



**STATE OF ARIZONA
OFFICE OF THE
AUDITOR GENERAL**

A PERFORMANCE AUDIT
of
THE ARIZONA STATE BOARD OF DENTAL EXAMINERS

SEPTEMBER 1979

THERE IS A NEED IN ARIZONA FOR A STATE AGENCY TO OVERSEE THE ACTIVITIES OF THE DENTAL PROFESSION. THE STATE BOARD OF DENTAL EXAMINERS CAN MORE EFFECTIVELY FULFILL THAT NEED BY IMPROVING ITS HANDLING OF CONSUMER COMPLAINTS TO ENSURE COMPLIANCE WITH STATUTORY REQUIREMENTS.

A REPORT TO THE
ARIZONA STATE LEGISLATURE

OFFICE OF THE AUDITOR GENERAL

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REPORT 79-11



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AUDITOR GENERAL

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OFFICE OF THE
AUDITOR GENERAL

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September 25, 1979

The Honorable Bruce Babbitt, Governor
Members of the Arizona Legislature
Members of the State Board of Dental Examiners

Transmitted herewith is a report of the Auditor General, A Performance Audit of the Arizona State Board of Dental Examiners. This report is in response to a September 19, 1978 resolution of the Joint Legislative Budget Committee and a January 18, 1979 resolution of the Joint Legislative Oversight Committee.

A summary of this report is found on the blue pages at the front of the report. A response to this report from the members of the State Board of Dental Examiners is found on the yellow pages preceding the appendices of the report.

My staff and I will be happy to meet with the appropriate legislative committees, individual legislators or other state officials to discuss or clarify any items in this report or to facilitate the implementation of the recommendations.

Respectfully submitted,

Douglas R. Norton
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SUMMARY

The first civil code for the State of Arizona, enacted in 1913, contained statutes governing the licensing and regulation of dentists through a Board of Examiners. Dental hygienists were placed under licensure and regulatory powers of the Board in 1947 and denturists became certified and regulated in 1978. During the 1973 session, the Legislature changed the name from the State Dental Board to the State Board of Dental Examiners.

The Board was composed of five licensed dentists until 1977 when a lay member was added. In 1978 a statutory amendment added a dental hygienist, giving the Board its present membership of five licensed dentists, one dental hygienist and one lay person. All members are appointed by the Governor, serve for a period of six years and may not serve more than two consecutive terms.

The support staff of the Board is composed of an Executive Secretary and one full-time typist with a part-time position being added in fiscal year 1979-80. The staff's duties include: 1) administering examinations, 2) processing renewals, 3) processing complaints, 4) expending funds, and 5) handling other routine administrative functions. The Board and staff are also responsible for enforcing ARS 32-1201 through 32-1297, the statutes relating to dentistry.

Our review of the State Board of Dental Examiners has shown that there is a need for a state agency to oversee the activities of dental professionals. The Board can more effectively fulfill that need by improving its handling of consumer complaints to ensure compliance with statutory requirements.
(page 12)

Our review also revealed that the Board's appearance of objectivity becomes questionable when the Arizona State Dental Association (ASDA) becomes involved with Board affairs. The Board has not maintained an appearance of independence and objectivity in its dealings with the ASDA. (page 57)

Further we have identified changes needed to improve the efficiency of the State Board of Dental Examiners. (page 64)

In addition, our review revealed that the State Board of Dental Examiners has been substandard in its encouragement and use of public input in its operations. Information regarding meeting notices, proposed rules and regulations, and Board actions has not been adequately provided to licensees of the Board or the consumers of the licensees' services. (page 67)

Finally, our review has identified additional changes which are needed to enhance the State Board of Dental Examiners' complaint review process. (page 76)

It is recommended that:

- 1) The State Board of Dental Examiners investigate and resolve consumer complaints in compliance with ARS 32-1263(A) through ARS 32-1263(E). (page 56)
- 2) The State Board of Dental Examiners impose discipline as prescribed in ARS 32-1263(D) and ARS 32-1263(E) on those dentists found to have provided substandard care. (page 56)
- 3) The Legislature and Governor consider establishing a Health Occupations Council as outlined by The Council of State Governments. This alternative could apply to all health regulatory entities and is also included in the recommendations of the Board of Optometry performance audit. (page 56)
- 4) The public representation on the State Board of Dental Examiners be increased to three members. (page 63)
- 5) The Arizona State Dental Association not be designated specifically in ARS 32-1203 to supply a list from which the Governor may choose Board members; and the Board maintain a degree of independence and objectivity when working in conjunction with the Arizona State Dental Association. This will help to ensure that the Board's appearance of objectivity is maintained. (page 63)

- 6) Arizona Revised Statutes be amended to require members of the State Board of Dental Examiners to terminate active participation as delegates or officers in professional associations. (page 63)
- 7) Arizona Revised Statutes 32-1236, 32-1287 and 32-1287.06 be amended to allow for implementation of a triennial renewal system on a staggered basis. (page 66)
- 8) The Board adopt methods to encourage public input and participation in the promulgation of rules and regulations and development of legislative proposals. (page 75)
- 9) The Board actively pursue the ASDA President's offer to "...cooperate in any proper way with the Board." This cooperation could best be achieved by having the local societies of the ASDA forward copies of all consumer complaints to the Board. (page 81)
- 10) ARS 32-1201 et. seq. be amended to:
 - Include a provision similar to ARS 32-852.02 requiring insurance companies to forward all dental malpractice claims to the Board, and
 - Require Arizona Superior Courts to forward dental malpractice suits to the Board. (page 81)
- 11) The public be better informed regarding the Board's complaint review responsibilities. (page 82)
- 12) The Board improve its documentation of disciplinary actions. (page 82)
- 13) The statutory requirement that consumer complaints must be filed under oath be eliminated. (page 82)
- 14) The Board increase its utilization of the Office of the Attorney General as regarding complaint review. (page 82)

INTRODUCTION AND BACKGROUND

In response to a September 19, 1978 resolution of the Joint Legislative Budget Committee and a January 18, 1979 resolution of the Joint Legislative Oversight Committee, the Office of the Auditor General has conducted a performance audit as part of the sunset review of the State Board of Dental Examiners (Board), in accordance with ARS 43-2351 through 43-2374.

The first civil code for the State of Arizona, enacted in 1913, contained statutes governing the licensing and regulation of dentists through a Board of Examiners. Dental hygienists were placed under licensure and regulatory powers of the Board in 1947 and denturists became certified and regulated in 1978. During the 1973 session, the Legislature changed the name from the State Dental Board to the State Board of Dental Examiners.

The Board was composed of five licensed dentists until 1977 when a lay member was added. The Legislature added a dental hygienist in 1978 giving the Board its present membership of five licensed dentists, one dental hygienist and one lay person. All members are appointed by the Governor, serve for a period of six years and may not serve more than two consecutive terms.

The support staff of the Board is composed of an Executive Secretary and one full-time typist with a part-time position being added in fiscal year 1979-80. The staff's duties include: 1) administering examinations, 2) processing renewals, 3) processing complaints, 4) expending funds, and 5) handling routine administrative functions. The Board and staff are also responsible for enforcing ARS 32-1201 through 32-1297, the statutes regarding dentistry.

The State Board of Dental Examiners and its office are funded through fees charged for examination and licensure. Ninety percent of the fees collected are retained for the Board's use while ten percent are remitted to the State General Fund. Since the Board's budget exceeds \$50,000 the Legislature makes a lump sum appropriation for the Board's operations each year. Expenditures and revenues for the Board for fiscal years 1975-76 through 1977-78 are shown in the following table:

	Amounts		
	<u>1975-76</u>	<u>1976-77</u>	<u>1977-78</u>
Beginning fund balance	\$ <u>53,135</u>	\$ <u>52,438</u>	\$ <u>36,401</u>
<u>Expenditure Classification</u>			
Personal services	25,300	28,600	33,312
Employee related	3,500	3,900	5,400
Professional and outside services	6,100	11,400	10,500
Travel - instate	4,300	4,100	2,250
Travel - out of state	1,300	1,800	4,340
Other operating	11,000	12,600	13,175
Equipment	600	300	1,013
Other	<u> </u>	<u> </u>	<u>340</u>
Total expenditures	<u>52,100</u>	<u>62,700</u>	<u>70,330</u>
<u>Revenue Classification</u>			
Registration fees	30,150	29,985	48,155*
Examination fees	24,275	20,250	12,120
Penalty fees	280	370	1,230
Other	<u>2,409</u>	<u>1,243</u>	<u>1,141</u>
Total	57,114	51,848	62,646
Less 10%	<u>(5,711)</u>	<u>(5,185)</u>	<u>(6,265)</u>
90% Available	<u>51,403</u>	<u>46,663</u>	<u>56,381</u>
Ending fund balance	<u>\$52,438</u>	<u>\$36,401</u>	<u>\$22,452</u>

* The Board was granted an increase in annual license renewal fees from \$15 to \$35 for dentists and \$5 to \$15 for hygienists in June 1978. These increases were necessary to ensure that expenditures would not exceed the fund balance in fiscal year 1978-79.

The Office of the Auditor General expresses its gratitude to the members of the State Board of Dental Examiners and the Board's administrative staff for their cooperation, assistance and consideration during the course of our audit.

SUNSET FACTORS

THE OBJECTIVE AND PURPOSE IN ESTABLISHING THE BOARD

There is no explicit statement of objective or purpose in the dentistry statutes under which the Board was established. The Arizona Supreme Court commented:

"The purpose and the only justification of the various statutes regulating the practice of medicine in its different branches is to protect the public against those who are not properly qualified to engage in the healing art...." (Batty v. Arizona State Dental Board, 57 Ariz. 239, 254, 112 P. 2d 870 (1941)).

The Board in its budget request for 1979-80 stated:

"The Board protects the interests and the health and safety of citizens of Arizona by adoption and enforcement of State dental statutes and by resolving patient grievances through review, investigation, redress and disciplinary action."

THE DEGREE TO WHICH THE BOARD HAS BEEN ABLE TO RESPOND TO THE NEEDS OF THE PUBLIC AND THE EFFICIENCY WITH WHICH IT HAS OPERATED

The Board has not adequately responded to the needs of the public through the complaint review process. Almost 60 percent of the 96 respondents to an Auditor General questionnaire sent to complainants indicate that the Board has not adequately protected the public from incompetent or unethical dental practitioners. The average time to process a complaint during 1978 was over 195 days, which appears to be excessively long.

The operations of the Board have been conducted efficiently under the framework of the present statutes. However, with minor statute changes the Board's renewal process could be performed more efficiently. (page 64)

THE EXTENT TO WHICH THE BOARD
HAS OPERATED WITHIN THE PUBLIC
INTEREST

The State Board of Dental Examiners has not completely fulfilled its statutory responsibility to protect the citizens of Arizona from incompetent dental practitioners. (page 12)

The Board has not maintained an appearance of independence and objectivity in its dealings with the Arizona State Dental Association. Such a relationship gives the appearance of not being in the interest of the general public. (page 57)

According to a statement prepared by the Executive Secretary of the State Board of Dental Examiners* the Board has operated in the interest of the public in that the Board has:

- Made improvements in its complaint review process;
- Certified approximately 1,200 Dental Assistants to use X-ray equipment;
- Developed a program to evaluate those persons administering general anesthesia;
- Developed, but not yet adopted, a continuing education program for relicensure; and
- Developed a special examination for graduates of foreign dental schools.

In addition, individual board members:

- Spent ten to 21 days in 1978 administering examinations;
- Participated in 11 Board meetings plus conference calls;
- Participated in nine days of Western Conference of Dental Examiners and Dental School Deans and American Association of Dental Examiners meetings;
- Assisted the Office of the Attorney General and functioned as informal hearing officers;
- Appeared before legislative committees.

* Appendix IX is a complete text of this statement.

Overall it is estimated that Board members spend 20 to 45 days per year involved in Board business.

THE EXTENT TO WHICH RULES AND
REGULATIONS PROMULGATED BY THE
BOARD ARE CONSISTENT WITH
LEGISLATIVE MANDATE

The rules and regulations promulgated by the Board appear to be consistent with legislative mandate with one possible exception. The Legislature amended the dental statutes in 1974 and removed restrictions on the number of hygienists that can practice under a dentist's supervision. However, the Board reinstated a restriction on the number of hygienists that can practice under a dentist's supervision by regulation in 1976. (page 87) Further, the Board may not have promulgated rules and regulations as intended by the Legislature in that ARS 32-1235 gives the Board the authority to issue licenses by credentials, a policy which the Board has chosen not to follow.

THE EXTENT TO WHICH THE BOARD HAS
ENCOURAGED INPUT FROM THE PUBLIC
BEFORE PROMULGATING ITS RULES AND
REGULATIONS AND THE EXTENT TO WHICH
IT HAS INFORMED THE PUBLIC AS TO ITS
ACTIONS AND THEIR EXPECTED IMPACT
ON THE PUBLIC

The Board has been remiss in its duty to encourage public input and to inform the public of its actions. Our audit indicates that a large portion of the public is not aware that the Board exists. A majority of the registrants are not aware of proposed actions or scheduled Board meetings. (page 67)

THE EXTENT TO WHICH THE BOARD HAS
BEEN ABLE TO INVESTIGATE AND RESOLVE
COMPLAINTS THAT ARE WITHIN ITS
JURISDICTION

The Board has proven its ability to investigate and resolve complaints that are within its jurisdiction, however, the Board has shown an inclination not to resolve complaints in the best interest of the public. The Board attempts to arbitrate complaints rather than initiating appropriate disciplinary procedures. (page 12)

THE EXTENT TO WHICH THE ATTORNEY GENERAL
OR ANY OTHER APPLICABLE AGENCY OF STATE
GOVERNMENT HAS THE AUTHORITY TO
PROSECUTE ACTIONS UNDER THE ENABLING
LEGISLATION

The Attorney General's Office has the authority to prosecute actions under the enabling legislation. However, the Board has failed to bring to the attention of its Attorney General representative many cases which might warrant disciplinary action. (page 81)

THE EXTENT TO WHICH THE BOARD HAS
ADDRESSED DEFICIENCIES IN THE
ENABLING STATUTES WHICH PREVENT
THEM FROM FULFILLING THEIR
STATUTORY MANDATE

The Board has expressed a dissatisfaction with ARS 32-1263, subsection C which requires the Board to request an informal interview if information alleging unprofessional conduct is or may be true. The Board has ignored or has attempted to circumvent this provision rather than requesting that the provision be amended.

THE EXTENT TO WHICH CHANGES ARE
NECESSARY IN THE LAWS OF THE
BOARD TO ADEQUATELY COMPLY WITH
FACTORS LISTED IN THIS SUBSECTION

For a discussion of this issue see pages 56, 63, 66, 81 and 82.

FINDING I

THE STATE BOARD OF DENTAL EXAMINERS HAS NOT COMPLETELY FULFILLED ITS STATUTORY RESPONSIBILITY TO PROTECT THE CITIZENS OF ARIZONA FROM INCOMPETENT DENTAL PRACTITIONERS.

The State Board of Dental Examiners is responsible for investigating charges of misconduct on the part of persons licensed with the Board and imposing discipline upon any licensee who is guilty of unprofessional conduct, conviction of a felony or misdemeanor involving moral turpitude, or physical or mental incompetence to practice dentistry. Our review of the State Board of Dental Examiners revealed that the Board is not completely fulfilling its statutory responsibility to protect the citizens of Arizona from incompetent dental practitioners.

According to the Arizona Supreme Court:

"The purpose and the only justification of the various statutes regulating the practice of medicine in its different branches is to protect the public against those who are not properly qualified to engage in the healing art...." (Batty v. Arizona State Dental Board), 57 Ariz. 239, 254, 112 P. 2d 870 (1941).

In addition, ARS 32-1207(A)(8) requires the State Board of Dental Examiners to investigate consumer complaints against persons licensed with the Board and states:

"The board shall:....Investigate charges of misconduct on the part of licensees and persons to whom restricted permits have been issued...."

Finally, the Board in its budget request for fiscal year 1979-80 stated:

"The Board protects the interest and the health and safety of the citizens of Arizona by adoption and enforcement of State dental statutes and by resolving patient grievances through review, investigation, redress and disciplinary action." (Emphasis added)

According to the Board's Executive Secretary the Board has made a number of improvements in its complaint review process. Prior to 1974 the Board had no complaint review process.

The Executive Secretary stated that the following improvements have been made over the past few years:*

- 1) In 1974 the Board began using the Chiropractic Board's complaint form.
- 2) From 1974 through 1977 the Board, during its meetings, tried to resolve complaints that were filed and investigated by the Board office.
- 3) In 1978 regional complaint committees were formed to investigate consumer complaints, examine patients and report their findings to the Board.
- 4) The Board is in the process of:
 - Adopting guidelines for complaint review from a well established California peer review program.
 - Adding a lay person to each complaint review committee.

However, our review of the Arizona State Board of Dental Examiners' handling of consumer complaints revealed that the Board is not completely fulfilling its statutory responsibility to protect the citizens of Arizona against incompetent dental practitioners. The Board has consistently failed to adequately: 1) investigate allegations of substandard or incompetent professional care or unprofessional conduct on the part of dentists licensed by the Board, and 2) discipline dentists when allegations of substandard or incompetent professional care or unprofessional conduct have been substantiated.

* See Appendix IX for the complete text of this statement.

Failure To Adequately Investigate
Allegations Of Substandard Or Incompetent
Professional Care Or Unprofessional Conduct
On The Part Of Dentists Licensed By The Board

The State Board of Dental Examiners has established a process for investigating and resolving consumer complaints that is not in compliance with statutory requirements.

ARS 32-1263(A) defines the causes for which the Board may censure, prescribe probation, suspend or revoke the license of a person licensed by the Board and states:

- "A. The board may censure, prescribe probation or suspend or revoke the license issued to any person under this chapter for any of the following causes:
1. Unprofessional conduct.
 2. Conviction of a felony or of a misdemeanor involving moral turpitude, in which case the record of conviction or a certified copy thereof certified by the clerk of the court or by the judge in whose court the conviction is had shall be conclusive evidence.
 3. Physical or mental incompetence to practice his profession.

According to ARS 32-1201(10)* "Unprofessional conduct" includes:

- Use of drugs or alcohol to the extent that it affects the ability of the dentist or dental hygienist to practice his profession
- Gross malpractice or repeated acts constituting malpractice
- Any conduct or practice contrary to recognized standards of ethics of the dental profession or any conduct or practice which does or would constitute a danger to the health, welfare or safety of the patient or the public. (Emphasis added)
- Willfully causing or permitting a dental hygienist or dental auxiliary personnel operating under his supervision to commit illegal acts or perform an act or operation other than that permitted under the provisions of article 4 of this chapter and by the rules and regulations adopted by the board pursuant to section 32-1282.

* Appendix II is a full text of ARS 32-1201(10).

Arizona Revised Statutes 32-1263(B) through 32-1263(E) further define the Board's responsibilities in conducting investigations and imposing discipline upon those persons licensed by the Board as follows:

32-1263(B) "The board on its motion may investigate any evidence which appears to show the existence of any of the causes set forth in subsection A of this section, as grounds for censure, probation, suspension or revocation of a license. The board shall investigate the report under oath of any doctor of dentistry, the Arizona state dental association, any component society, or any other person, which appears to show the existence of any of the causes set forth in subsection A of this section as grounds for censure, probation, suspension or revocation of a license." (Emphasis added)

32-1263(C) "If, in the opinion of the board, it appears such information is or may be true, the board shall request an informal interview with the dentist or dental hygienist concerned." (Emphasis added)

32-1263(D) "Following the investigation, including such informal interview, if requested, and together with such mental, physical, or professional competence examination as the board deems necessary, the board may proceed in the manner hereinafter provided:...

2. If the board finds that the evidence obtained under subsections B and C of this section does not warrant suspension or revocation of a license but does warrant censure or probation, it may either:

(a) Issue a decree of censure.

