABC test must be applied and interpreted for licensed professionals and those they work with to determine the rights and obligations of employees.

In 2019, the enactment of Assembly Bill 5 (Gonzalez, Chapter 296, Statutes of 2019) effectively codified the *Dynamex* decision's ABC test while providing for clarifications and carve-outs for certain professions. Specifically, physicians and surgeons, dentists, podiatrists, psychologists, and veterinarians were among those professions that were allowed to continue operating under the previous framework for independent contractors. However, NDs were not included in the bill, and it has yet to be determined whether this has had any adverse consequences for the profession.

Staff Recommendation: *The Committee should provide the Legislative Committees with any information it has regarding the impact of the Dynamex decision on the practice of naturopathic medicine and whether the lack of an exemption for NDs has proven at all problematic.*

Committee Response:

Naturopathic Doctors work similarly to their healthcare practitioner counterparts, having practices and providing consultation or specialty needs in other healthcare establishments. Both the Committee and the professional trade association (CNDA) have received feedback that NDs are being affected by the AB 5 law. Licensees are unable to provide their services and work in the same context that other doctors in California are permitted.

The Committee would like to request that the NDs be included to allow them the ability to continue operating under the previous framework for independent contractors and remove the current unintended barrier.

ISSUE #16: *Billing Issues. Have health insurance providers failed to reimburse for naturopathic care notwithstanding provisions enacted through the Affordable Care Act?*

Background: Language was included in the Affordable Care Act to improve coverage of integrative and complementary health care, limiting the ability of health plans to discriminate against which providers may treat a covered condition, specifically including NDs that are licensed in their state. While these provisions took effect in 2014, regulations were not effective in California until 2016. Since then, some insurance providers have started to cover naturopathic treatments using the treatments had the same billing codes as the other primary care providers. However, while NDs can order labs and medications under Medi-Cal, office visits continue not to be covered. The Committee reports that in its most recent study, this insurance limitation was one of the top five reasons why licensees would consider leaving the state.

Staff Recommendation: *The Committee should provide an update on the current status of billing issues experienced by NDs and whether any action could appropriately be taken by the Legislature to resolve these challenges.*

Committee Response:

Naturopathic Doctors provide treatment and services similarly to those offered by other doctor types in California and utilize the same billing codes. However, most insurance companies still refuse to cover these services if an ND licensee provides them. For instance, Medi-Cal only covers charges for items ordered by an ND but will not cover the actual office visit. Since NDs spend on the average of 60 to 90 minutes with a patient to understand their specific lifestyle and general overall health of their patient, not providing the same coverage as other practitioners appear to be discriminatory.

The Committee requests that the Legislature provide statutes that will provide additional clarification that as long as an ND licensee provides services that have an appropriate billing code, and is within the NDs scope of practice, that insurance companies should treat them equally to the other medical professionals. Currently, the Committee must use limited resources to reach out to insurance companies on behalf of the consumer to assist in resolving the denial of coverage. This became such an issue and strain on the Committee's resources, that the Committee posted information on its website with details on how consumers can apply for an Independent Medical Review (IMR) or file a consumer complaint with the California Department of Managed Health Care.

COVID-19 PANDEMIC ISSUES

ISSUE #17: *Emergency Waivers. How have the Committee and the profession utilized the Governor's emergency process for obtaining waivers of the law during the COVID-19 pandemic?*

Background: Since the onset of the COVID-19 pandemic, state health experts have continued to highlight the ongoing need to bolster the California's capacity to respond to a surge in patient needs across the state's health care system. On March 30, 2020, Governor Newsom announced his an initiative to "expand California's health care workforce and recruit health care professionals to address the COVID-19 surge" and signed Executive Order N-39-20. This executive order established the waiver request process under the DCA and included other provisions authorizing the waiver of licensing, certification, and credentialing requirements for health care providers.

Several waivers were obtained through this process impacting the Committee. Statutes were waived that limited the number of continuing education hours that may be completed through computer-assisted instruction and limited such instruction to those that allow participants to concurrently interact with instructors or presenters while they observe the courses. The DCA Director also waived statutes requiring individuals to complete education or examination requirements as a condition of license renewal. In addition to these DCA waivers, the Committee has also taken advantage of certain waivers of Bagley-Keene Open Meeting Act requirements, allowing it to conduct its meetings entirely virtually. While these waivers will currently expire when the State of Emergency is lifted, there may be some value in retaining some pandemic-era policies that have proven effective.

