California State Board of Pharmacy
1625 N. Market Blvd, N219, Sacramento, CA 95834
Phone: (916) 574-7900
Fax: (916) 574-8618
www.pharmacy.ca.gov

XV. Review and Discussion of Office of the Attorney General Legal Opinion Relating to SB 1441 (Ridley-Thomas, Chapter 548, Statues of 2008) Relating to Substance Abusing Healing Arts Licensees

Attached is the legal opinion that was recently provided to the board in response to the board's request. Staff will prepare a chronology of the board's prior implementation efforts as well as work with counsel to identify what, if any future action needs to be taken. An updated on this item will be provided during the June Board Meeting.

Relevant Sections

California Code of Regulations Section 1760 requires the board to consider disciplinary guidelines when reaching a decision on a disciplinary action.

Business and Professions Code Section 315 established the Substance Abuse Coordination Committee (SACC) within the Department of Consumer Affairs. The committee was charged with formulating uniform and specific standards in several areas for dealing with substance-abusing licensees.

Chapter 9, Division 2, Chapter 19 (Business and Professions Code sections 4300-4315) defines disciplinary proceeding for the board as well as the grounds for taking such discipline.

Background

In early 2011, the board directed staff to restructure and update its Disciplinary Guidelines. Subsequent to this, in April 2011, the uniform standards required in B&PC section 315 were finalized. Over the course of the next year, the board initiated a rulemaking to update the disciplinary guidelines and incorporate the SB 1441 uniform standards as it deemed appropriate considering comments from counsel and staff on how best to proceed.

In addition to the standards themselves, the board also received opinions on what was required to implement the uniform standards. The board was provided a copy of a legal opinion from the Legislative Counsel Bureau, executive summary issued by the Office Of the Attorney General as well as an implementation memo from Doreatha Johnson, Deputy Director of Legal Affairs, DCA. The opinions provided did not provide consistent guidance and as such the board requested a formal legal opinion from the Office of the Attorney General in January 2013. The board received a response to this request on April 8, 2015.

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CALIFORNIA 94102-7004

Public: (415) 703-5500
Telephone: (415) 703-5876
Facsimile: (415) 703-1234
E-Mail: Susan.Lee@doj.ca.gov

April 8, 2015

U. S. Mail and email:
virginia.herold@dca.ca.gov

Virginia Herold, Executive Officer
California State Board of Pharmacy
1625 N. Market Blvd. N219
Sacramento, CA 95834

RE: Opinion No. 13-202

Dear Ms. Herold:

Enclosed is our Opinion No. 13-202 issued in response to your request of January 10, 2013.

Sincerely,

Susan Duncan Lee / sg

SUSAN DUNCAN LEE
Supervising Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

SDL:sg

Enclosure
cc: Bruce M. Slavin

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

KAMALA D. HARRIS
Attorney General

OPINION	:	No. 13-202
of	:	April 8, 2015
KAMALA D. HARRIS Attorney General	:	
BRUCE M. SLAVIN SUSAN DUNCAN LEE Deputy Attorneys General	:	

VIRGINIA HEROLD, EXECUTIVE OFFICER FOR THE CALIFORNIA BOARD OF PHARMACY, has requested an opinion on the following questions:

1. Is the law that prescribes the development and issuance of uniform standards for healing arts boards to use in dealing with their "substance-abusing licensees" invalid either (a) for vagueness or (b) as an improper delegation of legislative authority to the committee charged with formulating the standards?

2. To be effective, must the uniform standards be adopted as regulations under the Administrative Procedure Act, and, if so, by what entities?

3. May individual healing arts boards adopt regulations defining the term "substance-abusing licensees" for purposes of determining which of their licensees are subject to the uniform standards?

4. Must individual healing arts boards use the uniform standards as written in all cases in which they are found to apply, and, if so, do the boards nonetheless retain discretion in applying the uniform standards to particular circumstances and in deciding individual cases?

CONCLUSIONS

1. The law that prescribes the development and issuance of uniform standards for healing arts boards to use in dealing with their "substance-abusing licensees" is not invalid either (a) for vagueness or (b) as an improper delegation of legislative authority to the committee charged with formulating the standards.