(b) Fix such period and terms of probation best adapted to protect the public health and safety and rehabilitate and educate the dentist or dental hygienist concerned. Failure to comply with any such probation shall be cause for filing a complaint and holding a formal hearing as hereinafter provided in paragraph 3 of this subsection. (Emphasis added)

3. If the board finds that the evidence obtained under subsections issued under this chapter,...then a complaint shall be issued and formal proceedings for the revocation or suspension of such license shall be initiated." (Emphasis added)

32-1263(E) "If, after a hearing as provided in this section any of the causes for censure, probation, suspension or revocation shall be found to exist, the dentist or dental hygienist shall be subject to censure, probation, suspension of license or revocation of license or any combination of these and for such period of time or permanently and under such conditions as the board deems appropriate for the protection of the public health and safety and just in the circumstance."

The Board has established a process for investigating and resolving consumer complaints that provides for:

- Review of consumer complaints by "complaint committees" which were formed to assist the Board in processing and investigating complaints. These complaint committees are comprised of four practicing dentists. It should be noted that according to the Board's own guidelines established January 2, 1979, a lay member should be appointed to each complaint committee. As of August 31, 1979, no lay members had been appointed to the complaint committees.
- Dismissal of consumer complaints by complaint committees if the dentist who is the subject of the complaint agrees to make a refund or provide other restitution to the complainant but without holding an informal interview.
- Dismissal of consumer complaints by individual Board members without the approval of a quorum of the Board and without holding an informal interview.
- Dismissal of consumer complaints by the Executive Secretary of the Board without the approval of a quorum of the Board and without holding an informal interview.
- Refusal of the Board to hold an informal interview even though allegations of unprofessional conduct or incompetent work have been substantiated by the complaint committees.

According to the Legislative Council, in opinions dated June 14, 1979 and June 20, 1979, the above practices are not in compliance with the requirements of ARS 32-1263.A through 32-1263.E in that:

"...The dental board is not acting in accordance with Arizona Revised Statutes section 32-1263, subsection C if a representative of the board finds evidence of substandard care pursuant to a report filed with the board under oath by any doctor of dentistry, the Arizona state dental association, any component society, or any other person and the board does not conduct an informal interview...

The dental board is not acting in accordance with Arizona Revised Statutes section 32-1263, subsection D, paragraph 1 if one board member terminates the board's investigation of a complaint. Action by a majority of the board members is required....

The Dental Board must conduct an informal interview in response to a formal outside complaint involving possible substandard professional care....

It is inappropriate for the Dental Board to recommend fee refunds or restitution prior to holding at least an informal interview...."*

It should be noted that in 1978 the Board received 98 consumer complaints. As of July 31, 1979, 70 of these complaints had been resolved. However, the Board did not investigate and dispose of any of these 70 complaints in accordance with ARS 32-1263(A) through 32-1263(E).

Table 1 summarizes the disposition of those consumer complaints filed with the Board during 1978 and resolved as of July 31, 1979.

* Appendix I contains a full text of these Legislative Council opinions.

TABLE 1

SUMMARY OF THE DISPOSITION OF THOSE CONSUMER COMPLAINTS
FILED WITH THE BOARD AND RESOLVED AS OF JULY 31, 1979

Inappropriate Actions Taken To Dispose Of Complaints	Complaint Allegations						Total
	Other	Incompetent or substandard Treatment	Insurance Fraud	Fee Dispute	Refusal to Release X-Rays		
Complaint dismissed without 1) an investigation being performed, 2) an informal interview being held, or 3) a vote by a quorum of the Board.		5					5
Complaint dismissed without 1) a full* investigation being performed, 2) an informal interview being held, or 3) a vote by a quorum of the Board.		9		7			16
Complaint dismissed (even though an investigation indicated that substandard or inadequate dental care had occurred), without 1) an informal interview being held, or 2) a vote by a quorum of the Board.		13					13
Complaint dismissed without a vote by a quorum of the Board.	3	14	3	10	6		36
Totals	3	41	3	17	6		70

* Investigations were initiated; however, when the dentist agreed to make a refund or provide restitution the investigation was terminated.

The following cases illustrate the manner in which the consumer complaints summarized in Table 1 were resolved.

Case 1 - Dental Complaints 57-78, 61-78

Situation - Two complaints were filed against the same dentist within two weeks of each other in September 1978. Both complaints involved patients whose teeth had been extracted and whose subsequent dentures were uncomfortable and ill fitting. The complaint committee reports indicated there were numerous deficiencies in both sets of dentures, which caused them to be neither adequate nor functional. In both cases the complaint committee's opinion was that full denture service had not been necessary.

Board Action - The Board took no formal action in either case. The complaints were resolved by letters signed by the Board's Executive Secretary to the dentist in January 1979. The first letter recommended,

"...that the necessary corrections be made which appear to be an alveolectomy (removal of root fragments) and a full upper denture remake or a refund of fees be made. The Board feels that if the recommendations are not fulfilled they will find it necessary to initiate an informal interview, which is the first step in the disciplinary process."

The second letter recommended,

"...that you...either remake the denture or offer a full refund of fees."

Case 2 - Dental Complaint 69-78

Situation - A patient filed a complaint in October 1978 claiming that a dentist had overcharged him and was negligent in the extraction of a tooth. The complaint committee report indicates that the dentist removed the wrong tooth and left root fragments "with no apparent justification of surgical judgment." The report also states,

"We find treatment...to not in any way meet standards of quality dentistry, the charges seem excessive and the treatment grossly wrong."

Board Action - The Board took no formal action. A letter signed by the Board's Executive Secretary was sent to the dentist in March 1979 recommending that the dentist contact the complainant to resolve the matter and the complaint was closed.

Case 3 - Dental Complaint 22-78

Situation - The Board received a complaint in April 1978 charging a dentist with poor surgery procedures, improper diagnosis and substandard dental care. The complaint committee report indicates the dentist pulled teeth and placed crowns on teeth unnecessarily. As a result, the complainant required subsequent root canal treatment.

Board Action - The Board President wrote a letter to the dentist which outlined the following areas concerning professional judgement and treatment planning:

- "1. Some key posterior teeth with good periodontal health have been extracted, apparently without consideration for endodontic or other tooth saving treatment.
2. Arbitrary vertical dimension change on a patient with (the patient's) medical and dental history without benefit of trial splinting or other reversible procedure for diagnosis.
3. One appointment nearly full mouth tooth preparation under the circumstances of (the patient's) symptoms, signs and medical and dental history.
4. Need for full coverage on all teeth.
5. Fixed partial dentures with cantilevered pontics extended distally further than the mesial distal diameter of one bicuspid.
6. Crowning endodontically questionable teeth in a rehabilitative treatment procedure."

The letter also stated,

"Additionally, the Board is not in a position to intervene in the area of a professional's relations with patients. By statute definition, we may only adjudicate the professional's conduct, patient management or treatment."

It should be noted that the dentist under investigation agreed to cooperate with the complainant's subsequent dentist to resolve the problems in October 1978. However, the complainant responded to an Auditor General survey in April 1979 that:

"...to this date nothing has been resolved."

Case 4 - Dental Complaint 9-78

Situation - In January 1978, a complaint was filed against one of the Board members concerning dentures that were ill fitting and not functional. The complaint file indicates that the complaint committee never contacted the complainant or examined the dental work to determine whether or not it was substandard. The complaint committee report ended with this statement, "We don't feel it is our position to evaluate the work performed."

Board Action - The Board took no formal action. The complaint was resolved in May 1979, over 16 months after the complaint was filed, with a letter to the complainant stating that the dental care provided was adequate.

Case 5 - Dental Complaint 47-78

Situation - A complaint was filed with the Board claiming a dentist pulled teeth without waiting for the anesthesia to take effect and left massive bone spurs protruding from the gums causing the complainant physical and emotional trauma. The dentist made a refund of \$250 for a bill of \$195 and the complaint committee terminated its review. There was no indication that the committee had examined the patient or any subsequent x-rays to determine the extent to which the dental care provided was substandard.

Board Action - The Board took no formal action. The complaint was resolved with a letter to the complainant stating that since the dentist had issued a compensatory check the complaint would be considered closed.

The complainant responded to an Auditor General survey as follows:

"They (the Board) seem to try to placate the person who files the complaint with a refund of their money instead of attempting to remove the incompetent and unethical from practice. The quality of dental and medical care in this state is well below that of other places I have lived and tougher laws and greater effort to remove quacks from practice is needed."

As demonstrated in the above cases, the Board has not complied with ARS 32-1263(A) through 32-1263(E) in its investigation and ultimate resolution of consumer complaints. Further, the policy of dismissing complaints if a dentist agrees to provide a refund or other restitution to the complainant avoids the question of the competency of the dentist. According to the Legislative Council in an opinion dated June 20, 1979:

"If the evidence found by the board indicates that a possibility of substandard care exists, the issuance of a letter by the board requesting a fee refund does not satisfy the statutory requirements. In this situation the statutory mandate is clear. The board is obligated to make a written request for an informal interview...." *

Failure To Adequately Discipline Dentists
When Allegations Of Substandard Or Incompetent
Professional Care Or Unprofessional Conduct
Have Been Substantiated

The State Board of Dental Examiners has consistently failed to discipline dentists in spite of statutory requirements to do so. This policy has allowed dentists with numerous substantiated consumer complaints of incompetence or substandard care to continue affording dental services to the public.

* Appendix I contains a full text of this Legislative Council opinion.

Arizona Revised Statutes 32-1263(D) and 32-1263(E) prescribe the disciplinary options available to the Board and state that the Board may:

- 1) issue a decree of censure,
- 2) fix such period and terms of probation best adapted to protect the public health and safety and rehabilitate and educate the dentist,
- 3) suspend a license, or
- 4) revoke a license.

Disciplinary actions should be based upon the evidence obtained and as the Board deems appropriate for the public health and safety and just in the circumstance.

Our review of the Board has revealed that the Board has exercised those prescribed disciplinary options very infrequently. For example, from January 1, 1964 to December 31, 1978, the Board:

- Revoked only three licenses, none of which was the result of a dentist providing substandard care.
- Suspended only two licenses, for 60 days and 90 days, neither of which was the result of a dentist providing substandard care.
- Placed ten dentists on probation only one of which was the result of a dentist providing substandard care.
- Issued three decrees of censure none of which was the result of a dentist providing substandard care.

Further, not one of the 70 consumer complaints that were filed with the Board during 1978 and resolved as of July 31, 1979, resulted in the Board imposing any discipline on a dentist. (See Table 1, page 18)

Our review of consumer complaints filed with the Board revealed several instances of the Board not imposing any discipline on a dentist even in cases of substantiated allegations of substandard care. The following cases are illustrations of that policy.

Case 1 - Review of a 1977 Complaint

Situation - A complaint was filed in May 1977 charging a dentist with using improper procedures while performing a root canal which resulted in the loss of a tooth and considerable pain to the complainant. In June 1977, the Board determined that the dentist had acted properly. The Board reopened the complaint in March 1979 and, at the request of the complainant, a dentist representing the complainant was placed on the complaint committee. The complaint committee presented their findings at the July 14, 1979 Board meeting. The chairman of the complaint committee stated, "...ultimately it boiled down to the removal of the bridge being an error in judgment on the part of (the dentist). The committee found that the bridge should not have been removed and that access to the decay and the root canal could have been obtained through the crown."

Board Action - At its July 14, 1979 meeting, a Board member stated, "...the Board is being asked to be a malpractice panel and the Board should not act in that capacity." However, the Board's legal representative from the Attorney General's Office responded, "...the Board is in fact a panel that determines or sits in review of malpractice and if in review of this case there appears to be malpractice the Board should hold an informal interview in the matter." In spite of the advice of the Board's Attorney General representative, the Board voted not to hold an informal interview or initiate any type of formal disciplinary action. It should be noted that the Board's only public member was absent from this meeting.

Case 2 - Dental Complaint 21-78

Situation - A complaint was filed in April 1978 charging a dentist with improperly capping teeth, leaving the complainant in continual pain and discomfort. A complaint committee report stated,

"The preparation, fit (and) cementation of the cappings was inadequate, especially considering that only 16-18 months have elapsed since treatment."

The dentist agreed to make a refund and the complaint review was terminated in July 1978.

Board Action - The Board has taken no formal action.

It should be noted that the dentist did not make a refund and in January 1979 a letter was sent by the Board to the dentist stating the only alternative to a refund would be an informal interview. However, as of July 31, 1979, the refund had not been made and the Board had not voted to hold an informal interview. The Executive Secretary stated the reason for the lack of action was that the complainant had filed a civil suit and the Board was awaiting the decision of the court. This appears to be inappropriate in that the decision of the court should have no bearing on any decision made by the Board. Further, the Board voted on February 27, 1979, to hold an informal interview with the same dentist regarding a subsequent complaint. However, the Board has not scheduled that informal interview as of July 31, 1979.

The Board's policy of not imposing discipline applies not only to those dentists that have one or two consumer complaints filed against them but to dentists with numerous consumer complaints filed against them as well. The following three cases are clear examples of the Board's consistent reluctance to impose discipline on a dentist in spite of numerous allegations of incompetence, substandard treatment or unprofessional conduct.

Case 1

From May 13, 1978 to August 14, 1979, the Board received 47 consumer complaints against the same dentist. After the eighth consumer complaint the Board voted to hold an informal interview. After the 24th consumer complaint, the Board placed the dentist on probation. After the 42nd consumer complaint, the Board voted to hold a formal hearing, however, as of August 31, 1979, no date has been established for that hearing.

The following is a synopsis of these 47 consumer complaints and the resultant Board action or inaction.

May 13, 1978

Complaint Number 1 - The complaint alleged that dentures prepared by the dentist were inadequate and the dentist's behavior was abusive. The complaint stated, "(the dentist) grabbed my arm, tried to force me into the chair, and when I didn't sit, he grabbed my jaw -as he had a few times before - to try to force me to put the things in my mouth again." It should be noted that the dentist responded to a complaint committee inquiry stating "No...we do not grab them by the arm an(sic) force them to take the teeth. Not yet anyway."

Board Action - None

May 23, 1978

Complaint Number 2 - The complaint alleged that dentures prepared by the dentist caused sores on the complainant's gums, despite seven office calls for adjustments. The complaint stated, "What I have is a very sore mouth (and) a tongue that is so sore from a bite that I have a problem talking, eating or even drinking. The dentures I have do not fit as well as the ones they replaced. I can't afford to just throw the price I paid away."

Board Action - None

June 30, 1978

Complaint Number 3 - The complaint alleged that dentures prepared by the dentist were not functional, causing the complainant pain, and preventing him from eating. Another dentist examined the dentures and advised the complainant to take them back and ask for a refund. The dentist became abusive when the complainant returned for a refund. The complaint stated, "But for God's sake please stop him from taking advantage of some poor person who doesn't know when they have been taken to the cleaners."

Board Action - None

July 19, 1978

Complaint Number 4 - The complaint alleged that the dentist's behavior was abusive and the dentures prepared by the dentist were inadequate. The complaint stated, "He put the top ones in my mouth and I just moaned with pain. I told him they did not fit. He put them back in my mouth and I moaned again." The complainant returned to pick up the finished dentures and the complaint stated, "...when (the dentist) put the top one in my mouth it felt like my gums were being torn apart....Then he put the bottom ones in, they felt like they were coming out in my jaw, the teeth were away from my gums. I could feel a breeze coming in between my gums and teeth....He told me I would have to get used to them. I said I could never get used to them. He just took the dentures out of my mouth, threw them in the waste basket. Handed me my teeth and told (the receptionist) to get rid of her."

Board Action - None

August 3, 1978

Complaint Number 5 - The complaint alleged that dentures prepared by the dentist were painful to wear and did not fit correctly. The complaint stated, "I went there expecting to get a set of custom made dentures, instead they gave me a set of pre-made horse teeth."

Board Action - None

September 25, 1978

Complaint Number 6 - The complainant is 83 years old, retired and on a reduced income. The complaint alleged that dentures prepared by the dentist were much larger than the complainant's previous set and irritated the gums "so that open sores developed." The complainant also stated, "(I) could not enjoy a meal as they were so loose they danced around in my mouth and food gathered underneath so that I was in misery trying to chew."

Board Action - None

September 29, 1978

Complaint Number 7 - The complaint alleged that the dentist made a lower partial which was very loose and caused the complainant's mouth to become sore. When the complainant returned for the second adjustment the dentist became rude. The complaint stated, "I said that we could call the B.B.B. and he (the dentist) said he did not give (a) (deleted expletive) if we called President Carter and walk(ed) out. Came back. I tried to tell him about my discomfort and sores. He told me to open my (deleted expletive) mouth and said he would make them so tight I would not be able to take them out....I told him that we were on low income and could not afford to lose \$185 and not (be) able to wear the partial, but he told me to go to somebody else." The complaint also stated, "I will not go back to (the dentist) again. I am afraid of him. If nothing comes out of this complain(t) I do hope no one else will have to go through with (the dentist) what I went through."

Board Action - None

September 21, 1978

Complaint Number 8 - The complaint alleged that the dentures prepared by the dentist were of poor workmanship, impossible to fit and painful even when talking. The complaint stated, "(the dentist) got mad when he had filed them down and I told him they hurt and looked terrible." The complaint also stated, "He is a detriment to the dental society in general." It should be noted that the complainant received a satisfactory set of dentures from another dentist.

Board Action - None

September 30, 1978

Board Action - The Board voted to hold an informal interview based on the previous eight complaints.

October 3, 1978

Complaint Number 9 - The complaint alleged that dentures prepared by the dentist did not fit. The complaint stated, "They are so much smaller than my old set of dentures that when I try to wear them my nose and chin almost meet and my mouth puckered."

Board Action - None

October 20, 1978

Complaint Number 10 - The complaint alleged that dentures prepared by the dentist did not fit and that the dentist relined the dentures in a sloppy manner.

Board Action - None

December 13, 1978

Complaint Number 11 - The complaint alleged that the dentist became rude when the complainant told him that the dentures hurt. The complaint stated, "The new teeth are so dull that I cannot even bite off a piece of bread, let alone meat."

Board Action - None

December 13, 1978

Complaint Number 12 - The complaint alleged that dentures prepared by the dentist were not functional. The complaint stated, "I am 78 years old, on Social Security, and to pay \$255 for teeth I can't even use seems very unfair."

Board Action - None

December 13, 1978

Complaint Number 13 - The complainant was dissatisfied with the aesthetics of a lower plate. Complainant cancelled the check written as a deposit on the plate and did not return to the dentist's office.

Board Action - None

December 14, 1978

Complaint Number 14 - The complaint alleged that dentures prepared by the dentist were causing pain and were not functional. The complaint stated, "After weeks and then months of pain and misery trying to use them I had to give up, due to pain, plus the fact I didn't eat one single meal with comfort, and lived mainly on soup and soft boiled eggs." It should be noted that the complainant now has dentures made by a denturist "and they fit perfect."

Board Action - None

December 19, 1978

Complaint Number 15 - The complaint alleged that dentures prepared by the dentist were not centered properly and could not be worn. The complaint stated, "I've been wearing false teeth since World War II and have had several pair made during that time. These are the most crudely made, the most ill-fitting and the poorest craftsmanship of any I've had or seen."

Board Action - None

December 19, 1978

Complaint Number 16 - The complaint alleged that dentures prepared by the dentist were not fitted properly and the dentist's behavior was unprofessional. The complaint stated, "I told him what I thought was wrong and he told me 'You seem to know more than me' and every visit he was very sarcastic and even told me to fix them myself. Keeps telling me the dentures are perfect - upon last visit I was telling him I can't stand to wear them any longer - that I can not chew food and have sores all over, I've lost 6 pounds trying for 5 weeks to get used to them."

Board Action - None

January 12, 1979

Complaint Number 17 - The complaint alleged that dentures prepared by the dentist did not fit. The complaint stated, "I think this dentist should be made (to) pay the poor peoples money back to them are at least what is right because he did a very poor job. I am on Social Security and do not have money to give away." The complainant took the dentures to another dentist and, "...he looked at them and said he had seen Bad Jobs but this was the worst one he had ever witnessed."