Staff Recommendation: *The Committee should inform the Legislative Committees of what waivers*

it has requested from the DCA and whether it believes any waiver might be continued after the conclusion of the pandemic.

Committee Response:

The Committee requested three specific waivers from the DCA.

The first, waived in-person continued education (CE) courses.

The second, allowed NDs to renew their license without meeting CE requirements, while providing a six-month extension to show completion of the requirement.

The last, allowed the independent administration of COVID-19 vaccines to their patients.

During the pandemic, there was a loosening of requirements of the Bagley-Keene provisions, which allowed meetings to take place virtually. While the Committee did not specifically request this, we noticed many benefits to this new way of attending public meetings. We observed an increase in public participation, increasing access to consumers in all parts of the state. Further, there was cost savings to the Committee in regard to travel and meeting room rentals.

The Committee would like to request that naturopathic doctors be provided the ability to independently provide both COVID-19 and normal vaccines. In addition, the Committee would support a change of Bagley-Keene provisions, such as AB 1733, that allow the option to conduct its meetings virtually moving forward.

ISSUE #18: *Vaccine Misinformation. Are there issues with NDs engaging in the spread of COVID-19 vaccine misinformation? Has the Board received and responded to any related complaints regarding COVID-19 and COVID-19 vaccine misinformation from NDs?*

Background: In 2021, HR 74 passed the Assembly to declare health misinformation a public health crisis. News reports have indicated that misinformation regarding the COVID-19 vaccine has been spread by some health care professionals, including licensed NDs (such as the case of Dr. Juli Mazi in Napa Valley²⁹). Additionally, state regulatory boards have issued warnings that disciplinary action could be taken for licensees engaged in disseminating disinformation.

Legislation has since been introduced to make the dissemination of COVID-19 vaccine misinformation and disinformation an express cause for discipline for physicians and surgeons in California. However, it is unclear to what extent misinformation has originated from NDs. In the Committee's recent survey, a number of NDs responded that reasons to leave the state include vaccine mandates. However, the California Naturopathic Doctors Association has publicly stated that "the majority of California licensed naturopathic doctors advocate for vaccination."

Whether the naturopathic medicine community should be considered a significant source of COVID-19 vaccine misinformation is not immediately known and it is not certain that any action should be taken to prevent its spread among ND practices. The Committee should specify if it has received complaints of medical misinformation regarding the distribution of COVID-19 prevention, treatments, or vaccines by licensed NDs in California. In addition, the Committee should address how it has responded to any such complaints, and if it has taken measures to educate NDs about the consequences of disseminating vaccine and COVID-19 misinformation to consumers.

Staff Recommendation: *The Committee should provide its perspective on whether NDs are more or less likely to engage in disseminating COVID-19 vaccine misinformation than other health care professionals, and whether any action should be taken to help the Committee enforce against any such dissemination.*

Committee Response:

During the Coronavirus Pandemic, the Committee only had one serious case of COVID-19 misinformation and fraud, which the Committee took swift action on and worked with federal and state level law enforcement entities to investigate.

While it is an NDs general philosophy to engage their patients to maintain adequate immunity to disease and illnesses by advocating for healthy lifestyle choices and dietary and supplemental options, the Committee wanted to ensure that licensees were careful in how they advertised messaging to their patients to assist in increasing their immune systems, without implying that they could cure or prevent COVID-19. The Committee did not receive any other concerns from patients or other sources about issues with licensees disseminating COVID-19 vaccine misinformation.

²⁹ <https://www.justice.gov/usao-ndca/pr/napa-woman-arrested-fake-covid-19-immunization-and-vaccine-card-scheme>

ISSUE #19: *COVID-19 Immunizations. How has the Committee engaged in oversight and enforcement of NDs initiating and administering in COVID-19 vaccinations?*

Background: As part of the Executive Order N-39-20 waiver process established in response to the COVID-19 pandemic, DCA Waiver DCA-21-114 waived provisions of statute “to the extent they prohibit licensed naturopathic doctors from independently initiating and administering COVID-19 vaccines that are approved or authorized by the federal Food and Drug Administration (FDA) to persons 16 years of age or older and, in cases involving a severe allergic reaction, epinephrine or diphenhydramine by injection.” To be eligible to administer the COVID-19 vaccine, NDs must complete a training program prescribed by the California Department of Public Health and comply with certain recordkeeping requirements.