2. The uniform standards need not be adopted as regulations under the Administrative Procedure Act in order to be effective. Individual healing arts boards may, but are not required to, adopt regulations incorporating the uniform standards for the purpose of administering their own programs.

3. Individual healing arts boards may adopt regulations defining the term "substance-abusing licensees" for purposes of determining which of their licensees are subject to the uniform standards, so long as such regulations are consistent with the legislation directing the formulation and issuance of the uniform standards and reasonably necessary to effectuate the purposes of that legislation.

4. To the extent practicable, individual healing arts boards must use the uniform standards as written in all cases in which they are found to apply, but the boards retain discretion in applying the uniform standards to particular circumstances and in deciding individual cases.

ANALYSIS

In 2008, the Legislature enacted Senate Bill 1441 to address the increasing problem of substance abuse in the health-care professions,[1] where "the impairment of a health care practitioner for even one moment can mean irreparable harm to a patient."[2] Finding that various health care licensing boards have inconsistent or nonexistent standards for dealing with substance-abusing professionals, the Legislature determined

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[1] Senate Bill 1441 added an article to the Business and Professions Code entitled Uniform Standards Regarding Substance-Abusing Healing Arts Licensees. (Stats. 2008, ch. 548 (Sen. Bill No. 1441), § 3.)

[2] *Id.* at § 1(a).

that patients would be better protected if regulatory boards would agree to follow consistent standards and best practices in this area.[3]

To that end, new Business and Professions Code section 315 (section 315) created an entity within the Department of Consumer Affairs called the Substance Abuse Coordination Committee (Committee).[4] The Committee is chaired by the Director of the

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[3] Stats. 2008, ch. 548 (Sen. Bill No. 1441), § 1(g), (h).

[4] Section 315 states:

> (a) For the purpose of determining uniform standards that will be used by healing arts boards in dealing with substance-abusing licensees, there is established in the Department of Consumer Affairs the Substance Abuse Coordination Committee. The committee shall be comprised of the executive officers of the department's healing arts boards established pursuant to Division 2 (commencing with Section 500), the State Board of Chiropractic Examiners, the Osteopathic Medical Board of California, and a designee of the State Department of Health Care Services. The Director of Consumer Affairs shall chair the committee and may invite individuals or stakeholders who have particular expertise in the area of substance abuse to advise the committee.
>
> (b) The committee shall be subject to the Bagley-Keene Open Meeting Act (Article 9 (commencing with Section 11120) of Division 3 of Title 2 of the Government Code).
>
> (c) By January 1, 2010, the committee shall formulate uniform and specific standards in each of the following areas that each healing arts board shall use in dealing with substance-abusing licensees, whether or not a board chooses to have a formal diversion program:
>
> > (1) Specific requirements for a clinical diagnostic evaluation of the licensee, including, but not limited to, required qualifications for the providers evaluating the licensee.
> >
> > (2) Specific requirements for the temporary removal of the licensee from practice, in order to enable the licensee to undergo the clinical diagnostic evaluation described in paragraph (1) and any treatment recommended by the evaluator described in paragraph (1) and approved by the board, and specific criteria that the licensee must meet before being permitted to return to practice on a full-time or part-time basis.
> >
> > (3) Specific requirements that govern the ability of the licensing board to communicate with the licensee's employer about the licensee's

status and condition.

(4) Standards governing all aspects of required testing, including, but not limited to, frequency of testing, randomness, method of notice to the licensee, number of hours between the provision of notice and the test, standards for specimen collectors, procedures used by specimen collectors, the permissible locations of testing, whether the collection process must be observed by the collector, backup testing requirements when the licensee is on vacation or otherwise unavailable for local testing, requirements for the laboratory that analyzes the specimens, and the required maximum timeframe from the test to the receipt of the result of the test.

(5) Standards governing all aspects of group meeting attendance requirements, including, but not limited to, required qualifications for group meeting facilitators, frequency of required meeting attendance, and methods of documenting and reporting attendance or nonattendance by licensees.

(6) Standards used in determining whether inpatient, outpatient, or other type of treatment is necessary.

(7) Worksite monitoring requirements and standards, including, but not limited to, required qualifications of worksite monitors, required methods of monitoring by worksite monitors, and required reporting by worksite monitors.

(8) Procedures to be followed when a licensee tests positive for a banned substance.