Board Action - None

January 17, 1979

Complaint Number 18 - The complaint alleged that the dentist's behavior was abusive and the dentures prepared by the dentist caused "nothing but pain." The complaint stated, "I went back for five adjustments. The fourth time he reduced me to tears by his manner. The fifth and last time his manner had not improved and his repeating again and I quote 'I don't know what to do except send you for surgery. Your mouth is beat to hell!'" It should be noted that another dentist made a set of dentures which fit the complainant without requiring any surgery.

Board Action - None

January 26, 1979

Complaint Number 19 - The complaint alleged that dentures prepared by the dentist were causing sore spots and were not functional.

Board Action - None

January 26, 1979

Complaint Number 20 - The complaint alleged that dentures prepared by the dentist were ill-fitting. The complaint stated, "I am on Social Security and a widow, and can't afford this kind of loss...I feel that there are a lot of other people like myself, 'being taken' but feel ashamed to admit it." The complaint also stated, "I have had another dentist look at the teeth and the fit, and they were astonished that anyone would put that kind of work out at 'any price'."

Board Action - None

January 29, 1979

Complaint Number 21 - The complaint alleged that dentures prepared by the dentist were inadequate and the dentist's behavior was abusive. The complaint stated, "When it became evident to me that the situation was hopeless I told him that I would not be able to accept them, he appeared to become very angry and threw them in the garbage can and told me there was no one coming into his place and telling him how to run his business...The receptionist retrieved them from the garbage can, rinsed them off, and was explaining their appearance to us when the dentist came in and found us there. He began cussing and swearing at us and told the receptionist that I had used up my appointment and if I wanted anything more I would have to make another appointment."

Board Action - None

February 5, 1979

Complaint Number 22 - The complaint alleged that dentures prepared by the dentist were not functional. The complaint stated, "they flip and allow food to get between the lower plate and gums. A week later I made an appointment to have this corrected. The denture was never taken out of my mouth and (the dentist) told me 'that was the best they would ever fit' and he walked out of the room in a fit of temper...."

Board Action - None

February 5, 1979

Complaint Number 23 - The complaint alleged that dentures prepared by the dentist were ill-fitting and the dentist's behavior was rude. The complaint stated, "I called him again on January 25, 1979 and explained again the upper teeth were too long, and I couldn't eat or even drink liquids without choking....He left the phone when I was still trying to tell him how they were affecting my health."

Board Action - None

February 9, 1979

Complaint Number 24 - The complaint alleged that dentures prepared by the dentist were not functional, were too large, and caused pain "all the time."

Board Action - None

February 27, 1979

Board Action - An informal interview was held on February 9, 1979, and based on the interviewing officer's report the Board voted to place the dentist on probation. It should be noted that one of the terms of probation stated, "That every effort be made to manage complaints in the office in order that the inordinate amount of complaints cease."

February 28, 1979

Complaint Number 25 - The complaint alleged that the lower plate did not fit properly. The complainant took the plate to a dental lab and was told "it was just a piece of junk."

Board Action - None

April 4, 1979

Complaint Number 26 - The complaint alleged that dentures prepared by the dentist caused his whole mouth and tongue to swell. Also, when he returned to the dentist's office he was told that the dentures were a perfect fit.

Board Action - None

April 3, 1979

Complaint Number 27 - The complaint alleged that the dentist's behavior was abusive and the dentures prepared by the dentist would not fit. The complaint stated, "I tried to tell him they hurt my gums, and one tooth that wasn't right and did not fit right and every time I would start to tell him about it he would yell at me that I wasn't giving them a chance. So I told him I couldn't wear them and he would yell at me, and grab his head and say Jesus, and walk out of the room, saying, I can't talk to that woman, then he would come back in, and when I tried to talk he would do the same thing, grab his head and walk out. I thought he was going to slap me."

Board Action - None

April 21, 1979

Complaint Number 28 - The complaint alleged that dentures prepared by the dentist were inadequate and not fitted properly. It should be noted that the complainant took the dentures to another dentist and was told, "I don't know what you paid for them but whatever it was it was way too much."

Board Action - None

April 21, 1979

Complaint Number 29 - The complaint alleged that dentures prepared by the dentist were very uncomfortable. The complaint stated, "I complained that my mouth was getting worse from pain. He asked me to come in for (an) adjustment which I did...he made a minor adjustment which was no help." The complaint also stated, "I have now reached the conclusion that it is useless to try to obtain satisfactory service from (the dentist) and in making this complaint it will spare someone else a similar treatment."

Board Action - None

April 23, 1979

Complaint Number 30 - The complaint alleged that: 1) dentures prepared by the dentist were received approximately October 20, 1978, 2) the complainant returned numerous times for adjustments, 3) the dentures never fit properly, and 4) the complainant returned for a reline in early April 1979. The complaint stated that after the reline, "Pieces were breaking off them before I got home. They still have my mouth sore so I am not satisfied with his work at all."

Board Action - None

April 24, 1979

Complaint Number 31 - The complaint alleged that dentures prepared by the dentist were not properly fitted and that the dentist had left a circular cut in a plate while grinding which irritates his mouth.

Board Action - None

May 9, 1979

Complaint Number 32 - The complaint alleged that the upper plate made by the dentist did not fit. The complaint stated, "I told him (the dentures) were too wide and did not match up with my bottom partial bridge. He in turn ground my lower bridge and tried to bend it to fit and on four occasions made it worse each time, until my mouth was so sore I could no longer wear the teeth."

Board Action - None

May 4, 1979

Complaint Number 33 - The complaint alleged that dentures prepared by the dentist were inadequate and the dentist's behavior was very rude and uncalled for. The complaint stated, "I said I can't chew and choke on my food - had a locked jaw and earache - he said (deleted expletive) He acted like a madman waving his arms in the air and shouting." The complaint also stated, "I hope this may help some other senior citizen on a limited income as we are."

Board Action - None

May 28, 1979

Complaint Number 34 - The complaint alleged that dentures prepared by the dentist are ill-fitting and not functional. The following statements were excerpted from the complaint:

1. "When food is taken, the lowers float off into the food, with the exception of mashed potatoes. This is horrible in public and also hurts whenever it touches the gums."
2. "The shape of the teeth also was so jagged you had to hold your tongue motionless to keep from scraping it."
3. "As a retired person on Social Security I cannot afford to pay for dentures I cannot use, and all I got was a sore mouth."
4. "(the dentist)'s way of doing business reminds me very much of Bugs Bunny."

It should be noted that the complainant received a set of dentures from another dentist that "fit fine."

Board Action - None

June 1, 1979

Complaint Number 35 - The complaint alleged that the dentures prepared by the dentist in September 1978 were ill-fitting and inadequate. The complaint stated, "Now the teeth in the partial are worn down and I am chewing on the silver. I don't think it's right."

Board Action - None

June 19, 1979

Complaint Number 36 - The complaint alleged that the dentures were not fitted correctly despite five office visits for adjustments. The complaint stated, "I am on Social Security, I can't just throw my money away on something like this. The complaint also contained a newspaper article which stated in part:

"The irritation to mouth tissues, including the tongue and lips, that can result from wearing illfitting dentures can set the stage for oral cancer, they (dentists) caution.

In addition, dentures that fit poorly do not permit the proper chewing of food. As a result, food is swallowed when only partly masticated, leading to digestive upsets and sometimes even choking, dentists say.

The inability to chew food properly can lead to the avoidance of solid food, resulting in malnutrition, dentists also say."*

Board Action - None

June 25, 1979

Complaint Number 37 - The complaint alleged that the dentures prepared by the dentist did not fit and were totally unacceptable. The complainant had another dentist evaluate the dentures.

The second dentist stated, "My opinion is that the dentures are of a poor quality and that the service should be dramatically improved."

The complaint also stated, "I hope you can prevent this happening to others."

Board Action - None

June 17, 1979

Complaint Number 38 - The complaint alleged that the dentures prepared by the dentist were inadequate and ill-fitting and the dentist's behavior was rude. The complaint contained the following statements:

1. "He kept hitting my top lip and telling me to relax. I couldn't because it felt like the piece of skin that connects my lip to my gum was being cut off."
2. "I had gotten so mad and upset that it brought on a colitis attack which lasted quite a few days."

* DeVries, Julian. "National Dental Association Warns Against Prefabricated False Teeth," The Arizona Republic, April 12, 1979.

3. "When he was satisfied with the fit, I told him they were still too long and cut into the back of my mouth. He said my old ones were too short and I'd get used to these."
4. "I haven't been back and I don't intend to see him again. I would still like to have my \$50.00 back and I don't feel he should be a licensed Dentist."

June 23, 1979

Complaint Number 39 - The complaint alleged that: 1) the complainant put down a \$50 deposit for a set of dentures after a brief examination, 2) checked into the dentist's background by calling the Better Business Bureau and the Dental Association, 3) stopped payment on the check and cancelled his appointment for the following day, and 4) the dentist threatened to institute proceedings to collect the \$50 deposit.

Board Action - None

June 25, 1979

Complaint Number 40 - The complaint alleged that the dentist was very rude and that the dentures did not fit. The complaint stated, "I don't want a lot of trouble over this but I do want my money refund(ed) because I have save(d) for a long time so I could get these teeth."

Board Action - None

July 5, 1979

Complaint Number 41 - The complaint alleged that partial dentures prepared by the dentist would not fit and were causing sores despite five return visits for adjustments. The complaint stated, "He told me I would have to learn to chew differently and that I may be one of those people who would never be able to get used to wearing dentures. I told him I have worn dentures for thirteen years."

Board Action - None

July 7, 1979

Complaint Number 42 - The complaint alleged that dentures prepared by the dentist were ill-fitting and caused her gums to swell and hurt.

Board Action - None

July 11, 1979

Complaint Number 43 - The complaint alleged that the dentist's behavior was unprofessional and the dentures prepared by the dentist did not fit. The complaint stated, "He came out of his office like a mad man. He never listened to me. I tried to tell him that he could keep the \$50 deposit and give me back the rest. He never listened to me or heard a word I said. At first he claimed I'd never been in there - didn't know me. He was just ranting and raving."

Board Action - None

July 14, 1979

Board Action - The Board voted to hold a formal hearing.

August 13, 1979

Complaint Number 44 - The complaint alleged that the occlusion of the dentures was not proper, the dentures were ill-fitting and the dentist's behavior was rude. The complaint stated, "When he repaired the crack in the uppers he took my lower partial and ground the four front false teeth so that cosmetically, they were much shorter than the adjacent teeth giving a wolfish fang-like look. The uppers are also slanted way up to the left and abnormally too low on the right."

Board Action - None

August 14, 1979

Complaint Number 45 - The complaint alleged that dentures prepared by the dentist were ill-fitting and not functional. The complaint stated, "I haven't eaten a solid piece of food since getting these dentures. I have lost weight rapidly and is getting weak and unsteady."

Board Action - None

August 14, 1979

Complaint Number 46 - The complaint alleged that dentures prepared by the dentist lacked proper occlusion and were ill-fitting. The complaint stated, "In the thirty-five (35) years of wearing dentures I have never had the problems that (the dentist)'s dentures were giving me."

Board Action - None

August 14, 1979

Complaint Number 47 - The complaint alleged that dentures prepared by the dentist were ill-fitting and caused "great pain" despite five or six visits for adjustments.

Board Action - None

Case 2

From October 15, 1975 to January 8, 1979, the Board received 15 consumer complaints against dental clinics owned and operated by the same dental corporation. The consumer complaints alleged that the level of professional care was substandard and/or that dental auxiliaries* were performing unauthorized duties. The Board held an informal hearing on the 8th, 9th and 10th consumer complaints which dealt only with the use of dental auxiliaries. An informal hearing was not held by the Board to investigate any of the allegations of substandard care. The Board did not impose any discipline on the dentist named in the consumer complaints. The following is a synopsis of these 15 consumer complaints and the resultant Board action or inaction.

October 15, 1975

Complaint Number 1 - The complaint alleged that the dentures were very painful and did not fit properly. The complaint stated, "I'm very nervous, and have lost weight, as I can not eat anything yet, except soft foods."

Board Action - A letter from the Board's Executive Secretary to the complainant stated, "I regret that from the material presented in the letter we can take no action." It also stated, "Generally the things you mention are matters for civil courts to determine and I might suggest you obtain the advice of an attorney to determine your legal standing in respect to the implied contract you have with the doctor."

* Dental auxiliaries, as used in this report, refers to dental assistants, dental hygienists, dental technicians and denturists.

February 1, 1976

Complaint Number 2 - The complaint alleged that the dentures received were ill-fitting and caused the complainant's face and gums to become swollen.

Board Action - No disciplinary action was taken. A letter from the Board's Executive Secretary to the complainant stated, "I wish to assure you that this agency that was created to serve the public's interest is not indifferent to your plight." The same letter stated, "I am afraid there is no agency that can help you unless you went to the Legal Aid Society or Lawyers' Referral. Both agencies are designed to aid persons in legal matters."

August 9, 1976

Complaint Number 3 - The complainant alleged that a dental plate received from the dentist cracked after less than two months use and that the dentist refused to have it remade.

Board Action - No disciplinary action was taken. A letter from the Board's Executive Secretary to the complainant stated, "As I indicated on the telephone, it takes more than one or two complaints about a dentist in order to have a hearing on incompetency and we will keep your complaint on file pending receipt of others of like nature."

September 22, 1976

Complaint Number 4 - The complaint alleged that a partial plate repaired by the dentist was not repaired correctly, kept falling out and was not satisfactory.

Board Action - No disciplinary action was taken. A letter from the Board's Executive Secretary to the complainant stated, "charges of incompetency against a professional requires more than one complaint in order to conduct a hearing in the matter. We will retain your complaint in the files pending receipt of others."

November 23, 1976

Complaint Number 5 - The complaint alleged that the dentures were not fitted properly. The complaint stated, "Hence I also lost considerable weight as I was not able to chew with them." It should be noted that the complainant was subsequently fitted "comfortably" and "satisfactorily" with dentures by a private dental laboratory technician.

Board Action - No indication of any action.

January 22, 1977

Complaint Number 6 - The complaint alleged that the dentures were ill-fitting and caused pain while eating despite approximately 12 return visits for adjustments.

Board Action - There was no indication that the Board ever responded to the complaint. However, a letter from the Board's Executive Secretary to the dentist stated, "The Board has asked me to write to you to advise you that perhaps you might re-establish communication with (the patient) to try and resolve the situation. We all realize particularly at this time that dentistry does not need vocal critics especially in the area of dentures." (Emphasis added)

March 27, 1977

Complaint Number 7 - The complaint alleged that proper treatment was not received from the dentist when a "dry socket" occurred after a tooth was extracted. The complainant made an appointment with another dentist to have the pain alleviated.

Board Action - No disciplinary action was taken. A letter from the Board's Executive Secretary to the complainant stated, "Perhaps in view of this complaint, the dentists in (the dentist)'s office will go to greater lengths to explain their treatment plans and especially when these special problems occur."

March 28, 1977

Complaint Number 8 - The complaint alleged that the dentures caused "excruciating pain" despite a series of office visits for adjustments. The complaint also alleged that dental auxiliaries, not dentists, were adjusting the dentures.

Board Action - See Complaint Number 10

July 9, 1977

Complaint Number 9 - The complaint alleged that the dentures did not fit properly. The complaint also alleged that dental auxiliaries, not dentists, were adjusting the dentures.

Board Action - See Complaint Number 10

August 8, 1977

Complaint Number 10 - The complaint alleged that the dentures did not fit and were not functional. The complaint also alleged that dental auxiliaries, not dentists, were adjusting the dentures. It should be noted that the complainant also requested assistance from the Maricopa County Legal Aid Society. This agency sent a letter to the Board of Dental Examiners which stated, "Where several such persons come to our office with essentially similar claims against a single person, for a time period covering less than two years of practice, it would appear that the problem would be one to which the Board might give more weight than an isolated denture complaint."

Board Action on Complaint Numbers 8, 9 and 10 - An informal interview was held for complaints 8, 9 and 10. The Board did not retain a copy of the transcript of the interview. However, the interviewing officer did prepare a one-page summary of the interview. The issue of substandard dental care does not appear to have been addressed in the interview based on the officer's summary. The main issue addressed was lack of proper supervision over auxiliaries. One other issue was discussed as evidenced by this statement in the interviewer's report, "The fact that (the dentist) has had more complaints than anyone in the state registered with the Dental Board was discussed and (the dentist) stated that he was proud of his service and that he simply had a very large practice." The Board voted to censure the dentist based on the interviewing officer's report.

November 17, 1977

Complaint Number 11 - The complaint alleged that the upper partial plate did not fit and was never properly adjusted. The complaint also alleged that the dentist's clinic was "engaged in unethical and fraudulent conduct which is dangerous to the people of Arizona."

Board Action - The complaint committee could not determine the validity of the patient's complaint. There is no indication in the complaint file that the complainant was notified of the resolution of the complaint.

May 8, 1978

Complaint Number 12 - The complaint alleged that the dentures caused the complainant's mouth to become sore and were ill-fitting. It should be noted that the complainant received a set of dentures which "fit perfectly" from a denturist.

Board Action - The complaint committee found numerous inadequacies in the dentures and determined that the biggest problem was that the complainant and dentist could or would not work together. No disciplinary action was taken.

May 5, 1978

Complaint Number 13 - The complaint alleged that the dental plate was inadequate and caused the complainant's mouth to become sore and swollen. It should be noted that the complainant received a plate from a denturist which "fit perfect."

Board Action - The complaint committee found numerous deficiencies in the plate and stated, "The denture was not in our opinion satisfactory and the patient has a legitimate complaint." It should be noted that no disciplinary action was even initiated.

July 6, 1978

Complaint Number 14 - The complaint alleged that the dentures did not fit properly and that the dentist was rude.

Board Action - The complaint committee determined that the treatment was proper.

January 8, 1979

Complaint Number 15 - The complaint alleged that the dental care performed was inadequate and that a partial was not properly fitted.

Board Action - The complaint committee determined that the dental care provided was less than adequate and the partial was unacceptable. It should be noted that no disciplinary action was initiated.

Case 3

From July 15, 1976 to August 23, 1979, the Board received 15 consumer complaints against several dental clinics owned and operated by the same dental corporation. Not only has the Board not imposed any discipline on this dentist but it has failed to hold an informal interview to determine what action if any it should take. The following is a synopsis of these 15 consumer complaints and the resultant Board action or inaction.

July 15, 1976

Complaint Number 1 - The complaint alleged that: 1) the dentures provided were ill-fitting, 2) despite 18 office visits the dentures were never properly adjusted, and 3) the complainant lost 20 pounds during this time. It should be noted that the complainant did receive dentures which fit properly from another dentist.

Board Action - The Board initiated no investigation or disciplinary action.

August 9, 1976

Complaint Number 2 - The complaint alleged that the dentist's diagnosis involved overtreatment. The complaint also alleged that a second dentist was consulted using the first dentist's x-rays and the second dentist diagnosed nine fewer cavities.

Board Action - There is no indication that any action was taken by the Board.

November 16, 1976

Complaint Number 3 - The complaint alleged that the dentures provided were ill-fitting despite two visits for adjustments. It should be noted that the complainant did receive a satisfactory set of dentures from one of the "new denture specialists" (a denturist).

Board Action - The Board initiated no investigation or disciplinary action. It appears that the complaint was closed when two members of the dentist's staff agreed to try to satisfy the complainant.

December 14, 1976

Complaint Number 4 - The complaint alleged that the dental plates provided were nothing more than temporary plates.

Board Action - The Board initiated no investigation or disciplinary action. The Board did send a letter to the dentist's office which stated, "We have received additional complaints concerning each of (the dentist's) offices." The letter also indicated that no action would be taken until the dentist's office "had an opportunity to try and come to some mutual understanding with the patients."

July 9, 1977

Complaint Number 5 - The complaint alleged that the dentures provided did not fit despite six return visits for adjustments and that the dentist was very rude.

Board Action - The Board did not initiate any disciplinary proceedings. There is no indication that the Board informed the complainant of the resolution of the complaint.