In a recent survey conducted by the Committee, only 17 percent of NDs responded that they currently administered the COVID-19 vaccine pursuant to the waiver. However, a relatively small number of NDs responded to this survey question, and it is unclear how commonly administered the vaccine has been by NDs since the waiver was issued. Further, because this waiver authority is not formally included in an ND’s scope of practice under the Naturopathic Doctors Act, it is unclear how the Committee would be expected to validate or track NDs using waiver authority. The Committee may assist its licensees with complying with requirements set by the California Department of Public Health to perform COVID-19 vaccinations; however, much of the relevant information may be with that department rather than the Committee. As the Committee’s licensees become more actively engaged in the state’s efforts to immunize its population, there may be questions as to whether the Committee is equipped or empowered to oversee those activities.

Staff Recommendation: *The Committee should provide an update regarding whether it believes a substantial number of NDs have been administering the COVID-19 vaccine and how it has engaged to ensure oversight and compliance with the waiver’s requirements.*

Committee Response:

The Committee has received requests from licensees for the ability to administer COVID-19 vaccines and has identified an increase in incoming inquiries on how to appropriately register to provide this service to their patients. The exact number of licensees who provide this service is currently unknown.

The Committee tracks and takes appropriate action on violations surrounding the administration of the COVID-19 vaccine and wants to assure the Legislature that we believe the benefit to the public outweigh the risk of the very small percentage of COVID-19 vaccine related violations that occurred.

The Committee consulted with other healthcare boards to ensure that the Committee uses processes in the same manner as physicians and surgeons to expedite any such violations. The Committee has also taken steps to send licensees appropriate information on how to become trained on COVID-19 vaccine administration.

TECHNICAL CLEANUP**ISSUE #20: Technical Cleanup. Is there a need for technical cleanup?**

Background: As the profession continues to evolve and new laws are enacted, many provisions of the Business and Professions Code relating to naturopathic medicine become outmoded or superfluous.

Staff Recommendation: *The Committee should recommend cleanup amendments for inclusion in its sunset bill.*

Committee Response:

The Committee has identified a section of the law that currently poses a barrier, not allowing licensed naturopathic doctors to be included as one of the practitioners allowed to complete workers' compensation and disability insurance forms. This barrier has a direct effect on patients who currently have to seek this evaluation from another type of practitioner.

Labor Code §3209.3 outlines practitioners that are included by law, to complete these evaluations and allows the practitioners to place their patients out on disability leave. The code includes the following licensed practitioners:

Physicians and surgeons (MD/DO),
Psychologists,
Acupuncturists,
Optometrists,
Dentists,
Podiatrists, and
Chiropractic practitioners

Since NDs are considered primary care doctors, they should have the ability to place their patients out on disability or maternity leave and should have the ability to complete the necessary forms to do so. The Committee requests that a technical cleanup of Labor Code §3209.3 be made to include licensed naturopathic doctors. We believe that this would be a benefit to consumers; further that there is no potential of risk to the public.

CONTINUED REGULATION OF THE NATUROPATHIC MEDICINE PROFESSION
BY THE NATUROPATHIC MEDICINE COMMITTEE

ISSUE #21: *Continued Regulation. Should the licensing of naturopathic doctors be continued and be regulated by the Naturopathic Medicine Committee?*

Background: In consideration of the Committee's significant public protection mission in its regulation of NDs and the naturopathic medicine profession in California, it is relatively likely that the Legislature will ultimately determine that the Committee's repeal date should be extended for an additional term.

However, this decision will not be ultimately made until there has been further discussion regarding the Committee, the profession, and what statutory language is appropriate to protect consumers and patients.

Staff Recommendation: *The Committee's current regulation of naturopathic medicine should be continued, with potential reforms, to be reviewed again on a future date to be determined.*

Committee Response:

The NMC appreciates the Committee's recommendation that we should continue to be regulated by the current Naturopathic Medicine Committee of California to protect the interests of the public. The NMC works closely with other healing arts regulatory programs and will continue to work together on issues that may affect the practice of naturopathic medicine. The NMC is a small but efficiently functioning Committee with the primary goal of the protection of consumers. The NMC is constantly working on different means to educate consumers on the functions of the Committee and on license information of Naturopathic Doctors.