(9) Procedures to be followed when a licensee is confirmed to have ingested a banned substance.

(10) Specific consequences for major violations and minor violations. In particular, the committee shall consider the use of a "deferred prosecution" stipulation similar to the stipulation described in Section 1000 of the Penal Code, in which the licensee admits to self-abuse of drugs or alcohol and surrenders his or her license. That agreement is deferred by the agency unless or until the licensee commits a major violation, in which case it is revived and the license is surrendered.

(11) Criteria that a licensee must meet in order to petition for return to practice on a full-time basis.

Department of Consumer Affairs and consists of the executive officers of the department's healing arts boards, the State Board of Chiropractic Examiners, and the Osteopathic Medical Board of California, as well as a designee of the State Department of Health Care Services.[5]

Section 315 required the Committee to formulate standards on sixteen specific subjects for the healing arts boards to use in dealing with substance-abusing licensees, "whether or not a board chooses to have a formal diversion program."[6] The subjects include clinical evaluation of licensees for substance abuse, suspension of licensees from practice, communications between the licensing board and the licensee's employer, and the use of private-sector diversion programs.[7] In December 2009, the Committee adopted uniform standards for each of the sixteen subjects. The standards were published

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(12) Criteria that a licensee must meet in order to petition for reinstatement of a full and unrestricted license.

(13) If a board uses a private-sector vendor that provides diversion services, standards for immediate reporting by the vendor to the board of any and all noncompliance with any term of the diversion contract or probation; standards for the vendor's approval process for providers or contractors that provide diversion services, including, but not limited to, specimen collectors, group meeting facilitators, and worksite monitors; standards requiring the vendor to disapprove and discontinue the use of providers or contractors that fail to provide effective or timely diversion services; and standards for a licensee's termination from the program and referral to enforcement.

(14) If a board uses a private-sector vendor that provides diversion services, the extent to which licensee participation in that program shall be kept confidential from the public.

(15) If a board uses a private-sector vendor that provides diversion services, a schedule for external independent audits of the vendor's performance in adhering to the standards adopted by the committee.

(16) Measurable criteria and standards to determine whether each board's method of dealing with substance-abusing licensees protects patients from harm and is effective in assisting its licensees in recovering from substance abuse in the long term.

[5] Bus. & Prof. Code, § 315, subd. (a).

[6] Bus. & Prof. Code, § 315, subd. (c).

[7] *See* Bus. & Prof. Code, § 315, subds. (c)(1)-(16).

in April 2010, and revised in April 2011.[8] In this opinion, we address several questions and concerns that have been raised regarding the uniform standards

Question 1

We begin with the threshold question whether section 315 is valid. It has been suggested that section 315 is too vague to be enforceable because it fails to define the phrase "substance-abusing licensees."[9] It has also been argued that the Legislature improperly delegated its authority by charging the Committee with developing standards instead of crafting them itself. We reject both of these propositions.

a. Vagueness

While "void-for-vagueness" challenges arise most often in the context of criminal statutes, the principle extends to other types of legislation as well.[10] In addressing a vagueness claim, we give the challenged statute "a reasonable and practical construction in accordance with the probable intent of the Legislature."[11] "Reasonable certainty" is all that is required; a statute will not be held void for vagueness if any reasonable, practical construction can be given to it, either on its own footing or by reference to other definable sources.[12]

Because section 315 itself does not define the term "substance-abusing licensees," (nor expressly require the Committee to do so), our task is to determine whether the term may be made reasonably certain by reference to other sources.[13] Where a statute or statutory scheme does not specify a definition for a given term or phrase, the general rule is to give the words "their usual, ordinary meaning, which in turn may be obtained by referring to a dictionary."[14]

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[8] The uniform standards may be accessed from the Department of Consumer Affairs' public website, at http://www.dca.ca.gov/about_dca/sacc/uniform_standards.pdf.

[9] Bus. & Prof. Code, § 315, subds. (a), (c).

[10] *Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 763-764.

[11] *County of Nevada v. MacMillen* (1974) 11 Cal.3d 662, 672-673.

[12] See *id.* at p. 673.

[13] *Id.* at pp. 672-673.