March 25, 1978

Complaint Number 6 - The complaint alleged that the dentures provided were very unsatisfactory and were never properly fitted despite numerous visits for adjustments. It should be noted that the complainant received a set of dentures from another dentist which fit correctly and are of much better quality.

Board Action - The Board had not resolved the complaint as of August 23, 1979.

May 25, 1978

Complaint Number 7 - The complaint alleged that the dentures provided were inadequate and did not fit despite numerous visits for adjustments.

Board Action - The Board did not take any disciplinary action. A letter from the Board's Executive Secretary to the complainant revealed that the complaint was closed after the dentist made a full refund.

August 18, 1978

Complaint Number 8 - The complaint alleged that a partial was ill-fitting and that the dentist failed to diagnose periodontal disease. The complaint also alleged that surgery was required and a new plate was necessary.

Board Action - The Board took no action after the complaint was withdrawn. There is no indication of the reason that the complaint was withdrawn.

December 4, 1978

Complaint Number 9 - The complaint alleged that the treatment plan was improper and the materials and workmanship were of questionable quality. The complainant had another dental office re-do much of the work.

Board Action - The Board did not take any disciplinary action.

December 13, 1978

Complaint Number 10 - The complaint alleged that the dentures are ill-fitting and are causing sore spots on the complainant's jaw.

Board Action - The Board did not take any disciplinary action. A letter from the Board's Executive Secretary to the complainant indicated that the complaint was closed because "an appointment was made for you on...with (the dentist against whom the complaint was filed) in an effort to resolve the issue and that you chose not to pursue the matter."

January 15, 1979

Complaint Number 11 - The complaint alleged that an immediate partial prepared by the dentist was ill-fitting, inadequate and not properly adjusted. The complaint also alleged that the discomfort caused the patient to not wear the partial. The report also indicated that after the complaint was filed the dentist made a new partial plate satisfactory to the patient.

Board Action - None

March 19, 1979

Complaint Number 12 - The complaint alleged that the dentures caused the complainant's mouth to hurt and gums to bleed despite numerous return visits for adjustments. The complaint committee determined that the dentures were not acceptable in their present condition.

Board Action - A letter from the president of the Board to the dentist recommended that the patient be contacted as soon as possible to resolve this matter. No disciplinary action was initiated.

May 1, 1979

Complaint Number 13 - The complaint alleged that the dentures prepared by the dentist were totally useless.

Board Action - The Board has not taken any disciplinary action. A letter from a Board member to the complainant advised, "...that (the dentist's) office should have an opportunity to correct any problem that was created in the process of making the denture prior to carrying the complaint any further."

July 1, 1979

Complaint Number 14 - The complaint alleged that the dentures prepared by the dentist did not fit in spite of several office visits for adjustments.

Board Action - The complaint is being reviewed by the complaint committee.

Complainant Dissatisfaction With
The Board's Complaint Process

The Office of the Auditor General surveyed 130 people who had filed complaints with the Board from January 1978 to March 1979 to assess their satisfaction with the Board's handling of their complaint. The results of this survey revealed a widespread dissatisfaction with the Board's complaint process. Nearly 60 percent of those persons responding to the survey felt that the Board had not adequately protected the public from incompetent or unscrupulous dental practitioners. Those complainants that were dissatisfied with the Board's complaint process generally expressed reservations about the Board's ability to arbitrate consumer complaints objectively. Complainant comments included the following:

"Very few complainants can receive a fair and impartial hearing before a Board that has a built-in conflict of interest, whose dental members know most of the defendants named in the complaints, and in (an) arena where it is difficult to get one dentist to testify against another."

"It should be handled by somebody or group who are impartial from the Dental Association."

"A request for an examination should be given. Poor work certainly cannot be determined by letter. Both parties should be afforded the same courtesies."

"I believe if you want a satisfactory decision made as to the experience the public are having with the dental practitioners you should have a board of NON-DENTISTS to handle the complaints."

"There are many other victims in my position who do not have the means to fight back therefore are left to have to suffer the consequences with no relief or help."

"I feel the dentists do not honestly monitor their own society."

"As far as I'm concerned the Dental Board is nothing but a farce filled with Dentists looking out for other Dentists."

"I believe the examiners are not tough enough. They should be an independent body. I think they are afraid to do anything against one of their own kind."

"The Board should be composed of at least half lay people. Since it is impossible to take legal action against dentists due to the reluctance of dentists to testify against each other."

"...I know I would never call them again."

"A Dentist investigating a Dentist? (Birds of a feather flock together)"

Public Membership On

Professional Boards

Dr. Benjamin Shimberg, a recognized authority on occupational regulation, addressed the issue of public participation in the regulatory process in a recent Council of State Governments publication*. The following section of the booklet discusses public representation on regulatory boards as one method of enhancing the effectiveness of disciplinary procedures.

"For many years, trade and professional groups fostered the idea that only members of their own occupational group were qualified to make judgments about entrance standards, examination content, or disciplinary matters. This professional mystique argued that the public had no role to play in the regulatory process.

In recent years this view has been challenged. Consumers now argue that since regulation affects their vital interests, they have a right to share in the decision-making process. They point out that every day laymen legislators and jurors must make decisions in highly technical areas. They are able to do so by utilizing the testimony of experts to set forth the facts and clarify the issues.

There has been a growing movement to place public members on regulatory boards to ensure that there will be input from groups other than those representing the regulated occupation. Those who favor the idea believe that the presence of public members will help to break up the in-group psychology that often prevails when all board members are practitioners. Ideally, public members will provide a point of view otherwise absent on a board composed solely of license holders.

* Shimberg, Benjamin, and Roederer, Doug, Occupational Licensing: Questions a Legislator Should Ask. Lexington, Kentucky: Council of State Governments, 1978.

Initial experience with public members often was not favorable because those appointed lacked the qualifications for effective service on a board. Recent experience suggests that public members can make significant contributions when they have backgrounds equipping them to deal with problems and issues likely to come before the board, a strong interest in serving, sufficient time to devote to board activities, and prior experience in community affairs so that they know how to get things done in the public arena."

"While public members may not know much about the technical aspects of an occupation, they may nevertheless contribute to board deliberations by raising questions about such topics as the appropriateness of entrance requirements, board rules, tests, fees, and disciplinary procedures.

How many public members should be on a board? There is no simple answer, but if impact is the major criterion, one public member is probably too few, two would be the minimum, and three or four would increase the likelihood that the impact of public members would be felt, particularly if the board had from seven to 10 members. In California, the legislature has decreed that for certain boards a majority shall be public members" (Emphasis added)

The publication went on to point out another problem that may result from professionally dominated boards, by stating:

"Many regulatory agencies are perceived as overly protective of those whom they regulate. This has led consumers to question whether professionally dominated boards are willing to deal forcefully with their peers when complaints are received from the public. Consumers also express doubts that they will receive a fair hearing before boards composed solely of licensed practitioners."

Health Occupations Council Is
Alternative To Individual
Regulatory Bodies

A Council of State Governments* publication entitled, State Regulatory Policies - Dentistry and the Health Professions, contains a description of a model law creating a State Health Occupations Council. Composed of one representative from each health area subject to regulation through the law and at least one-third membership representing the general public, the Council is authorized to review and coordinate licensing boards regulations, establish discipline and enforcement procedures, and resolve scope of practice questions. Such a Council would also coordinate certain functions currently performed by individual licensing boards by centralizing budgeting, staffing, investigations and professional discipline.

The major purpose of such a Council is, according to the Council of State Governments, to maintain the perspective of public interest in the regulation of professions and occupations:

"Historically, once licensed, the groups tended to be regulated by autonomous boards composed primarily of representatives from the profession. Many have felt that such a system dominated by practitioners will primarily protect the interests of the individual professional groups rather than those of the consumer. State policy-makers often have been frustrated in their attempts to ensure that the licensure and regulatory process takes into consideration broad public policy issues such as costs, availability of services, and fragmentation of health care delivery." (Emphasis added)

* The Council of State Governments is a joint agency of all the state governments - created, supported and directed by them. It conducts research on state programs and problems; maintains an information service available to state agencies, officials, and legislators; issues a variety of publications; assists in state-federal liaison; promotes regional and state-local cooperation; and provides staff for affiliated organizations.

CONCLUSION

The State Board of Dental Examiners has not completely fulfilled its statutory responsibility to protect the citizens of Arizona against incompetent dental practitioners. The Board has consistently failed to adequately investigate allegations of substandard care or discipline dentists when allegations of substandard care have been substantiated. As a result, dentists with numerous substantiated consumer complaints of incompetence or substandard care continue to offer dental service to the public.

RECOMMENDATION

It is recommended that:

1. The State Dental Board investigate and resolve consumer complaints in compliance with ARS 32-1263(A) through 32-1263(E).
2. The State Dental Board impose discipline as prescribed in ARS 32-1263(D) and on those dentists found to have provided substandard care.
3. The number of public members on the State Dental Board be increased. (See page 58)
4. The Legislature and Governor consider establishing a Health Occupations Council as outlined by the State Council of Governments. This alternative would apply to all health regulatory entities and is also included in the recommendations of the Board of Optometry performance audit.

FINDING II

THE BOARD HAS NOT MAINTAINED AN APPEARANCE OF INDEPENDENCE OR OBJECTIVITY IN ITS DEALINGS WITH THE ARIZONA STATE DENTAL ASSOCIATION.

Jonathan Rose, an A.S.U. law professor and an authority on antitrust as it applies to occupational licensing, stated in a report to the Attorney General's office:

"The State Dental Board does not provide for adequate public representation nor provide adequate policing against undue influence by the profession and its private society."

Professor Rose is not alone in holding the above opinion. Office of the Auditor General surveys indicate that complainants and even some dentists feel that the Board is too heavily influenced by the dental profession in general and the Arizona State Dental Association (ASDA) in particular. The Council of State Governments has addressed several factors relating to occupational licensing boards*, two of which appear to be major problems with the Arizona State Board of Dental Examiners.

1. "Trade and professional associations frequently are vested with the power to nominate board candidates. This practice contributes to the notion that the board is an extension of the association rather than an arm of state government.*"
2. "How many public members should be on a board? There is no simple answer, but if impact is the major criterion, one public member is probably too few, two would be the minimum, and three or four would increase the likelihood that the impact of public members would be felt, particularly if the board had from seven to ten members.*"

Board Membership

Prior to June 2, 1978, ARS section 32-1203 provided for the selection of new board members as follows:

* Shimberg, Benjamin, and Roderer, Doug. Occupational Licensing: Questions a Legislator Should Ask. Lexington, Kentucky: Council of State Governments, 1978.

"B. A vacancy on the board for a position for a licensed dentist shall be filled by the governor from a list of ethical practitioners recommended for appointment by the Arizona state dental society* over the signatures of its president and secretary. The governor may request such additional lists as he deems necessary. Layperson board members appointed pursuant to this section may participate in all board proceedings and determinations, except in the giving or grading of examinations for licensure." (Emphasis added)

During 1978, the Arizona Legislature amended the preceding section to state:

"B. A vacancy on the board for a position for a licensed dentist may be filled by the governor from a list of ethical practitioners recommended for appointment by the Arizona state dental association over the signatures of its president and secretary." (Emphasis added)

A letter received from Arthur Dalpiaz, D.D.S., current president of the Arizona State Dental Association states:

"The ASDA recommends qualified nominees for the Dental Board to the Governor. When a Board Member takes his oath of office, he becomes a representative of the State and not the profession." (Emphasis added)**

Four of the five dentists serving on the State Board of Dental Examiners during fiscal year 1978-79 have continued their active participation in the State Dental Association. In fact, one Board member served as president of the Southern Arizona Dental Society while serving on the Board. This may affect the appearance of objectivity of the Board in the eyes of the public.

Table 3 summarizes the extent of the Dental Board members' involvement in the Arizona State Dental Association, Central Arizona Dental Society and Southern Arizona Dental Society.

* The Arizona State Dental Association.

** Appendix III contains the full text of this letter.

TABLE 3

EXTENT OF BOARD MEMBER INVOLVEMENT IN THE ARIZONA STATE
DENTAL ASSOCIATION (ASDA), CENTRAL ARIZONA DENTAL SOCIETY (CADS)
AND SOUTHERN ARIZONA DENTAL SOCIETY (SADS)

Name of Board Member	Board Term	DESCRIPTION OF INVOLVEMENT				
		1978-79	1977-78	1976-77	1975-76	1974-75
Dr. James Wong	1978-1983	SADS Delegate				
Dr. Jim Yount	1977-1982		CADS Delegate	CADS Delegate	CADS Delegate	CADS Delegate
Dr. Donald Beall	1978-1981	CADS Delegate	CADS Delegate	CADS Delegate	CADS Delegate	CADS Delegate
Dr. John Misenheimer	1975-1980					
Dr. William Polson*	1976-1979	SADS President	SADS Pres-elect.	SADS Vice President	SADS Secretary	SADS Treasurer
Dr. Wilfred Alter	1973-1978	SADS Delegate	SADS Delegate	SADS Delegate	SADS Delegate	
Dr. J. Allan Hamblin	1973-1978	CADS Delegate	CADS Delegate	CADS Delegate	CADS Delegate	CADS Delegate
Dr. Dale E. Shirley	1972-1977		SADS Delegate	SADS Alternate Delegate	SADS Alternate Delegate	SADS Delegate
Dr. Ralph Koerner	1972-1977	CADS Delegate	CADS Delegate	CADS Delegate	CADS Delegate	Past President ASDA

* On June 11, 1979, Dr. Polson was reappointed by the Governor for a six-year term.

As shown in Table 3, eight of the nine current and most recent Board members have been delegates to the ASDA's annual meeting while serving on the Board.

The ASDA has provided assistance to and communicated with the Board in areas where it appears the primary concern is protecting the interests of Arizona's dentists. For example, the ASDA has worked with the Board on a lawsuit challenging the licensure examination. The ASDA also provided a substantial amount of the funding for investigations of the denturists* and a dentist involved in the denturism movement.

In August 1973, the Board was involved in a lawsuit filed by a dentist who challenged the manner in which the licensing examination was being averaged. (page 83) The legal counsel for the ASDA defended this case at the request of the Board and the ASDA paid the associated legal fees.

The ASDA has stated that:

"The ASDA's interest in the case was to insure that the State's position was adequately represented so that the legal standards for dental licensure in Arizona would not be circumvented by someone not found qualified by the licensure Board."**

** A denturist is statutorily defined as a person who:

1. Takes impressions and bite registrations for the purpose of or with a view to the making, producing, reproducing, construction, finishing, supplying, altering or repairing of complete upper or lower prosthetic dentures or both, or removable partial dentures for the replacement of missing teeth.
2. Fits any complete upper or lower prosthetic denture or both, or adjusts or alters the fit of any full prosthetic denture, or fits or adjusts or alters the fit of removable partial dentures for the replacement of missing teeth.

** Appendix III contains a full text of this letter.

In a similar matter, the ASDA provided assistance to the Board when, in 1976, the denturists in Arizona began to make inroads into the dental profession. This movement culminated in 1978 when the "Denturism Bill" was passed by the Arizona Legislature. During the period from 1976 to 1978, the ASDA appeared to be using the Board as a tool against the denturist and a dentist who supported the denturists.

For example, in September 1976 the Board suspended the license of a dentist who was employing a denturist. However, it should be noted that the Board did not suspend or revoke the license of a single dentist for reason of substandard care from fiscal years 1964-65 through 1978-79.

In October 1976, the Board hired a private investigative agency to gather evidence against denturists, and a dentist who was supportive of the denturism movement. The ASDA offered to employ the investigator and pay the fees* allegedly because the Board did not have sufficient funds to pay for the investigations. However, a review of the Board's financial position reveals that the Board had ample funds to pay for the investigations. The ASDA paid approximately \$6,300 for the investigation of denturists from November 1976 through July 1977 while during that same period the monthly balance of the Board fund never fell below \$20,000 and at times was as high as \$36,000. Further, the Board did not attempt to request a special budget appropriation or authorization for a fee increase from the Legislature until fiscal year 1977-78. According to the Legislative Council in an opinion dated July 12, 1979:

* When our Office contacted the person in charge of the investigations on July 3, 1979, he stated emphatically that the agency had been employed by the Executive Secretary of the Board of Dental Examiners and the Board itself from 1976 through 1978 and not by the Arizona State Dental Association. Approximately one week later after our Office had discussed the involvement of the ASDA in the denturism investigations with the Executive Secretary for the Board, the person in charge of the investigations called back and retracted his statement. (See Appendix IV)

"In spite of the fact that no statutory provisions prohibit the ASDA from paying for investigations of the State Dental Board and even assuming that the Board has authority to accept a gift, we believe that certain fundamental ethical and equitable principles compel the conclusion that such activities are highly inappropriate for an administrative agency investigation. A hearing before an administrative agency exercising judicial, quasi-judicial or adjudicatory powers must be fair, open and impartial. The applicable principle has been described by one state court as the doctrine of the appearance of fairness."*

The Legislative Council also stated:

"Where a professional organization opposed to the denturism movement pays for an 'impartial' public investigation of the movement, a disinterested person could easily conclude that the appearance of fairness doctrine has been violated. In order to insure that administrative agencies act in an impartial manner activities such as those taken by the ASDA should be discouraged."*

The following statement by the ASDA president during 1977-78, which was printed in the ASDA Dental Notes in October 1977, is a further example of the relationship between the Board and the ASDA being an apparent violation of the appearance of fairness doctrine.

"...that the strengthening of the State Board of Dental Examiners was of utmost importance, since the defense of the denturism initiative proposal must come from that entity in order to avoid exposure of the profession."

CONCLUSION

The Board's appearance of objectivity becomes questionable when the ASDA becomes involved with Board affairs. The Board's involvement with the ASDA in the investigation of denturists is an apparent violation of the fairness doctrine. As a result, the Board has not maintained an appearance of independence and objectivity in its dealings with the ASDA.

* Appendix I contains a full text of this Legislative Council opinion.

RECOMMENDATION

It is recommended that:

1. The public representation on the Board of Dental Examiners be increased. The Board should be composed of five dentists, three lay members and one dental hygienist.
2. The Arizona State Dental Association not be designated specifically in ARS 32-1203 to supply a list from which the Governor may choose Board members.
3. The Board maintain a degree of independence and objectivity when working in conjunction with the Arizona State Dental Association.
4. Arizona Revised Statutes be amended to require members of the State Board of Dental Examiners to terminate active participation as delegates or officers in professional associations in order to ensure that an appearance of objectivity is maintained.

FINDING III

CHANGES ARE NEEDED TO IMPROVE THE EFFICIENCY OF THE STATE BOARD OF DENTAL EXAMINERS.

Our review of the State Board of Dental Examiners has shown that the efficiency of the Board could be improved with the following changes:

1. Implement a triennial renewal system to reduce the number of renewals processed each year by the Board's staff; and
2. Implement a staggered renewal system to spread the registration workload more evenly throughout the year.

These changes could result in a savings of \$10,970 and 104 staff days over a four-year period. In addition, interest earnings could be increased by \$38,900 over the same time period.

The dental statutes require the licensees of the Board to renew their licenses prior to June 30 each year. The applicable statutes are ARS 32-1236 for dentists, ARS 32-1287 for hygienists and ARS 32-1297.06 for denturists. According to the Legislative Council in an opinion dated April 20, 1979:

"Therefore, if it is considered desirable to stagger the registration of dentists, it is recommended that Arizona Revised Statutes section 32-1236 be amended. The amendment could:

1. Provide for the annual registration of dentists by payment of a registration fee.
2. Provide that the board may prescribe rules to implement a staggered registration system.
3. Provide for forfeiture of the license for persons who fail to pay on the date set by the board and the imposition of penalties for dentists who wish to reinstate the license after this date. The penalty provision could be similar to the penalties that are presently found in Arizona Revised Statutes section 32-1236, subsection B."*

* Appendix I contains a full text of this Legislative Council opinion.

Each year the Administrative Office of the State Board of Dental Examiners processes an increasing number of renewals. Based on estimates of the Board's Executive Secretary, the office staff spent a total of 40 work days during fiscal year 1977-78 processing approximately 2,750 renewals. The renewal process creates a backlog of work during May, June and July each year and has caused the Board to hire additional part-time clerical help during fiscal year 1979-80.

One means of reducing the number of renewals processed each year and the resultant strain on the operations of the Administrative Office is to implement a triennial renewal cycle. The strain on the Administrative Office could be further reduced by processing the renewals on a staggered basis. A triennial renewal cycle implemented on a quarterly basis would allow the Administrative Office to process only one-twelfth as many renewals each quarter as are now being processed in June each year. This could result in a savings of \$10,970 over a period of four years.

When questioned by the Office of the Auditor General about the possibilities of renewing licenses biennially or triennially the Board members expressed one major objection. The extended renewal cycle would reduce contact with the licensees, leaving the Board less aware of the many address changes that occur. This problem could be prevented with an announcement in a newsletter to all license holders that the Board should be notified of all address changes. (See Table 5, page 74)

Interest earnings would also be increased by implementing a triennial renewal cycle. Revenues collected and deposited in the State Board of Dental Examiners fund (90 percent of the Board's revenue) and the State General Fund (10 percent of the Board's revenue) are invested by the State Treasurer until needed. All interest earnings from such investments are retained in the General Fund. As a result of converting to a triennial renewal cycle, additional interest earnings of \$38,900 could be generated over a four-year period assuming a nine percent rate of return on investments.*

The increase in interest earnings will result because revenue collected during the initial year of implementation will exceed the amount needed to finance that year's operations. The additional amount can be invested until needed, thus generating the additional interest earnings and leaving a reserve fund for emergencies.

CONCLUSION

Our review of the State Board of Dental Examiners revealed that by implementing a triennial renewal system on a staggered basis the operating expenses of the Board could be reduced by as much as \$10,970 and the workload of the administrative staff could be reduced by as much as 104 work days over a four-year period. In addition, interest earnings could be increased by as much as \$38,900 over that same time period.

RECOMMENDATION

Arizona Revised Statutes sections 32-1236, 32-1287 and 36-1297.06 should be amended to allow for the implementation of a triennial renewal system on a staggered basis.

* According to the State Treasurer, the annual rate of return on investments for 1979 is projected to be nine percent.

FINDING IV

THE STATE BOARD OF DENTAL EXAMINERS HAS BEEN SUBSTANDARD IN ITS ENCOURAGEMENT AND USE OF PUBLIC INPUT IN ITS OPERATIONS. INFORMATION REGARDING MEETING NOTICES, PROPOSED RULES AND REGULATIONS, AND BOARD ACTION HAS NOT BEEN ADEQUATELY PROVIDED TO LICENSEES OF THE BOARD OR THE CONSUMERS OF THE LICENSEES' SERVICES.

The State Board of Dental Examiners has been substandard in its encouragement of public input from the consumer of licensees' services and in notifying license holders of Board meetings, proposed rules and regulations and Board actions. The Board needs to expand its efforts to encourage participation by potential and actual consumers and to notify all licensees of Board meetings, activities and actions.

Board Actions Regarding

Public Notice Of Meetings

Arizona Revised Statutes 38-431.02(A) defines the responsibility of the Board of Dental Examiners to provide public notice of all meetings:

"Public notice of all meetings of public bodies shall be given as follows:

1. The public bodies of the state shall file a statement with the secretary of state stating where all public notices of their meetings will be posted and shall give such additional public notice as is reasonable and practicable as to meetings."

In addition, the Attorney General in a memorandum to all state agencies dated August 19, 1975, noted that an:

"'open meeting' is open only in theory if the public has no knowledge of the time and place at which it is to be held."

The Attorney General stated further that the law on open meetings was not specific, and outlined guidelines to be followed in complying with the public meeting law. He also cautioned agencies against the serious consequences for failure to comply with the law as follows:

"Decisions made at a meeting for which defective notice was given may likely be declared null and void...."*

The latest statement which the State Board of Dental Examiners has filed with the Secretary of State indicates that notices of meetings are posted at 2538 E. University Drive, Suite 235, in Phoenix. However, the Board's Administrative Office moved from this location in January 1977. According to the Executive Secretary of the Board, the meeting notices are now posted in the Occupational Licensing Building at 1645 W. Jefferson and are no longer posted at 2538 E. University Drive.

In providing guidelines to agencies regarding what would constitute sufficient "additional" public notice of meetings beyond posting printed notices, the Attorney General stated:

"F. Additional Notice

In deciding what types of notice shall be given in addition to posting, governing bodies should consider the following:

1. Newspaper Publication

In many cases, notice of meetings can be disseminated by providing press releases to newspapers published in the area in which notice is to be given. In addition, paid legal notices in such newspapers may be purchased by the governing body.

2. Mailing List

Some bodies may wish to provide a mailing list whereby persons desiring to obtain notices of meetings may ask to be placed on a mailing list. All notices of meetings issued will then be mailed to those appearing on the current mailing list.

* Appendix VII contains the full text of the Attorney General's memorandum.

3. Articles or Notices in Professional or Business Publications.

In addition, the governing body may obtain publication of articles or notices in those professional and business publications relating to the agency's field or regulation.

It is not necessary that all of these types of notices be given. Indeed, merely providing notice through the use of a mailing list and by posting should be sufficient in most cases. Neither should the above listings be considered exclusive and, to the extent other forms of notice are reasonably available, they should be used." (Emphasis added)

The Board has not adopted any of the "additional notice" methods for notifying the public and its licensees of meetings as outlined by the Attorney General.

It should be noted that in a survey by the Office of the Auditor General of the Board's licensees*, 66 percent (214) of the 323 licensees responding stated they were not aware of scheduled Board meetings. Thus, by the current public notice methods used by the Board, only one-third of the license holders, and only those consumers who are notified through the postings in the Occupational Licensing Building or who call the Board directly, would be aware of meetings.

Board Actions Regarding Public
Notice Of Proposed Rules And
Regulations And Other Board Actions

When proposing changes in rules and regulations, each agency is required by ARS 41-1002 (Administrative Procedures Law) to file a notice of such changes with the Secretary of State at least 20 days prior to the proposed adoption date. The Secretary of State publishes the proposed changes monthly in the Administrative Procedures Digest.

The State Board of Dental Examiners has complied with this statute; however, a review of the distribution list for the Digest as of May 1, 1979, revealed that 87.4 percent (195) of the 223 individuals or organizations reviewing the Digest were law firms or government agencies. Thus, the publication of proposed rules in the Digest does not appear to be an effective method of notifying the consuming public or Board registrants of proposed rule changes.

* Appendix V contains the results of the survey.

Methods Used By Other Arizona
Regulatory Agencies To Encourage
Public Input

A survey of 34 Arizona regulatory agencies was conducted by the Office of the Auditor General regarding methods used to encourage public input and participation in the promulgation of rules and regulations and in developing legislative proposals. The survey revealed that 82 percent (28) notified registrants of rule changes prior to the required public hearing and 35 percent (12) notified registrants of legislative proposals. Table 4 summarizes the various public input methods used by these 34 regulatory agencies.

According to the Executive Secretary, the Board does not develop legislative proposals although it has, in the past, worked in conjunction with the ASDA to develop legislation. The Board will also provide the legislature with input whenever statutes are proposed which affect the Dental Act.

TABLE 4

SUMMARY OF METHODS USED BY ARIZONA REGULATORY BODIES TO ENCOURAGE PUBLIC INPUT AND PARTICIPATION IN THE PROMULGATION OF RULES AND REGULATIONS AND DEVELOPING LEGISLATIVE PROPOSALS

AGENCY	METHOD OF ENCOURAGING PUBLIC INPUT AND PARTICIPATION									
	PROMULGATING RULES				DEVELOPING LEGISLATIVE PROPOSALS					
	Informs Affected Registrants Prior To Hearing	Advertises In News Media	Informs Consumer Groups	Holds Pre-Adoption Meetings Other Than Hearings	Informs Affected Registrants Prior To Adoption	Contacts Professional Associations	Advertises In News Media	Holds Pre-Adoption Meetings	Solicits Consumer Group Participation	
STATE BOARD OF DENTAL EXAMINERS	X									B
Professional Regulatory Agencies										
State Bar of Arizona	X ^A	X			X		X			
State Board of Accountancy	X ^A					X				
State Board of Barber Examiners	X				X			X		
State Board of Chiropractic Examiners	X	X				X				
State Board of Cosmetology	X	X	X	X	X			X	X	
State Board of Funeral Directors and Embalmers	X	X				X	X			
Board of Medical Examiners	X				X					
State Naturopathic Board of Examiners	X					X				
State Board of Nursing	X	X			X	X	X			
Board of Optometry						X				
Arizona Board of Osteopathic Examiners in Medicine and Surgery										
Arizona State Board of Pharmacy	X						X			
Board of Physical Therapy Examiners	X						X			
State Board of Podiatry Examiners	X				X	X				
State Board of Psychologist Examiners	X		X		X	X		X		
State Board of Technical Registration							X			
Arizona State Veterinary Medical Examiners Board	X									
State Board of Education			X ^C	X ^C	X	X	B	X		
SUBTOTAL	15	5	3	2	8	12	3	4	1	
Other Regulatory Agencies										
Arizona Commission of Agriculture and Horticulture	X	X	X							B
Arizona State Athletic Commission	X					X				
Arizona Atomic Energy Commission		X								
State Banking Department, Collection Agencies	X									
Registrar of Contractors							X		X	
Division of Mobile and Manufactured Housing Standards	X				X	X				
State Dairy Commissioner	X									
State Board of Dispensing Opticians	X									B
State Egg Inspection Board	X					X				
Department of Insurance	X									
Department of Liquor Licenses and Control	X	X					X			
Board of Nursing Care Institution Administrators	X				X	X				
Arizona Racing Commission	X									
State Real Estate Department	X	X								B
Structural Pest Control Board	X				X					
SUBTOTAL	13	4	1	0	4	6	0	1	0	
TOTAL	28	9	4	2	12	18	3	5	1	

A Statutes require notification to registrants
 B Agency does not draft legislative proposals
 C Agency creates task forces of professional and lay persons to develop proposals

As shown in Table 4, a total of nine methods are used by Arizona's regulatory agencies to solicit public input and participation when promulgating rules and regulations and developing legislative proposals. Since the State Board of Dental Examiners utilizes only one of these nine methods, and the effect of the method used is questionable, the Board is significantly substandard in its efforts to encourage public participation in its decision-making.

The Board's Executive Secretary stated that the Board informs affected registrants prior to promulgating rules and regulations. However, in the survey of Board licensees by the Office of the Auditor General, approximately 54 percent of those responding stated they were unaware of proposed Board actions and over 45 percent responded they were not aware of actions taken by the Board. Therefore, the licensees of the Board appear to be inadequately informed regarding the Board actions or proposed actions.

A major reason for the lack of public input may be that the public is not aware of the existence of the Board. The Office of the Auditor General reviewed the malpractice cases filed against dentists in Maricopa and Pima County Superior Courts from January 1, 1976 through March 27, 1979. Thirty-two civil cases filed against dentists were found, only three of which were reported to the Board. (page 77)

In addition, an Office of the Auditor General survey of complainants revealed that the public is generally not aware of the State Board of Dental Examiners. (page 78)

Methods For Improving Public Participation

Mr. Ernest Gellhorn, former Dean of Arizona State University College of Law and a recognized authority on administrative procedure law, has formulated recommendations for improving the Federal Administrative Procedures Act.* Many of these recommended actions are equally applicable to state regulatory bodies. Mr. Gellhorn's recommendations are:

* Gellhorn, Ernest, "Public Participation in Administrative Proceedings," Yale Law Journal, Volume 81, No. 3 (January 1972) pp 398-401.

- "1. Agency obligations. Minimum constitutional requirements are insufficient reasons for agencies to fail to explore appropriate procedures for providing effective notice to the affected public. (Emphasis added)
2. Meeting public notice needs. Agencies should be required to provide identified, accessible sources of information about proceedings in which public participation is likely to be effective. At a minimum, each agency should:
 - a. Strive to provide notice as far in advance of the proceeding as possible; and
 - b. Prepare a separate bulletin issued periodically, identifying the proceeding and providing relevant information.
3. Attracting and focusing public attention. The public can be made aware of important agency proceedings in many ways, such as press releases to news media; requirements that applicants directly inform users; special notice to governmental bodies, citizen groups or trade associations and separate agency listings of significant matters. (Emphasis added)

Coverage in the news media is perhaps the most effective way of reaching the average citizen, and public interest groups and agencies should make special efforts to encourage reporting of their activities. Factual press releases written in lay language should explain the significance of the proceedings and opportunities for public participation. Releases describing important proceedings with a local geographical impact should be sent to area news media. In major matters, agencies might consider public service advertisements and announcements over local broadcasting facilities. Direct mailing are yet another alternative." (Emphasis added)

Under ARS 41-2354 (The Sunset Law), one factor that shall be considered in determining the need for continuation or termination of each agency is:

"The extent to which the agency has encouraged input from the public before promulgating rules and regulations and the extent to which it has informed the public as to its actions and their expected impact."

In our opinion, the State Board of Dental Examiners has not adequately encouraged the input of license holders, consumers of licensees' services or the general public in the promulgation of rules or other actions and has not adequately informed the public of its actions and their expected impact.

Cost Of Program To
Encourage Public Input
Would Be Minimal

The Executive Secretary of the Board has stated that because of the Board's concern regarding the cost of notifying the Board's licensees and the public of Board meetings and actions, the Board has limited its efforts in this area.

A review of the costs of selected public input methods revealed that the combined cost for a mailing to Board license holders and professional associations, a press release to news media, and legal advertisement in five Arizona newspapers would be approximately \$580.

Table 5 details the estimated costs for encouraging public input.

TABLE 5

ESTIMATED COSTS* FOR IMPLEMENTING
THREE METHODS OF ENCOURAGING PUBLIC
PARTICIPATION BY THE STATE
BOARD OF DENTAL EXAMINERS

<u>Public Participation Method</u>	<u>Estimated Cost</u>
Reproduction and postage costs to mail announcements to 3,000 license holders and 50 professional associations and interested individuals*	\$500
Reproduction and postage costs for press releases to 25 newspapers, radio and TV Stations*	5
Legal advertisements in five Arizona newspapers @ \$14.75 average** cost per newspaper	<u>74</u>
Total	<u>\$579</u>

* Staff time to type and mail copies not included in cost estimate.
** Based on actual costs for legal advertising in 20 Arizona newspapers.

The estimated cost for these three methods for encouraging public participation, if utilized four times per year, would be approximately \$2,316. This represents 2.9 percent of the 1978-79 fiscal year expenditures for the Board and 2.8 percent of the 1979-80 budget. It appears that this represents a minimal level of expenditure affordable by the Board.

CONCLUSION

The Board of Dental Examiners has been substandard when compared to other Arizona regulatory agencies in its encouragement and use of public input in its operations. As a result, license holders are not adequately informed of Board meetings, actions and proposed actions, and consumers have significantly limited opportunities to be informed concerning Board activity.

RECOMMENDATION

It is recommended that:

- The State Board of Dental Examiners adopt methods to encourage public input and participation in the promulgation of rules and regulations and development of legislative proposals. Consideration should be given to the methods being used by other Arizona regulatory bodies, the recommendations presented by Mr. Gellhorn and the recommendations of the Attorney General's Office.

FINDING V

ADDITIONAL CHANGES ARE NEEDED TO ENHANCE THE STATE BOARD OF DENTAL EXAMINERS COMPLAINT REVIEW PROCESS.

Complaint Review Process

Our review of the State Board of Dental Examiners complaint review process revealed several additional changes that are needed to enhance the effectiveness of that process. These changes are:

1. The Board should receive and investigate all consumer complaints within the state regarding the quality of dental services.
2. The public should be better informed regarding the Board's complaint review responsibilities, and the statutory requirement that consumer complaints be filed under oath should be eliminated.
3. The Board should improve its documentation of investigations and disciplinary actions.
4. The Board should increase its utilization of the Attorney General's Office.

The Board Should Receive And Investigate All Consumer Complaints Within The State Regarding The Quality Of Dental Services

To effectively oversee the quality of dental services provided within the state, the State Board of Dental Examiners must first be aware of all instances of possible substandard care. However, a substantial number of complaints alleging substandard dental care are resolved by other entities within Arizona without the Board's knowledge of the allegations. For example, local societies of the Arizona State Dental Association (ASDA) regularly receive and investigate consumer complaints. Further, in a June 29, 1977 letter to the Office of the Auditor General,* the President of the ASDA stated:

"The ASDA will continue to do its best to see that the laws of the State of Arizona are not violated. Since the State Dental Board is the enforcing agency, the ASDA will cooperate in any proper way with the Board and the law enforcement agencies, including providing evidence of violations of law." (Emphasis added)

* Appendix III contains the full text of the June 29, 1979 letter.

Our review also revealed that many consumers have initiated civil suits against dentists without filing related consumer complaints with the Board. For example, the Office of the Auditor General reviewed malpractice suits filed against dentists in Maricopa and Pima County Superior Courts from January 1, 1976 through March 27, 1979. There were 32 such civil suits filed against dentists, however, only three of these charges were also filed with the Board. Further, according to information provided to the Office of the Auditor General by the ASDA, 33 malpractice claims against dentists were closed during 1978 in Arizona. Because of the confidential nature of these claims, it could not be determined if an associated complaint had been filed with the Board. However, as a general practice information contained in malpractice claims is not forwarded to the Board even though Arizona statutes provide a precedent for doing so. Under the provisions of ARS 32-852.02, any provider of professional liability (malpractice) insurance to a podiatrist licensed in Arizona must "...report to the (Podiatry) board, within thirty days of its receipt, any written or oral claim or action for damages for personal injuries claimed to have been caused by an error, omission or negligence in the performance of the insured's professional services, or based on a claimed performance of professional services without consent or based upon breach of contract for professional services by a podiatrist."*

The State Board of Dental Examiner's ability to effectively oversee the quality of dental services provided within the State of Arizona would be enhanced if it received and investigated all consumer complaints alleging substandard dental care.

* Appendix VIII contains the full text of ARS 32-852.02.

The Public Should Be Better
Informed Regarding The Board's
Complaint Review Responsibilities
And The Statutory Requirement That
Consumer Complaints Be Filed Under
Oath Should Be Eliminated.

Arizona consumers appear to be largely unaware that the State Board of Dental Examiners investigates consumer complaints. The Office of the Auditor General's review of malpractice suits filed against dentists from January 1, 1976, through March 27, 1979 revealed that there were 32 civil cases filed against dentists, only three of which were filed with the Board. Also, most complainants learn by word of mouth or through referral that the Board processes complaints. An Auditor General survey of persons who had filed complaints with the Board revealed that less than 20 percent of the complainants contacted the Board directly. Almost 45 percent learned of the Board's services from dentists, lawyers or friends and 38 percent learned from referral services and other government agencies. The following quotes were taken from the complainants' responses to the Auditor General survey:

"I feel...two(sic) few people are aware of the Board's existence or of their functions or purpose. The 'public' needs to be better informed about being able to use the Board as an arbitrator in disagreements or disputes."

"The public does not know that there is an office where legitimate complaints can be handled."

"MOST PEOPLE ARE UNAWARE THIS BOARD EVEN EXISTS."

"I think more people should know more about the Dental Board."

Further, when a person has contacted the Board regarding a complaint there does not appear to be an adequate effort made to encourage that person to file a formal complaint. For example, the Board's staff sends complaint forms to all persons that telephone the Board regarding complaints against its licensees. However, less than half of the persons that requested complaint forms in 1978 subsequently filed complaints with the Board. No attempt was made by the Board's staff to determine why formal complaints were not filed.