[14] *Smith v. Selma Community Hospital* (2010) 188 Cal.App.4th 1, 30; see 95 Ops.Cal.Atty.Gen. 16, 19 (2012).

The term "substance-abusing" is hardly unique to section 315. Some form of the term has been used by the Legislature in many different statutes without express definition.[15] This is not surprising. The common definition of "substance abuse" is "excessive use of a drug (as alcohol, narcotics, or cocaine)" or "use of a drug without medical justification."[16] The concept of substance abuse is exceedingly familiar in society, and we see no reason why the commonly understood definition of this term may not be applied with reasonable certainty in the context of protecting patients by ensuring practitioner competency.[17]

Also, when the Legislature enacted section 315, there were already statutes pertaining to substance abuse by licensees of most healing arts boards. For example, existing law provides for diversionary programs as an alternative to traditional disciplinary action to address "unprofessional conduct relating to controlled substances or dangerous drugs" by licensed nurses,[18] and for recovery programs for pharmacists "whose competency may be impaired due to abuse of alcohol [or] drug use."[19] In addition, for most healing arts licensees, existing law provides that unprofessional conduct includes the use of a controlled or intoxicating substance in a manner impairing the licensee's ability to practice safely.

Indeed, in enacting section 315, the Legislature acknowledged the existing statutes addressing substance-abusing licensees, and made express findings that further legislation was necessary to address deficiencies in existing programs.[20] Despite the existence of

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[15] See e.g. Bus. & Prof. Code, § 8025.1 (certified shorthand reporter subject to suspension where "licensee is unable to perform the duties of a certified shorthand reporter due to the abuse of chemical substances or alcohol"); Ed. Code, § 44049 (school principal may report to parent or guardian any instance of "alcohol or controlled substance abuse" by student); Fam. Code, § 3200 (Judicial Council to develop standards for supervised visitation in cases of alleged "substance abuse"); Health & Saf. Code, § 11367.5 (immunity from prosecution for peace officer possessing controlled substance "while providing substance abuse training to law enforcement").

[16] Webster's 3d New Internat. Dict. (1993) p. 112.

[17] Cf. *In re Drake M.* (2012) 211 Cal.App.4th 754, 764-765 (interpreting "substance abuse" for purposes of removing child from custody of parent or guardian who puts child at risk through substance abuse).

[18] Bus. & Prof. Code, § 2762; see *id.* at § 2770.

[19] Bus. & Prof. Code, § 4360; see *id.* at § 4364 (Board of Pharmacy to establish criteria for program entry).

[20] See Stats. 2008, ch. 548 (Sen. Bill No. 1441), § 1(a), (b).

myriad healing-arts statutes that use this or similar terms,[21] the Legislature refrained from adopting any single definition. Given the prevalence of the problem, and the Legislature's intention to steer boards toward "best practices," we perceive not vagueness but flexibility in the use of the term "substance-abusing licensees."

Reading section 315 in the "context of the statutory framework as a whole in order to determine its scope and purpose," we conclude that it is not void for vagueness. Based on the ordinary meaning of the words "substance-abusing licensees" as those words are understood in common parlance and in other statutory contexts, we conclude that section 315 describes with reasonable certainty the class of individuals who are subject to the uniform standards prescribed by section 315.[22]

b. Delegation of Authority

We next consider whether, by requiring the Committee to develop uniform standards, instead of crafting them itself, the Legislature improperly delegated its authority to the Committee. We find no improper delegation.

In *Kugler v. Yocum*,[23] the California Supreme Court considered the validity of a city ordinance which decreed that the salaries of certain employees would be no less than the average of those of an adjoining city and county, and that future salaries would be set according to that formula. The Court held that the ordinance was not an unlawful

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[21] E.g., Bus. & Prof. Code, § 1681, subd. (b) (dentists); Bus. & Prof. Code, § 2239, subd. (a) (physicians); Bus. & Prof. Code, § 2533, subd. (c)(1) (speech language pathologists and audiologists); Bus. & Prof. Code, § 2570.29, subd. (b) (occupational therapists); Bus. & Prof. Code, § 2762, subd. (b) (nurses); Bus. & Prof. Code, § 2878.5, subd. (b) (vocational nurses); Bus. & Prof. Code, § 2960, subd. (b) (psychologists); Bus. & Prof. Code, § 3750.5, subd. (b) (respiratory therapists); Bus. & Prof. Code, § 4982, subd. (c) (marriage and family therapists); Bus. & Prof. Code, § 4989.54, subd. (c) (licensed educational psychologists); Bus. & Prof. Code, § 4992.3, subd. (c) (social workers).