Arizona Revised Statute 32-1263(B) states, in part:

"...the board shall investigate the report under oath of any doctor of dentistry, the Arizona state dental association, any component society, or any other person, which appears to show the existence of any of the causes set forth in subsection A of this section as grounds for censure, probation, suspension or revocation of a license. Any person reporting under this section who provides such information in good faith shall not be subject to liability for civil damages as a result thereof."
(Emphasis added)

As a result of the above statute the Board is only required to investigate those consumer complaints that are under oath. In fact, when the Board's staff sends complaint forms to consumers a notice is attached stating that the complaint need not be notarized. According to the Board's Executive Secretary this procedure is followed because the notarization requirement discourages consumers from filing complaints. The Board has investigated consumer complaints that were not notarized. It should be noted, however, that the Board is not statutorily required to investigate any consumer complaints it receives that are not under oath. According to the Legislative Council opinion dated June 14, 1979:

"A close reading of section 32-1263, Arizona Revised Statutes, indicates that an informal interview is only required when a formal complaint is filed and not when the board investigates evidence of misconduct on its own motion."*

A subsequent Legislative Council opinion dated September 13, 1977 also stated:

"The language of Arizona Revised Statutes section 32-1203, subsection B which relates to a 'report under oath' of unprofessional conduct of a dentist is probably no longer desirable. There appears to be a trend away from requiring a report under oath in similar situations."**

* Appendix I contains a full text of this Legislative Council opinion.

** Appendix II contains a full text of this Legislative Council opinion.

The Board Has Not Adequately
Documented Information Regarding
The Disciplinary Actions Taken.

The complaint files of the State Board of Dental Examiners often do not provide enough information to determine if the resolution of a complaint is reasonable, consistent or proper. Also, informal interview proceedings are often not transcribed and the only record made of these proceedings is the interviewing officer's report which contains a cursory summary of what transpired during the interview.

The information contained in the minutes of the Board meetings regarding disciplinary actions taken against licensees is inadequate. For example, the minutes seldom contain information on Board member discussions regarding consumer complaints or the basis for the Board's ultimate decision.

Arizona Revised Statute 38-431.01 subsection B states,

"Such minutes shall be properly and accurately recorded as to all legal action taken and open to public inspection except as otherwise specifically provided by statute."

According to the Attorney General's Office opinion 75-8,

"Discussions and deliberations by members of the governing body prior to the final decision are an integral and necessary part of any decision, commitment or promise and we believe are included within the definition of 'legal action.'"*

* See Appendix VI for the full text of the opinion.

The Board Has Not Adequately
Utilized The Services Of The
Office Of The Attorney General

The Board of Dental Examiner Attorney General representative was unaware of the manner in which complaints filed with the Board were being processed. The Board usually does not involve its legal counsel in the complaint review process until after a vote to hold a formal hearing. As a result, the Board's Attorney General representative normally is not apprised of the manner in which most consumer complaints are resolved by the Board. This lack of communication has had an adverse affect on the complaint review process. For example, the Attorney General representative had to rewrite the notice of hearing for a complaint involving substandard care because the notice prepared by the Executive Secretary of the Board did not contain charges which were indicated by the evidence.

CONCLUSION

The Board has failed to adequately inform the public of its complaint review responsibilities. In addition, the Board has not adequately encouraged the public to file complaints. Further, the Board has not adequately documented its investigations and subsequent disciplinary actions. Finally, the Board has not adequately utilized the services of the Attorney General's Office.

RECOMMENDATIONS

It is recommended that:

1. The Board actively pursue the ASDA President's offer to "...cooperate in any proper way with the Board." This cooperation could best be achieved by having the local chapters of the ASDA forward a copy of all consumer complaints to the Board.

2. ARS 32-1201 et. seq. be amended to
 - include a provision similar to ARS 32-852.02 requiring insurance companies to forward all dental malpractice claims to the Board, and
 - require Arizona courts to forward dental malpractice suits to the Board.

3. The Board inform the public of the Board's oversight responsibility and the results of its disciplinary actions. (See page 66 for a more thorough discussion of public participation.)
4. The Board periodically follow up cases in which persons request complaint forms, yet do not file complaints with the Board. This should be done to determine the reasons complaints are not being filed so that appropriate corrective measures may be taken.
5. The Board maintain better records of its disciplinary process, including:
 - More complete records in the complaint files, and
 - Complying with the Office of the Attorney General's Opinion 75-8 regarding minutes.
6. The Board increase the utilization of the Attorney General's Office as regarding complaint review.
7. The reference to the complaints being taken under oath be deleted from ARS 32-1263(B).

OTHER PERTINENT INFORMATION

The following is information that is pertinent to the operations of the State Board of Dental Examiners and the regulation of the dental profession in Arizona.

Entrance Into The Profession

Examination - Arizona Revised Statute 32-1233 provides that in order to be licensed as a dentist in Arizona an individual must pass an examination that tests the applicant's theoretical and clinical proficiency. Such examination must be conducted by the members of the State Board of Dental Examiners or its designees.

Prior to 1978, those persons wishing to practice dentistry in Arizona had to pass a clinical examination conducted by the Arizona State Board of Dental Examiners. From 1973 to 1978 the passage rate on this examination was 59 percent while the average passage rate for examinations administered by other state jurisdictions was 85 percent during the same period. Arizona had the third lowest examination passage rate in the nation from 1973 to 1978.

In 1978, Arizona joined with Utah and Oregon to form the Western Regional Examining Board (WREB). An applicant that passes the WREB examination is eligible to practice dentistry in Utah, Oregon or Arizona. The average passage rate for the three WREB examinations administered in 1978 was 85 percent.

Licensing By Credentials - Arizona Revised Statute 32-1235 provides the Board with the discretionary authority to promulgate regulations to allow for the acceptance of a certificate from another state or testing agency in lieu of passing the licensing examination. However, the Board has not promulgated the necessary regulations to allow for waiver of the examination requirement.

Currently, 17 other states do accept credentials from other states in lieu of passing an examination. This practice is referred to as licensing by credentials or comity.

The 17 states that license by credentials or comity are:

Indiana	Nebraska
Iowa	New York
Kansas	Ohio
Maine	Oklahoma
Maryland	Pennsylvania
Massachusetts	Rhode Island
Michigan	South Dakota
Minnesota	Tennessee
Missouri	

Restricted Permits - Arizona Revised Statute 32-1237 provides the Board with the discretionary authority to issue "Restricted Permits" to persons who have not passed the licensing examination provided the individual:

- Has a pending contract with a recognized charitable dental clinic or organization offering dental services without compensation.
- Has a license to practice dentistry issued by another state or territory of the United States or the District of Columbia.
- For the three years next preceding his or her application, has been actively engaged in one or more of the following:
 - (a) The active practice of dentistry
 - (b) An approved dental residency training program,
 - (c) Postgraduate training deemed by the Board equivalent to an approved dental residency training program, or
 - (d) That the Board is otherwise satisfied of his or her competence and proficiency to practice dentistry.

Persons with restricted permits are subject to the same licensing provisions as licensed dentists. However, they may only work for a recognized charitable dental clinic or organization approved by the Board and must serve without compensation. As of July 31, 1979, the Board had issued 33 restricted permits.

According to the Legislative Council in an opinion dated April 20, 1979, when the Board issues a restricted permit because it is satisfied that an individual is competent and proficient to practice dentistry, it has complied with its duty to protect the public and that the additional imposition of an examination licensing requirement on that individual appears unreasonable. The opinion states, in part:

"If the board of dental examiners both determines that a restricted permit applicant meets all qualifications and is satisfied as to the competency and proficiency of the applicant to engage in dentistry, it has complied with its duty to protect the public. However, that a permit holder may engage in dentistry without the supervision of a licensed dentist in circumstances not occasioned by emergency need or justified as an element of an educational program for prospective dentists indicates that a different level of qualifying standard has been established for persons to engage in dentistry without taking or passing a licensing examination. Having established authority for qualified applicants to be allowed to practice dentistry without a license, what can be the legal basis for the continuation of an additional licensing requirement which serves only the purpose of restricting access to the money-making aspect of such practice? Since the only apparent motivation is to limit public access to the services of additional dentists who would compete with current licensees for clientele, the state may not validly sustain such action without a determination supported by significant findings that the public interest strongly compels such restraints on the operation of a free market in order to ensure the provision of adequate dental services. In the absence of a determination that the board of dental examiners must restrain trade to ensure adequate services we can only conclude that the imposition of an examination requirement upon a dentist who qualifies for a restricted permit appears unreasonable as not necessary and appropriate for the protection of the public health."*

Ratio Of Population Per Active Practitioner - According to the American Dental Association, Arizona has over ten percent less active dentists per capita than the national average. Also, Arizona has almost 19 percent less active dentists per capita than the other states in the Mountain Region.

* See Appendix I for the full text of the opinion.

Supervision Requirements

The Board's rules and regulations require dental hygienists and denturists to practice under the "personal supervision" of a dentist. As defined in Article 4 of the Arizona State Board of Dental Examiners Rules and Regulations:

"'Personal supervision' means the dentist must be present in the office. The dentist must be available to check the work as it progresses and must approve the completed work."

There are 14 states with statutory provisions allowing dental hygienists to practice under the "general supervision" of a dentist and 22 other states whose statutory provisions allow practice under a dentist's supervision, unspecified as to "personal" or "general." There are only two states other than Arizona which license denturists. Maine statutes allow denturists to practice under a dentist's supervision, unspecified as to "general" or "personal," and Oregon statutes allow denturists to practice unsupervised by dentists. Canadian provinces also allow denturists to practice unsupervised by dentists.

In order to qualify for licensure as a hygienist or certification as a denturist, Arizona statutes require an individual to successfully complete a special two year college level dental hygiene or denturism course. The individual must also prove his or her competence by passing an examination conducted by the Board or its designees.

According to a Legislative Council opinion dated May 22, 1979:

"It is a substantive public policy question as to whether certified denturists and licensed dental hygienists should be permitted to practice without being under the direct supervision of a dentist. Given the maintenance of some form of entry control by the State Dental Board over the licensing of dental hygienists and the certification of denturists, there would seem to be little reason from a public policy standpoint not to permit certain forms of limited independent practice."*

* See Appendix I for a full text of this Legislative Council opinion.

The Board also has a regulation, R4-11-49 paragraph B, which prescribes that:

"No more than two Dental Hygienists may perform their professional duties under a Dentist's supervision at any one time."

This regulation was adopted by the Board in 1976. However, the Legislature had amended ARS 32-1281 in 1974 to remove any restrictions on the number of hygienists that can practice under the supervision of a dentist.

Again, according to the Legislative Council opinion dated July 6, 1979:

"The enforcement of A.C.R.R. R4-11-49, paragraph B would seem to violate legislative intent. Additionally, while we cannot predict how a court might rule in this matter, arguments could be made that enforcement of this regulation would violate restraint of trade laws."*

Practice Requirements

Rules and regulations promulgated by the Board designate the duties which dental hygienists and expanded duty dental hygienists may perform. These specified duties do not include the placing, carving and finishing of restorative materials and taking impressions for preparing artificial devices to substitute for or repair teeth. The Suggested Dental Practice Act developed by the Council of State Governments included the completing of restorations and the taking of impressions as allowable duties for dental hygienists. The commentary stated:

"The task force having concluded that the procedure was safe, felt there was no state interest to be serviced by prohibiting hygienists from delivering the service."

* Appendix I contains a full text of this Legislative Council opinion.

Also, the Office of the Auditor General reviewed a report draft from the United States General Accounting Office regarding expanded function dental auxiliaries (EFDA's). The report noted ten states that already allow the EFDA's to perform restorative tasks. These states are Colorado, Indiana, Kentucky, Mississippi, Missouri, Ohio, Pennsylvania, Utah, Washington and Wyoming. The report concluded that state laws should be revised to permit the use of expanded function dental auxiliaries to complete restorations.

General Anesthesia Peer Review

The State Board of Dental Examiners has developed a general anesthesia self-evaluation manual. The Board is also in the process of implementing a peer review program to determine that the procedures and equipment used in dental offices to administer general anesthesia meet certain standards.

THE STATE BOARD OF DENTAL EXAMINERS RESPONSE
TO PERFORMANCE AUDIT REPORT
OF THE ARIZONA STATE AUDITOR GENERAL'S OFFICE



Arizona State Board of Dental Examiners

EXECUTIVE OFFICE

Occupational Licensing Building
1645 W. Jefferson - Room 419
Phoenix, Arizona 85007

(602) 255-3696

September 21, 1979

Douglas Norton
Auditor General
112 N. Central - 600
Phoenix, Arizona 85004

Dear Mr. Norton:

The Arizona State Board of Dental Examiners takes this opportunity to respond to the draft report prepared under Sunset Legislature by your office as a performance audit of this agency. The responses will be in the order of the findings by the auditors enumerated in the report.

"Finding I

The State Board of Dental Examiners has not fully fulfilled its statutory responsibility to protect the citizens of Arizona from incompetent dental practitioners."

This finding is based primarily on the interpretation of ARS 32-1263 (B) which reads as follows:

B. The Board on its motion may investigate any evidence which appears to show the existence of any of the causes set forth in subsection A of this section, as grounds for censure, probation, suspension, or revocation of a license. The Board shall investigate the report under oath of any doctor of dentistry, the Arizona State Dental Association, any component society, or any other person which appears to show the existence of any of the causes set forth in subsection A of this section as grounds for censure, probation, suspension or revocation of license. Any person reporting under this section who provides such information in good faith shall not be subject to liability for civil damages as a result thereof.

Subsection A provides in part that:

- A. The Board may censure, prescribe probation or suspend or revoke the license issued to any person under this chapter for any of the following causes:
1. Unprofessional conduct
 2. . . .

Following this line further, ARS 32-1201 (10) defines unprofessional conduct a number of ways, all of which relate to 32-1263 (B) but those items that most concern your interpretation of the law are:

- (d) Gross malpractice, or repeated acts constituting malpractice.
- (n) Any conduct or practice contrary to recognized standards of ethics of the dental profession or any conduct or practice which does or would constitute a danger to the health, welfare or safety of the patient or public.

It is understood that under your interpretation of the law, the complaint review process comes under (n) when the complaint review process, in many instances, finds that there had been less than adequate care provided for the complainant and that the Board is derelict in its statutory obligation when it does not bring that particular dentist to the informal interview process in accordance with ARS 32-1263.

That is where we agree to disagree. It is our contention and interpretation that the complaint review process is not conjunctive with ARS 32-1263 unless or until the Board in its investigation determines that there has been gross malpractice, repeated acts constituting malpractice or a conduct or practice that could or would constitute a danger to the health, welfare or safety of a patient or the public. Your position that discovery by the Board of evidence of substandard or less than adequate care for a patient is automatically a violation of the subsection 10 (n) does not square with the legislature giving space and consideration to two categories:

- 1) Gross or repeated acts of malpractice, and
- 2) Conduct or practice that could or would be a danger to the public.

Medical malpractice is defined in ARS 12-561 (2) as follows:

2. "Medical malpractice action" or "cause of action for

injury or death against a licensed health care provider based upon such provider's alleged negligence, misconduct, errors or omissions, or breach of contract in the rendering of health care, medical services, nursing services or other health related services or for the rendering of such health care, medical services, nursing services or other health related without express or implied consent.

It appears to us that the legislature was not intending that each incidence of less than adequate care constituted gross malpractice or repeated acts of malpractice but did give the Board additional latitude to determine if a conduct or practice, whether malpractice or not, did constitute a danger to the health, welfare and safety to the patient or public. A case in point is the case in Tucson in which one complaint was sufficient to determine that this was a conduct or practice that constituted a threat to the patient and/or public and the disciplinary process was initiated. I should point out also that the report under oath could be any matter enumerated under subsection A of 32-1263 or 32-1201, unprofessional conduct and not just quality of care.

In respect to the informal interview that was discussed earlier in this response, the Board has decided to set up a panel of two dentists and a legal professional so as to more properly utilize this investigatory process to elicit the true facts.

Conclusion: That there is indeed a difference of opinion on interpretation of this very important part of the dental practice act and the Board felt that it was using this section in the best interest of the public.

Recommendation: That a definitive effort be made to clarify the law during this Sunset Review and if necessary, amend the law so it is clear on the face of it.

"Finding II

The Board's appearance of objectivity becomes questionable when the ASDA becomes involved with Board affairs. The Board's involvement with the ASDA's investigation of the Denturist movement is an apparent violation of the fairness doctrine. As a result, the Board has not maintained an appearance of independence and objectivity in its dealings with the ASDA."

I think the Board agrees that things can appear to be different than they actually are and that accepting assistance from a professional organization can create appear-

ances of impropriety. The particular case cited in which the ASDA employed an investigator to uncover illegal activity is probably a good example.

It may be difficult for some to believe, but the Dental Association is interested in people and in fact three of its four stated purposes for existence is in the public interest. They are as follows:

Purpose: The basic purposes of the Association are

- a. To improve and protect the public's dental health and welfare;
- b. To insure quality dental care that is appropriate for the health of our patients.
- c. To promote the art and science of dentistry; and
- d. To represent the interest of the dental profession and the public which it serves.

(emphasis added)

The ASDA did employ the investigator but all material uncovered was delivered to the Board office and the Attorney General and was not delivered to the ASDA. The Attorney General's office accepted and utilized the evidence in prosecution of the cases and it was the judicial system of Maricopa County and the Supreme Court of Arizona that found that the denturists were in violation of the law and a threat to the health and welfare of Arizona's citizens. No investigation was conducted of those who supported denturism but only those who were engaged in activity that was in violation of Arizona law.

The additional case cited was one in which the ASDA attorney represented the Board in a challenge against the licensing system. No mention was made of the fact that the attorney was made a special assistant Attorney General and worked in conjunction with Mr. Andy Bettwy, the Assistant Attorney General representing the Board at that time. This case also was decided by the courts and ASDA attorney could only offer facts of law to the court. Can it be said that in these instances the Attorney General's office was assisting the ASDA to exert inordinate influence on the Board, or did the Attorney General's office accept the assistance to fulfill their obligation to enforce the law which they as well as the Board are mandated to do?

In terms of the Board members' activity in the professional association, the Attorney General has already issued an opinion stating that this was not a conflict of interest, but could only be considered a remote interest in terms of the law.

Since approximately 85 per cent of the licensed dentists practicing in the state are members, it would be made more difficult for the Governor to find one among the nonmembers who was a person interested and willing to take an appointment. It is often said if you want a good person to do a job, find a busy person. Naturally those people who tend to be respected and elected by their peers would be the type best suited to a Board position. The Governor requires a curriculum vitae (resume) on all candidates for appointment. One need only to review those to see the obvious qualities that are best for use by the state.

"Finding III

Changes needed to improve the efficiency of the State Board of Dental Examiners."

The Board concurs that a change in the law to a biennial or triennial system would be effective and would prefer the law to read either so that we could initiate the biennial and switch to the triennial as the number of registrants grows as it surely will.

The Board also feels that a clear option to have the Western Regional examination as Arizona's sole examination for licensure would be helpful in reducing State Board costs and enhancing the applicants' opportunity for multiple licensure in member states. Although the authority is granted in ARS 32-1235, the Attorney General's office maintained that it was necessary to continue giving a licensure examination in this state.

"Finding IV

The State Board of Dental Examiners has been substandard in its encouragement and use of public input in its operation. Information regarding meeting notices, proposed rules and regulations, and Board action has not been adequately provided to licensee of the Board or the consumers of the licensees' services.

Although the Board has not used public media for notification, it has made every effort to meet the requirements of the public meetings laws and open records laws. The Board does maintain a mailing list of names of persons requiring specific information that could be provided by the Board.

The Board has attempted through newsletters (see attached) and in one instance by postcard to notify registrants of rules changes or adoptions coming before the Board. The response to those notifications were dismal at best. Perhaps the reason they responded to the survey saying the Board did not inform them is the same reason

for their non-attendance at the meeting: they don't read the material sent them.

Conclusion: The Board does feel that we can and will make a greater effort in the area of publication of meetings and other important matters.

"Finding V

Additional changes needed to enhance the State Board of Dental Examiners."

1) A comment was made in the report that information in complaint files do not contain enough information to determine if resolution of a complaint is reasonable, consistent or proper.

A) The complaint file consists of the original complaint, letters sent in conjunction with complaint, a resolution sheet which lists the findings of the committee and a copy of the letter sent to the doctor or patient that enumerates the findings of the committee and the decision of the Board member who reviewed the complaint file. That appears to be sufficient documentation for determination. As was indicated earlier, the complaint process is relatively new and undergoing constant changes, including some fine suggestions by the auditing staff.