[22] The agency requesting this opinion has raised a concern that a "given agency might, for example, define 'substance-abusing licensee' to be a licensee with *any* history of substance abuse, whereas another agency might require that a licensee exhibit signs of addiction . . . within the last 5 years, and a third agency might go so far as to require that the licensee have been in active use within the last 12 months." We do not believe that the possibility of such variations undercuts our conclusion that the term "substance-abusing licensee" is reasonably certain in this context.

[23] *Kugler v. Yocum* (1968) 69 Cal.2d 371.

delegation of the city's legislative authority.[24] The Court's reasoning started from the well established principle that "'[t]he power . . . to change a law of the state is necessarily legislative in character, and is vested exclusively in the legislature, and cannot be delegated by it . . . .'"[25] There are also, however, well established limits to that principle. For example, "legislative power may properly be delegated if channeled by a sufficient standard."[26]

The Court explained that the "essentials" of the legislative function are the determination and formulation of legislative policy.[27] "'Generally speaking, attainment of the ends, including how and by what means they are to be achieved, may constitutionally be left in the hands of others.'"[28] Once it declares a policy and establishes a primary standard, the legislature is free to delegate power to executive officers to "fill up the details" by making rules and regulations designed to carry the legislative purpose into effect.[29]

In enacting Senate Bill 1441, the Legislature made the fundamental policy determination that "[p]atients would be better protected from substance-abusing licensees if their regulatory boards agreed to and enforced consistent and uniform standards and best practices in dealing with substance-abusing licensees."[30] It then directed the Committee to address sixteen specific areas in formulating such standards. Generally, "standards for administrative application of a statute need not be expressly set forth; they may be implied by the statutory purpose."[31] Given the Legislature's clear statement of purpose and its articulation of specific areas in which the Committee was to formulate standards, we conclude that the Legislature's delegation of authority to the Committee was not an invalid delegation of the legislative function.[32]

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[24] *Id.* at p. 373.

[25] *Id.* at p. 375, quoting *Dougherty v. Austin* (1892) 94 Cal. 601, 606-607.

[26] *Id.* at pp. 375-376.

[27] *Id.* at p. 376.

[28] *Ibid.*, quoting *First Industrial Loan Co. v. Daugherty* (1945) 26 Cal.2d 545, 549.

[29] *Ibid.* By contrast, an unconstitutional delegation of powers was held to occur when the Legislature gave an administrative agency unfettered authority to make fundamental policy determinations. (*Clean Air Constituency v. Air Resources Bd.* (1974) 11 Cal.3d 801, 816-817.)

[30] Stats. 2008, ch. 548 (Sen. Bill No. 1441), § 1(h).

[31] *People v. Wright* (1982) 30 Cal.3d 705, 713.

[32] It is also important to note what powers the Legislature did *not* delegate to the

Question 2

Section 315 directs the Committee to formulate uniform standards for healing arts boards to use in dealing with substance-abusing licensees, and the Committee has done so. Question 2 here asks whether these standards must also be adopted as regulations under the Administrative Procedure Act (APA)[33] in order for them to become effective. We conclude that the standards need not be adopted as regulations under the APA, but that individual boards are free to adopt regulations incorporating or pertaining to those standards for the purpose of administering their own programs.

Under the APA, no state agency may issue, utilize or enforce a regulation unless the agency complies with the procedures established in the APA.[34] A "regulation" is "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure."[35] To be valid and effective, a regulation must be "consistent and not in conflict with" the legislation to which it pertains and "reasonably necessary to effectuate" its purpose.[36] The APA sets forth a formal process by which regulations must be adopted. The process has been neatly summarized as follows:

> The agency must give the public notice of its proposed regulatory action (Gov. Code, §§ 11346.4, 11346.5); issue a complete text of the proposed regulation with a statement of the reasons for it (Gov. Code, § 11346.2 (subds. (a), (b)); give interested parties an opportunity to comment on the

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Committee in this bill. The Committee was not charged with adopting regulations having the force of law; it was not charged with adjudicating cases involving individual licensees; and it was not charged with enforcing diversionary referrals or disciplinary actions involving individual licensees. Nor was the Committee established as an independent agency with any budget, staff, or ongoing programs to administer. Rather, it is a committee within the Department of Consumer Affairs, composed primarily of executive officers of healing arts boards, for the specific and limited purpose of "determining uniform standards that will be used by healing arts boards in dealing with substance-abusing licensees." (Bus. & Prof. Code, § 315, subd. (a).)