2) Also noted in the report was that the Board did not transcribe interviews' proceedings.

A) As you must be well aware, transcripts are very expensive and should not be purchased unless or until cause exists to review such. An instance is when a decision is reached which would cause the matter to go forward to a formal hearing or should there be an appeal of the registrant on the proceedings. In any event the tapes are available for transcription by the reporter for a year following the interview. It was, in fact, a Board decision to utilize a reporter in their interest of having a verbatim account of what transpired even though it incurred additional costs.

3) It was noted particularly that the minutes did not contain deliberations of the Board in the matter of complaints.

A) This was true in the initial stages of the complaint process and an effort was being made to make the process work. The comment that it does not meet requirements of law could reflect the difference we have the the interpretation of ARS 32-1263.

4) The report stated that the Board does not utilize the services of the office of the Attorney General, and does not involve the attorney in the complaint process.

A) First, the Board does utilize the services of the Attorney General in all aspects of their service as legal advisors, prosecutors and creators of opinions. In the process of performing their duties, the attorneys represent multiple agencies, not only in daily legal matters, but in administrative hearings and in court. There has to be a limit to the possible involvement that any attorney can contribute to the individual agency considering other demands on his time.

This part of the report also indicated that the Executive Secretary prepared a notice of hearing and complaining and the attorney had to rewrite the complaint because it was not stringent enough.

A) In response to that, you should know that the attorney prepares or reviews every notice of hearing and complaint and every finding of fact, even though it is over the secretary's signature. The attorney has access to all the material concerning the case that the secretary has, plus the advantage of legal training to know how to analyze the complaint, transcripts of the interview and any evidence that is available, and to whom he should speak to gain expert professional advice.

5) Another response is in the area of comments in the report concerning restricted permit holders and their eligibility for regular licensure and legislative counsel's opinion concerning that matter.

A) Legislative counsel expressed some doubt about whether the Board could require additional testing of restricted permit holders for regular license but neglected to indicate the

two sections of Arizona's Revised Statutes in which the legislature pointed directly to examination of restricted permit holders.

ARS 32-1232 (B) states:

B. Each candidate shall make written application to the secretary accompanied by the examination fee fixed by the Board, at not to exceed two hundred dollars, which shall not be refunded. The fee provided in this subsection shall be waived for candidates who are holders of valid restricted permits.

(Emphasis added)

ARS 32-1239 (a) states as follows:

(a) That applicant understands and acknowledges that if his employment by the charitable dental clinic or organization is terminated prior to the expiration of his restricted permit, his restricted permit will be automatically revoked and he will voluntarily surrender the permit to the Board and will no longer be eligible to practice unless or until he has satisfied the requirements of section 32-1237 or has successfully passed the examination as provided in this article.

(Emphasis added)

It would appear that the legislature gave full consideration to this matter and felt that a restricted permit holder must be employed in a charitable institution which would provide a form of supervision and an acceptance of responsibility by that institution. The foregoing citations indicate that the legislature provided for restricted permit holders to be examined, exempting the holder only from the fee. I am sure legislative counsel had adequate opportunity to review this law when it was under consideration.

6) The report also implied that upon a change in the law governing the number of hygienists, under the supervision of a dentist, that the Board subverted legislative intent by reinstating a restrictive number.

A) The facts are that the law, ARS 32-1289 prior to

1974, said in part:

. . . No licensed dentist shall have more than one
such hygienist under supervision at one time . . .
(emphasis added)

When the law was amended in 1974, the number restriction
was removed and a new paragraph was added in 32-1207 (A-1)
to read as follows:

(a) Regulation of auxiliary personnel shall be
based upon the degree of education and training
of such personnel, the state of scientific
technology available and the necessary degree
of supervision of such personnel by dentists.
(emphasis added)

It appears that the legislature removed the mandatory requirement of one hygienist and left the decision to the Board. The Board's assessment was that the necessary supervision required precluded more than two hygienists being under supervision of a dentist at one time. That constitutes a doubling of the number of hygienists allowed without consideration of additional allowable duties for assistants and expanded functions for hygienists, all of which place demands on the dentists supervisory responsibilities.

7) The report also mentions the advisability of a Health Occupations Council in lieu of the individual Board process.

A) Over the last seven or eight years, much legislative time has been consumed in the consideration of umbrella type agencies in the regulatory field. In fact, the joint committee on health occupations had numerous hearings during this past summer. There has not appeared on the scene any definitive evidence, to our knowledge, that an umbrella type agency creates any special benefit for the state or its citizens.

If the Sunset process, which we are all in favor of, works in the manner the legislature intended, the efficiency and ability of the agencies should improve to the point where a health council would only be redundant and costly to the taxpayer.

8) Another item in the report had to do with the credentialing process of licensure.

A) The primary reason that the method has not been adopted is that the Board is not convinced that credentials are an adequate method of determining the ability of a practitioner to perform in the best interests of the public.

B) The Board has felt that our records were excellent when compared to other states' systems and were not assured that we could obtain adequate information.

You have pointed out in your report, that in your opinion, our records were not adequate and that malpractice cases went on without knowledge of the Board, and that the professional association did not make the Board aware of complaints against members. Your report tends to be the most severe indictment against the credentialing system that we have seen to this point.

9) Finally, the report mentions that Arizona has ten per cent less active dentists per population than the national average.

A) Attached is a list of cities and counties in the state and the number of practitioners currently licensed and recorded in that community.

You will note that in the population centers of the state, almost unanimously there are more dentists per capita than the national average. Our greatest problem which is consistent throughout the United States, not only for dentists but for physicians, is a mal-distribution problem, and that is slowly changing in Arizona since there are less opportunities in the major cities, new professionals are now gravitating to the smaller and rural communities.

The Board wishes to express its appreciation to the Auditor General and his staff first for their open minded approach to this process and in giving us an opportunity

Douglas Norton, Auditor General
September 21, 1979
Page 11

to respond to the report.

Although there are many points upon which we disagree, we believe that the auditing staff was attempting to perform its legislative mandate to the very best of its ability and the Board has already profited by the suggestions and findings of the auditing staff. We feel that this is the ultimate purpose of the Sunset Legislation and cannot help but enhance the services to the citizens of Arizona.

THESE STATISTICS INDICATE THAT STATEWIDE NUMBERS ARE NOT A TRUE INDICATOR OF AVAILABLE DENTAL SERVICES. POPULATION CENTERS ARE VERY MUCH BELOW THE NATIONAL AVERAGE

DENTAL STATISTICS FOR ARIZONA

AS OF OCTOBER 10, 1978

CITY	POPULATION	NUMBER OF DENTISTS PRACTICING	NUMBER OF HYGIENISTS PRACTICING	RATIO
AJO	6,100	1	0	6100-1
ALPINE	1,000	1	0	1000-1
APACHE JUNCTION	8,500	2	1	4250-1
AVONDALE	6,625	1	1	6625-1
BENSON	3,550	1	0	3550-1
BISBEE	8,500	4	2	2125-1
BUCKEYE	3,500	2	0	1750-1
BULLHEAD CITY	1,100	1	0	1100-1
CAMP VERDE	3,600	2	0	1800-1
CAREFREE	1,000	2	0	500-1
CASA GRANDE	14,250	7	2	2035-1
CAVE CREEK	1,000	1	0	1000-1
CHANDLER	21,110	7	4	3016-1
CLAYPOOL	2,550	0	1	-----
CLIFTON/MORENCI	8,750	1	0	8750-1
COOLIDGE	6,865	2	0	3432-1
CORNVILLE		1	0	
COTTONWOOD	3,780	4	0	945-1
DOUGLAS	12,620	5	1	2524-1
EAGER	2,250	1	0	2250-1
<u>FLAGSTAFF</u>	32,425	25	20	<u>1297-1</u>
FLORENCE	3,130	2	0	1565-1
FT. HUACHUCA	1,000	1	0	1000-1
FOUNTAIN HILLS	2,000	1	0	2000-1
GANADO	1,000	1	0	1000-1
GILBERT	3,800	2	0	1900-1
<u>GLENDALE</u>	73,495	38	23	<u>1934-1</u>
GLOBE	6,375	5	3	1275-1
GOODYEAR	2,550	2	0	1275-1
GREEN VALLEY	4,750	3	0	1583-1
HEREFORD		0	2	-----
HOLBROOK	5,375	2	1	2687-1
JOSEPH CITY	1,200	0	1	-----
KEARNY	2,525	1	1	2525-1
<u>KINGMAN</u>	7,830	7	2	<u>1118-1</u>
LAKE HAVASU CITY	10,275	5	1	2055-1

CITY	POPULATION	NUMBER OF DENTISTS PRACTICING	NUMBER OF HYGIENISTS PRACTICING	RATIO
LAVEEN		0	1	-----
LITCHFIELD PARK	3,000	3	2	1000-1
MARICOPA		0	1	-----
<u>MESA</u>	106,335	80	34	<u>1329-1</u>
MIAMI	3,500	1	0	3500-1
NOGALES	10,200	2	0	5100-1
ORACLE	2,000	1	0	2000-1
ORO VALLEY	1,280	0	1	-----
PAGE	5,500	2	0	2750-1
PARADISE VALLEY	9,560	3	5	2390-1
PARKER	5,000	1	1	5000-1
PATAGONIA		0	1	-----
PAYSON	3,070	2	0	1535-1
PEORIA	8,495	2	0	4247-1
<u>PHOENIX</u>	678,700	403	202	<u>1685-1</u>
PIMA	1,500	1	1	1500-1
PINETOP/LAKESIDE	7,000	4	3	<u>1750-1</u>
<u>PRESCOTT</u>	17,180	22	8	781-1
RED ROCK		0	1	-----
RIVIERA	1,000	2	0	500-1
SAFFORD	6,275	9	2	697-1
SAN MANUEL	4,550	2	0	2275-1
<u>SCOTTSDALE</u>	79,940	94	59	<u>850-1</u>
SEDONA	3,500	7	4	500-1
SHOW LOW	3,600	4	1	900-1
SIERRA VISTA	22,885	9	2	2543-1
SKULL VALLEY		0	1	-----
SNOWFLAKE	2,700	3	0	900-1
SPRINGERVILLE	1,450	2	0	725-1
ST. JOHNS	1,950	1	0	1950-1
SUN CITY	40,000	20	3	2000-1
<u>TEMPE</u>	99,605	60	46	<u>1660-1</u>
THATCHER	3,000	0	2	-----
TOLLESON	3,825	0	1	-----
<u>TUCSON</u>	305,525	263	123	<u>1162-1</u>
WEST SEDONA	2,000	2		1000-1
WILLIAMS	3,205	1	0	3205-1

CITY	POPULATION	NUMBER OF DENTISTS PRACTICING	NUMBER OF HYGIENISTS PRACTICING	RATIO
WILLCOX	2,950	3	1	983-1
WICKENBURG	3,015	2	0	1508-1
WINSLOW	7,663	3	0	2554-1
YOUNG	325	1	0	325-1
YOUNGTOWN	2,100	4	0	525-1
YUMA	30,805	20	0	1540-1
TOTAL DENTISTS IN ARIZONA		1,180		
TOTAL HYGIENISTS IN ARIZONA			572	

NATIONAL RATIO OF DENTISTS TO POPULATION APPROXIMATELY - 1950 TO 1

ARIZONA RATIO OF DENTISTS TO POPULATION BASED UPON 2,270,000 POPULATION EQUALS - 1924 TO 1.
THIS FIGURE INCLUDES THE INDIAN POPULATION WHICH IS GENERALLY NOT TREATED BY PRIVATE DENTISTS.

POPULATION STATISTICS PROVIDED BY THE DEPARTMENT OF ECONOMIC SECURITY DATED JULY 1, 1976.

DENTAL POPULATION STATISTICS FROM DENTAL EXAMINERS RECORDS TO OCTOBER 10, 1978.

NUMBER OF DENTISTS PRACTICING MAY INCLUDE SOME WHO HAVE NOT ADVISED THE BOARD THAT THEY ARE NOW INACTIVE EVEN THOUGH THEY KEEP THEIR LICENSE CURRENT.

TOTAL DENTISTS IN-STATE	1,180	TOTAL HYGIENISTS IN-STATE	572
TOTAL DENTISTS OUT-OF-STATE	<u>760</u>	TOTAL HYGIENISTS OUT-OF-STATE	<u>354</u>
TOTAL LICENSEES	1,940	TOTAL LICENSEES	926

THERE ARE ALSO 160 PART-TIME OFFICES LOCATED THROUGHOUT THE STATE.

NUMBER OF DENTISTS BY COUNTY

AS OF OCTOBER 10, 1978

<u>APACHE</u>		<u>COCHISE</u>		<u>COCONINO</u>	
POPULATION -	42,400	POPULATION -	72,700	POPULATION -	66,300
Alpine	1	Benson	1	Flagstaff	25
Eager	1	Bisbee	4	Page	2
Ganado	1	Douglas	5	Sedona	7
Springerville	2	Ft. Huachuca	1	Williams	1
St. Johns	1	Sierra Vista	9		
		Willcox	3		
<u>GILA</u>		<u>GRAHAM</u>		<u>GREENLEE</u>	
POPULATION -	33,200	POPULATION -	21,600	POPULATION -	11,500
Globe	5	Pima	1	Clifton	1
Miami	1	Safford	9	Morenci	
Payson	2				
Young	1				
<u>MARICOPA</u>					
POPULATION -	1,270,000				
Avondale	1	Gilbert	2	Phoenix	403
Buckeye	2	Glendale	38	Scottsdale	94
Carefree	2	Goodyear	2	Sun City	20
Cave Creek	1	Litchfield Park	3	Tempe	60
Chandler	7	Mesa	80	Wickenburg	2
Fountain Hills	1	Paradise Valley	3	Youngtown	4
<u>MOHAVE</u>		<u>NAVAJO</u>		<u>PIMA</u>	
POPULATION -	42,300	POPULATION -	61,100	POPULATION -	454,000
Bullhead City	1	Holbrook	1	Ajo	1
Kingman	7	Lakeside	4	Green Valley	3
Lake Havasu City	5	Pinetop		Tucson	263
Riviera	2	Show Low	4		
		Snowflake	3		
		Winslow	3		
<u>PINAL</u>		<u>SANTA CRUZ</u>		<u>YAVAPAI</u>	
POPULATION -	88,700	POPULATION -	16,800	POPULATION -	50,500
Apache Junction	2	Nogales	2	Camp Verde	2
Casa Grande	7			Cottonwood	4
Cooldige	2			Prescott	22
Florence	2	<u>YUMA</u>		West Sedona	2
Kearny	1	POPULATION -	71,800		
Oracle	1	Parker	1		
San Manuel	2	Yuma	20		

Arizona State Board of Dental Examiners

OCCUPATIONAL LICENSING BUILDING
1645 W JEFFERSON ROOM 419
PHOENIX, ARIZONA 85007



VOLUME II, NUMBER 1
SEPTEMBER 1, 1977

*** PUBLIC MEETING OF THE BOARD OF EXAMINERS ***
** EXPANDED DUTIES AND GENERAL ANESTHESIA **

On September 17th, 1977 the Board of Examiners will hold a public meeting in the Department of Transportation Building Auditorium, at the Southwest corner of 17th Avenue and Madison, beginning at 8:00 A.M., concerning the matter of the Expanded Duty Dental Hygiene Education Program. The Board desires to have input from all concerned with this issue. The second issue on the agenda will be the matter of regulation of the use of General Anesthesia in the dental office. The Board had preliminarily adopted rules similar to those in use in the State of Ohio. The Board desires input from all who are concerned with this issue.

This meeting is an informational meeting so that the Board can make decisions on rules with the knowledge of how the professions feel about these matters. The only decision that could possibly come from this particular meeting is the decision to prepare for a rules change and adoption meeting, which by law cannot be held without at least 20 days notice prior to the meeting.

If you feel you cannot attend this meeting, the Board would be happy to consider any written comments sent to this office prior to the meeting of the 17th.

*** NEW APPOINTMENTS TO THE BOARD ***

For those of you who may not be aware, Governor Raul Castro appointed Dr. William J. Polson of Tucson to fulfill the remaining term of Dr. Dale E. Shirley, who resigned last September.

The schools are all prepared to maintain this as an ongoing program so that new employees can qualify for certification.

There is also the question of whether assistants under the age of 18 may take X-rays. The Arizona Atomic Energy Commission, as part of their official rules, has a specific rule for allowable exposure to those under 18, as follows:

"Section C.104. Exposure of Minors.

- (a) No licensee or registrant shall possess, use or transfer sources of radiation in such a manner as to cause an individual within a restricted area, who is under 18 years of age, to receive in any period of one calendar quarter from all sources of radiation in such licensee's or registrant's possession a dose in excess of ten percent of the limits specified in the table in paragraph (a) of Section C.101."

"Section C.101. Exposure of Individuals to Radiation in Restricted Areas.

(a) Table:

	Rems in Calendar Quarter
Whole body; head and trunk; active blood forming organs; lens of eyes; or gonads.	1 $\frac{1}{4}$
Hands and forearms; feet and ankles.	18 $\frac{3}{4}$
Skin of whole body	7 $\frac{1}{2}$

*** ACTIVITIES OF THE BOARD ***

During the last fiscal year, July 1, 1976 to June 30, 1977, the Board has been involved in many activities, as follows:

Regular business meetings: There were 9 meetings called for this purpose.

Examinations: January examination, 57 dentists and 33 hygienists applied for licensure and of those 34 dentists and 26 hygienists were licensed.

June examination, 84 dentists and 93 hygienists applied for licensure and of those 55 dentists and 71 hygienists were licensed.

Informal interviews and hearings:

Hearing	Wayne L. Jensen	Unprofessional Conduct - 60 days suspension and probation
Hearing	Patrick Ryan	Unprofessional Conduct - Suspension and probation
Informal	William Daly	Unprofessional Conduct - Censure and probation
Informal	Richard Flores	Unprofessional Conduct - Matter closed
Informal	Robert Kopp	Unprofessional Conduct - Censure
Hearing	Robert Bobo	Unprofessional Conduct - Censure and probation
Hearing	Francis Marinangeli	Reinstatement of license granted upon successful completion of Board examination for licensure
Hearing	Wilfred Alter	Unprofessional Conduct as a Board Member - Charges dismissed
Hearing	Wilhelm Wilk	Appeal on failure of Board examination for licensure - Board rejected appeal

AN INDICATION THAT INVESTIGATION
PROBLEMS ARE RECOGNIZED FOR
ALL AGENCIES OF THIS TYPE

Attorney General



DEPARTMENT OF LAW
OFFICE OF THE
Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

BRUCE E. BABBITT
ATTORNEY GENERAL

January 19, 1978

MEMORANDUM

TO: Chiropractic Board
Dental Board
Funeral Board
Naturopathic Board
Nursing Care Institution
Administrators Board
Opticians Board
Optometry Board
Osteopathic Board
Physical Therapy Board
Podiatry Board
Psychology Board
Veterinary Board
Technical Registration Board

FROM: Assistant Attorneys General
David W. Ronald, Gary L. Sheets,
Michael W. Sillyman

RE: Investigative Services

A meeting has been set for February 1, 1978, at 8:30 a.m. in the Hearing Room, Second Floor, 1688 West Adams, Phoenix, with Mr. Mark May of the State Purchasing Office, to discuss the possibility of the State contracting to provide investigative services for selected state agencies.

It would be our recommendation that representatives from each of the above-named Boards attend this meeting so that all concerned may discuss the feasibility of "pooling" the respective agency's investigative services needs. Such an arrangement may possibly ameliorate the above agencies' investigative resources difficulties.

A representative of this office will attend.

David W. Ronald Michael W. Sillyman

APPENDICES

APPENDIX I

LEGISLATIVE COUNCIL MEMORANDUMS

ARIZONA LEGISLATIVE COUNCIL

MEMO

April 20, 1979

TO: Douglas R. Norton, Auditor General
FROM: Arizona Legislative Council
RE: Request for Research and Statutory Interpretation (O-79-24)

This is in response to a request submitted on your behalf by Gerald A. Silva in a memo dated March 30, 1979.