[33] Gov. Code, tit. 2, div. 3, pt. 1, chs. 3.5, 4, 4.5, 5 (§ 11340 et seq.).

[34] Gov. Code, § 11340.5; see *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 333.

[35] Gov. Code, § 11342.600.

[36] Gov. Code, 11342.2; see *Woods v. Super. Ct.* (1981) 28 Cal.3d 668, 679.

proposed regulation (Gov. Code, § 11346.8); respond in writing to public comments (Gov. Code, §§ 11346.8, subd. (a), 11346.9); and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law (Gov. Code, § 11347.3, subd. (b)), which reviews the regulation for consistency with the law, clarity, and necessity (Gov. Code, §§ 11349.1, 11349.3).[37]

In our view, the Committee is not an "agency" within the meaning of the APA. For purposes of the APA, a regulation is a rule adopted "by any *state agency*" to implement the law enforced or administered by the agency.[38] Government Code section 11000, subdivision (a), defines "state agency" to include "every state office, officer, department, division, bureau, board and commission." But the Committee is not an agency or authority that has responsibility for the enforcement or administration of any state policies or programs.[39] Rather, it is a *committee*—a group of selected officials brought together to perform a specific task—whose responsibilities are consummated when its assigned task is completed. Nor, in our view, do the uniform standards as formulated by the Committee qualify as "regulations" under the APA. The Committee's sole function is to formulate standards, not to implement, interpret, enforce, or administer them.[40] Therefore, we conclude that the Committee was not required to follow the APA process in order to formulate, publish, or amend the standards.

That leaves open the question whether an individual healing arts board may or must adopt the standards as regulations in compliance with APA procedures in order to implement the uniform standards in dealing with substance-abusing licensees. We believe that the boards may, but are not required to, adopt regulations incorporating the uniform standards. Neither the Committee, nor the Department of Consumer Affairs within which it was created, regulates the healing arts boards or their licensees.[41] That task falls to the individual healing arts boards themselves,[42] which are state agencies.

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[37] *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568.

[38] Gov. Code, § 11342.600 (emphasis added); see also Gov. Code, § 11342.520 (defining "agency" as used in the APA to mean any "state agency").

[39] While the Department of Consumer Affairs—within which the Committee was formed—is unquestionably a "state agency," it is not the entity responsible for formulating the uniform standards.

[40] *Cf.* Gov. Code, § 11342.600; see also Gov. Code, § 11342.5.

[41] See Cal. Code. Regs. tit. 16, Div. 38.

[42] See Cal. Code Regs. tit. 16, Divs. 4, 11, 13, 13.1, 13.2, 13.3, 13.4, 13.5, 13.6, 13.7, 13.8, 13.9, 14, 15, 16, 17, 18, 20, 25.

Thus, if an individual healing arts board wishes to enact regulations governing its own programs—including drug diversion programs—it is up to that board to do so.[43] In fact, several healing arts boards have already promulgated regulations that expressly incorporate by reference the uniform standards.[44] Of course, if an individual board sought to adopt the uniform standards as its own regulations, it would be required to comply with the APA to do so.[45]

We conclude that the Committee need not comply with the Administrative Procedure Act in order to make the uniform standards effective. Individual healing arts boards may, but are not required to, adopt regulations incorporating the uniform standards for the purpose of administering their own programs.

Question 3

In Question 3, we are asked whether a healing arts board may adopt a regulation that defines the term "substance-abusing licensees" for purposes of determining which of the board's licensees are subject to the uniform standards. As discussed in our response to Question 2, the healing arts boards are state agencies with the power and responsibility to regulate their respective licensees. As state agencies, they may adopt regulations to implement, interpret, or make specific the laws that they administer and enforce.[46] Thus, if a healing arts board finds it necessary or advisable to adopt a regulation defining the term "substance-abusing licensees," it may do so. Again, if it does, it must comply with APA procedures.[47] Further, it must ensure that any such implementing or interpretive regulations are consistent with section 315 and reasonably necessary to effectuate its purposes.[48]

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[43] Each of the healing arts boards "exists as a separate unit" with the power to set standards. (Bus. & Prof. Code, § 108.)

[44] See e.g. Cal. Code Regs. tit. 16, §§ 1018-1018.01 (Dental Bd.); Cal. Code Regs. tit. 16, § 1138 (Dental Hygiene Com.); Cal. Code Regs. tit. 16, § 1575 (Bd. of Optometry); Cal. Code Regs. tit. 16, §§ 2524 & 2579.10 (Bd. of Vocational Nursing and Psychiatric Technicians); Cal. Code Regs. tit. 16, § 4147 (Bd. of Occupational Therapy).

[45] Gov. Code, § 11340.5; *Morning Star Co. v. State Bd. of Equalization*, *supra*, 38 Cal.4th at p. 333.

[46] See Gov. Code, § 11342.600.

[47] Gov. Code, § 11340.5.

[48] Gov. Code, 11342.2; see *Woods v. Super. Ct.*, *supra*, 28 Cal.3d at p. 679.

Question 4

Section 315 directs that the uniform standards must be "used" by every healing arts board "in dealing with substance-abusing licensees."[49] We are asked whether the healing arts boards must use the uniform standards as written, and "in all cases in which they are found to apply."

At the heart of this question is what the Legislature meant when it required the healing arts boards to "use" the uniform standards. As always, the statute's language is the best starting point for determining the Legislature's intent. "Use" is a broad term with many meanings, the most apt of which here include "to put into action or service" and "to carry out a purpose or action by means of."[50] To "use," then, is something less than to "adopt" or "enact." On the other hand, the word "use" is set in the context of a statute expressing the Legislature's findings that some healing arts boards must improve their performance with respect to substance-abusing licensees, and that "uniform standards" and "best practices" are the Legislature's chosen means to that end, thereby making the standards much more than an academic exercise. Boards are not to ignore, discard, or disregard them; they are to "use" them. The uniform standards are to be "put into action;" boards are to carry out their drug-diversion programs "by means of" them. Thus we believe that, while the uniform standards are neither de jure nor de facto regulations in themselves, boards should not depart from them without some substantial reason for doing so. The Legislature's purpose was to raise the standard of practice across all boards, and in some cases that may require a board to change its procedures in order to conform to best practices.

Nevertheless, we believe that individual boards retain reasonable discretion over how to apply the uniform standards to individual cases. Although the Legislature has revised many statutes pertaining to the diversion programs administered by the healing arts boards,[51] every board still retains its independent authority over the discipline of its licensees.[52] An individual has a constitutionally protected fundamental right to practice a profession, and "a statute can constitutionally prohibit an individual from practicing a lawful profession only for reasons related to his or her fitness or competence to practice that profession."[53] Nothing in section 315 or the uniform standards undermines the

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[49] Bus. & Prof. Code, § 315, subd. (c).

[50] Webster's 3d New Internat. Dict. (1993) pp. 2523-2524.

[51] See Stats. 2008, ch. 548 (Sen. Bill No. 1441), §§ 4-26.

[52] E.g. Bus. & Prof. Code, § 108.

[53] *Hughes v. Bd. of Architectural Examiners* (1998) 17 Cal.4th 763, 788.

ability and responsibility of a healing-arts board to assess whether a licensee's substance abuse compromises his or her fitness or competence to practice the profession. Inherent in that authority, we believe, is the board's right to exercise reasonable discretion in applying the uniform standards to particular circumstances and in deciding individual cases.

We conclude that individual healing arts boards must use the uniform standards as written in all cases in which they are found to apply, to the extent that this is practicable, but that the boards retain discretion in applying the uniform standards to particular circumstances and in deciding individual cases.[54]

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[54] We have also been asked to provide a "detailed analysis of each standard," but we decline to do so. It is up to each board to determine questions such as the need to clarify or make more specific the uniform standards.