FACT SITUATION:

In 1974, the Arizona Legislature established a statutory scheme by which the state board of dental examiners could issue restricted permits to practice dentistry (Laws 1974, chapter 74, section 12). The board has the discretion to issue such permits for a limited period of time without examination or payment of a fee (Arizona Revised Statutes section 32-1238). Any person of good moral character who has a diploma from a recognized dental school or who has been a licensed dentist for five consecutive years in an American state or territory or a foreign country which has dental educational and practice standards acceptable to the board may apply for a restricted permit upon furnishing evidence:

1. Of a pending contract with a recognized charitable dental clinic or organization offering free dental services or services at a rate sufficient to cover supplies and overhead.

2. That the applicant will receive no compensation for his dental services at the dental clinic or organization.

3. That he has a dental license issued by another American state or territory or the District of Columbia.

4. That for three years prior to the application he has engaged in the active practice of dentistry, an approved dental residency training program or equivalent postgraduate training and that the board is otherwise satisfied of his competence and proficiency to practice dentistry (Arizona Revised Statutes section 32-1237).

In order to receive compensation for the practice of dentistry in Arizona, a person must take an examination on theory and clinical proficiency (Arizona Revised Statutes section 32-1233) and receive a license from the board (Arizona Revised Statutes section 32-1261). The board has discretionary authority to waive the examination requirement (Arizona Revised Statutes section 32-1235).

QUESTIONS PRESENTED:

1. If protection of the public is served by allowing a dentist, licensed in another state, to be issued a restricted permit to practice dentistry for a charitable organization without passing the Arizona examination, can the same dentist be required to pass the Arizona examination before being licensed to practice dentistry for a profit?

2. Does Arizona Revised Statutes section 32-1237 provide equal protection under the law for the indigent persons who are provided dental care in charitable clinics by restricted permittees who have not complied with all the requirements to become licensed dentists in Arizona?

ANSWERS:

1. No.

2. Yes.

1. The Legislature clearly has authority to regulate the practice of the medical arts. However, as the Arizona Supreme Court held in State v. Borah, 51 Ariz. 318, 322, 76 P.2d 757 (1938):

These regulations must be reasonable and bear some relation to the end or object to be attained, which is to protect the public from being mistreated or misled by incompetent or unscrupulous practitioners.

The test of reasonableness of a regulation is always whether or not it is reasonably necessary and appropriate for the protection of the public health. Id. at p. 323. The issue presented by this request is, then, whether or not the dental examination requirement is reasonably necessary and appropriate for the protection of the public health once a dentist qualifies for the restricted permit.

Traditionally, the state has required a license for the practice of certain occupations which affect the public interest. A common requisite for the issuance of a license has been the passage of an examination designed to test competency and proficiency. The possession of a license from the state has been a sign of protection to those members of the public who had prospective dealings with the licensed professional. Until 1974, Arizona followed this traditional scheme of examining and licensing dentists prior to their contact with the general public. Indeed, the Supreme Court commented:

The purpose and the only justification of the various statutes regulating the practice of medicine in its different branches is to protect the public against those who are not properly qualified to engage in the healing art, and one who is not licensed under such statutes is conclusively presumed to be unqualified (Batty v. Arizona State Dental Board, 57 Ariz. 239, 254, 112 P.2d 870 (1941)).

This statutory scheme and underlying presumption were altered in 1974 by the enactment of dental practice standards which did not require the applicant to pass an examination or receive a license under certain circumstances. The new standards were deemed sufficient by the Legislature to allow dentists licensed elsewhere to practice their trade in Arizona on members of the general public, with the proviso that dentists would be unable to profit from their practice. A holder of a restricted permit is subject to all of the provisions of Title 32, chapter 11, Arizona Revised Statutes, applicable to licensed dentists and may engage in any activity that a licensed dentist may engage in except that a permit holder may not charge for his services (Arizona Revised Statutes section 32-1239). A dentist who holds a restricted permit is, pursuant to this statutory scheme,

presumed to be qualified to serve the general public. Once a person satisfies the minimum standards to receive a restricted permit we fail to see how the passage of an additional examination is "reasonably necessary and appropriate for the protection of the public health." Borah, supra, at p. 323. Indeed, the only function that the examination appears to serve when a person holds a restricted permit is to bar that person from entry into a profit-making position. The refusal to allow a holder of a restricted permit to charge for services unless the dental examination is passed protects the profits of existing license holders rather than the health of the general public. The imposition of an examination requirement upon a dentist who qualifies for a restricted permit is, in our opinion, unreasonable under the Borah test as unnecessary to protect the public health.

2. The equal protection clauses of federal and state constitutions require that statutes passed pursuant to the state's police power have some natural and reasonable basis and relationship to the object to be accomplished and cannot be discriminatory, capricious or unreasonable. State v. Norcross, 26 Ariz. App. 115, 117, 546 P.2d 840 (1976). Ostensibly, the objective of the Arizona Legislature, by passage of Laws 1974, chapter 74, section 12, was to increase the availability of dental services to those who might otherwise not be able to obtain or afford such services. Arizona Revised Statutes section 32-1237 provides a means to increase the number of practicing dentists in Arizona whose services are available to the public at little or no cost. Those dentists who obtain a restricted permit are deemed to be qualified sufficiently to protect the public health. We are unable to determine whether the rights of those persons who utilize the services of charitable dental clinics or organizations have been affected in a discriminatory, capricious or unreasonable manner. People are not prevented from seeing licensed dentists nor are licensed dentists precluded from providing free or low cost services. This statute does not prescribe who may utilize the facilities of free or low cost dental clinics. While the state should not tolerate different levels of quality for different classes of society, we have not been presented with any evidence that patrons of these dental clinics receive inferior or substandard care as a result of the operation of Arizona Revised Statutes section 32-1237. Equal protection does not require that all persons be treated identically but rather that different treatment of persons similarly situated be justified by an appropriate state interest. In this case the state interest is to provide adequate health care for its citizens. Its method has been to enlarge the class of dentists available to provide free or low cost dental services. At this time we are unable to conclude that this statute has been implemented in a discriminatory manner violative of equal protection.

Perhaps the equal protection issue should be addressed by examining the effect of this state's statutory licensing scheme on the dentists, not their clients.

CONCLUSIONS:

1. If the board of dental examiners both determines that a restricted permit applicant meets all qualifications and is satisfied as to the competence and proficiency of the applicant to engage in dentistry, it has complied with its duty to protect the public. However, that a permit holder may engage in dentistry without the supervision of a licensed dentist in circumstances not occasioned by emergency need or justified as an element of an educational program for prospective dentists indicates that a different level of qualifying standard has been established for persons to engage in dentistry without taking or passing a licensing examination. Having established authority for qualified applicants to be allowed to practice dentistry without a license, what can be the

legal basis for the continuation of an additional licensing requirement which serves only the purpose of restricting access to the money-making aspect of such practice? Since the only apparent motivation is to limit public access to the services of additional dentists who would compete with current licensees for clientele, the state may not validly sustain such action without a determination supported by significant findings that the public interest strongly compels such restraints on the operation of a free market in order to ensure the provision of adequate dental services. In the absence of a determination that the board of dental examiners must restrain trade to ensure adequate services we can only conclude that the imposition of an examination requirement upon a dentist who qualifies for a restricted permit appears unreasonable as not necessary and appropriate for the protection of the public health.

2. We are unable to determine that Arizona Revised Statutes section 32-1237 violates the equal protection rights of the patrons of free or low cost dental clinics.

cc: Gerald A. Silva
Performance Audit Manager

ARIZONA LEGISLATIVE COUNCIL

MEMO

April 20, 1979

TO: Douglas Norton, Auditor General
FROM: Arizona Legislative Council
RE: Request for Research and Statutory Interpretation (0-79-23)

This is in response to a request submitted on your behalf by Gerald A. Silva in a memo dated March 30, 1979.

QUESTION PRESENTED:

Does Arizona Revised Statutes section 32-1236 preclude the Board of Dental Examiners from implementing a staggered registration system?

ANSWER:

Yes. However, a staggered registration system could only be implemented voluntarily.

Arizona Revised Statutes section 32-1236, subsection A states:

A. On or before June 30 each year, every licensed dentist shall pay an annual registration fee as determined by order of the board but not to exceed one hundred fifty dollars.

Subsection B of this section provides that a person who fails to pay this registration fee forfeits his dentistry license. This subsection also prescribes the procedure and monetary penalties for reinstating a forfeited license.

Reading this section in its entirety, it is clear that for a dentist to be properly registered for the coming fiscal year, the board must receive a registration fee from the dentist on or before the June 30th prior to the fiscal year. The effect of section 32-1236 is that a licensed dentist continuing in practice has a legal obligation to pay the annual registration fee before July 1. By implication, it seems that the registration period is intended to run from July 1 through the ensuing June 30. Unlike the statutes regulating barbers and cosmetologists, there is no restriction as to the earliest date when the regulated person must pay his registration fee. See Arizona Revised Statutes section 32-330 (a barber must pay a renewal fee on or within 30 days before January 1) and Arizona Revised Statutes section 32-529 (a cosmetologist must pay a renewal fee within 30 days before July 1).

Thus, it would be proper for a dentist under Arizona Revised Statutes section 32-1236, subsection A to pay his annual registration fee in advance of the coming fiscal year. The board could then implement a staggered registration system for dentists which would be designed so that some dentists would pay their registration fees at a date earlier than other dentists. However, this system could only be implemented on a voluntary basis. The board would have no power to enforce compliance with a staggered registration system. The reason for this is that Arizona Revised Statutes section 32-1236 specifically states the deadline (June 30th) for paying the registration fee. A licensed dentist not subject to disciplinary restrictions could continue to practice dentistry by paying the annual fee as prescribed by law. In addition, this section provides that failure to pay the annual registration fee causes a forfeiture of license and the penalty for reinstating the forfeited license. Thus, the board, in implementing a staggered registration system, could not mandate an earlier deadline or prescribe a penalty if a dentist wanted to pay the registration fee after this deadline.

Reading this section in this manner, any staggered registration system would need the cooperation of licensed dentists. A problem with a voluntary staggered program is that most dentists would probably view it as impractical. In effect, what they would be asked to do is prepay their registration fee for the coming fiscal year. Given the choice of paying early or waiting until the last possible moment, it would seem that most would choose the latter.

Therefore, if it is considered desirable to stagger the registration of dentists, it is recommended that Arizona Revised Statutes section 32-1236 be amended. The amendment could:

1. Provide for the annual registration of dentists by payment of a registration fee.
2. Provide that the board may prescribe rules to implement a staggered registration system.
3. Provide for forfeiture of the license for persons who fail to pay on the date set by the board and the imposition of penalties for dentists who wish to reinstate the license after this date. The penalty provision could be similar to the penalties that are presently found in Arizona Revised Statutes section 32-1236, subsection B.

CONCLUSION

The Board of Dental Examiners could implement a voluntary staggered registration system but could not penalize any dentist who refuses to follow the system.

ARIZONA LEGISLATIVE COUNCIL

MEMO

June 6, 1979

TO: Douglas R. Norton, Auditor General
FROM: Arizona Legislative Council
RE: Request for Research and Statutory Interpretation (O-79-33)

This is in response to a request made on your behalf by Gerald A. Silva in a memo dated April 27, 1979.

QUESTION PRESENTED:

Would enforcement of Arizona Revised Statutes, section 32-1261, paragraph 3 represent a violation of state or federal laws regarding restraint of trade?

FACT SITUATION:

The memo states that this section precludes nondentists from equipping a dental office and hiring licensed dentists to perform actual services while the owner handles only the business end of the operation and does not attempt to practice dentistry as defined in Arizona Revised Statutes section 32-1202. The question presented relates to the organizational form of the business of dentistry as distinguished from the practice of the profession of dentistry, and whether such form can validly be regulated in this way by a state statute.

DISCUSSION:

Arizona Revised Statutes section 32-1261 provides:

32-1261. Practicing without license; classification

Except as otherwise provided a person is guilty of a class 2 misdemeanor who, without a valid license as prescribed by this chapter:

1. Practices dentistry or any branch thereof.
2. In any manner or by any means, direct or indirect, advertises, represents or holds himself out as engaged or ready and willing to forthwith engage in such practice.
3. Manages, maintains or carries on, in any capacity or by any arrangement, a practice, business, office or institution for the practice of dentistry, or which is advertised, represented or held out to the public as such.

In our opinion, this section is a valid exercise of the police power, consistent with other Arizona statutes mentioned below, because the "business" and the "practice" are inseparably connected. The business of dentistry, for instance, would include the maintenance of records which may contain privileged matter. The definition of "unprofessional conduct" contained in Arizona Revised Statutes section 32-1201 includes

betrayal of a professional confidence, violation of a privileged communication, giving or receiving rebates, employing unlicensed persons, and offering to give away merchandise as an inducement to secure patronage. If the dentist maintains the business, he is responsible for these acts of unprofessional conduct, whether committed by him or by his employee. But the sanctions relating to unprofessional conduct could not be applied against an unlicensed principal, whether person or business entity, who is not practicing dentistry. The employee dentist could be entirely free of any unprofessional conduct, while all of these prohibited acts might be committed with impunity by the unlicensed employer who is not practicing dentistry.

A similar provision relating to all incorporated professionals is contained in the Professional Corporation Act, at Arizona Revised Statutes section 10-907:

10-907. Nature of corporate activity

A. A professional corporation may only be organized for the purpose and may only engage in the rendering of one category of professional service.

B. A professional corporation may render professional service only through shareholders, directors, officers, agents and employees who are themselves duly licensed in that category of professional service.

C. No person who is not licensed in that category of professional service shall have any part in the ownership, management or control of the corporation, nor may any proxy to vote any shares of such corporation be given to a person who is not so licensed. (Emphasis supplied)

Subsection C of that section is necessary for the implementation of section 10-905:

10-905. Professional relationship and responsibility

Nothing in this chapter shall be construed to alter any law applicable to the relationship between persons furnishing and receiving professional service, including but not limited to liability arising therefrom, and the shareholders of the corporation shall be and remain jointly and severally responsible for such liability.

The principle stated in American Medical Assn. v. United States, 130 F.2d 233 (D.C. Cir. 1942), aff'd. 317 U.S. 519 (1943), does not apply to Arizona Revised Statutes section 32-1261. There two doctors who had participated in group prepaid medical practice were expelled from the medical society of the District of Columbia. The court found that the conduct labeled "unethical" by the medical society, i.e., salaried medical practice under contract, affected doctor income much more than patient care. The Arizona Revised Statutes authorize nonprofit dental service corporations, sections 20-821 et seq., and prepaid dental plan organizations, sections 20-1001 et seq. The restraint, then, is not upon the dentist to prevent him from practicing by contract through a third person but upon the nondentist to prevent him from maintaining a dental business. The restraint seems to result in a clear benefit to the public, since statutory prohibitions against defined acts of unprofessional conduct would be hollow indeed if they could be evaded by an unlicensed person maintaining a "business" of dentistry.

Even if Arizona Revised Statutes section 32-1261, paragraph 3 were considered to constitute an anticompetitive activity, it would fall within the "state action" exemption

(See Statutory Interpretation O-79-36 dated May 22, 1979 at pp. 2, 3) or the "public service aspect" exemption (See Statutory Interpretation O-79-34, dated May 21, 1979, at pp. 3, 4) to the Sherman Act.

CONCLUSION:

Enforcement of Arizona Revised Statutes section 32-1261, paragraph 3 would not represent a violation of state or federal laws regarding restraint of trade.

ARIZONA LEGISLATIVE COUNCIL

MEMO

May 22, 1979

TO: Douglas R. Norton, Auditor General
FROM: Arizona Legislative Council
RE: Request for Research and Statutory Interpretation (O-79-36)

This is in response to a request made on your behalf by Gerald A. Silva in a memo dated May 1, 1979.

FACT SITUATION:

Prior to issuing certificates or licenses to denturists or dental hygienists the Board of Dental Examiners must determine that an applicant (1) meets all qualification requirements, and (2) is competent and proficient. Once certified or licensed, however, a denturist or dental hygienist must practice under the supervision of a licensed dentist (see A.R.S. 32-1281 (B) and 32-1294 (A) and (B), and R4-11-42 of the dental board rules and regulations).

QUESTIONS:

(1) Is it a violation of any federal or state restraint of trade statute to prohibit certified denturists or licensed dental hygienists from performing tasks for which they are specially certified or licensed except under the supervision of a dentist?

(2) Is it necessary for the reasonable protection of the public to require certified denturists to practice under the supervision of a dentist?

(3) Is it necessary for the reasonable protection of the public to require licensed dental hygienists to practice under the supervision of a dentist?

DISCUSSION:

(1) It is well accepted in the common law that all contracts, combinations or agreements creating or tending to create a monopoly or in restraint of trade are contrary to public policy. More to the point, under the common law, any combination or agreement which unreasonably suppresses competition or restrains trade is illegal and void as against public policy, regardless of the declared purpose. (See Speegle v. Board of Fire Underwriters of the Pacific, 29 Cal. 2d 34, 172 P. 2d 867 (1946); Nester v. Continental Brewing Company, 161 Pa. 473, 29 A. 102 (date); and Standard Oil Company v. Federal Trade Commission, 340 U.S. 231 (1950).)

The crucial question, of course, is that of determining what constitutes an unreasonable restraint of trade since, by definition, every act which involves an agreement on trade in fact involves a restraint or regulation of such trade. Generally, the legality of the combination is tested by the extent of the injurious effect on the public

interest. If such a combination or agreement is found to be injurious, it is void as against public policy. (See U.S. v. Addyston Pipe and Steel Company, 85 F. 271, affirmed 175 U.S. 211 (1899); and Burns v. Wray Farmers' Grain Company, 65 Colo. 425, 176 P. 487 (1918).) Each combination or agreement must be tested, however, by the particular fact situation involved. The common law provides no definitive guidelines as to whether any particular trade combination or agreement constitutes an unlawful restraint of trade.

Federal law on the subject of monopolies and unlawful restraints of trade is contained in the Sherman Antitrust Act (also cited in this memo as federal act), as amended (26 Stat. 209; 15 U.S.C. sec. 1 et seq.). The first sentence of section 1 of the federal act provides that:

Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . . (15 U.S.C. 1).

The U.S. Supreme Court has determined that the restraint involved must be unreasonable in order to come within the scope of the federal act. (See Standard Oil Company v. United States, 221 U.S. 1 (1910).) Elaborating on this point, the federal court in Dupont Walston, Inc. v. E.F. Hutton & Company, 368 F. Supp. 306 (1973) determined that in order for conduct to unreasonably restrain trade or commerce within the meaning of the federal act, it must tend or be reasonably calculated to prejudice the public interest.

As to whether the concept of "trade" or "commerce" incorporated in the federal act includes professional occupations in general, it may be noted that the courts have answered in the affirmative. In Goldfarb v. Virginia State Bar, 421 U.S. 773, rehearing denied, 423 U.S. 886 (1975), the Supreme Court determined that the nature of an occupation, standing alone, does not provide sanctuary from the federal act. In U.S. Dental Institute v. American Association of Orthodontists, 396 F. Supp. 565 (1975), the federal court found that there is no learned profession exempt from the proscription against restraint of trade or commerce under the federal act. In a final case, the U.S. Supreme Court agreed with a federal district court finding that (1) the Sherman Act contains neither an express nor an implied exclusion of commercial activity generated by professions; (2) the Sherman Act contains no exemption for practitioners of the learned professions from its provisions; and (3) if the trade or commerce produced by professional services is interstate in character, it is subject to the Sherman Act and conspiracy to restrain or monopolize it is prohibited. (See Ballard v. Blue Shield of Southern West Virginia, Inc., 543 F. 2d 1075, cert. denied, 430 U.S. 922 (1977).) Thus, while there was no case directly on point, there can be little question that dentistry and allied health professions do generally fall within the scope of the federal act.

While the above conclusion clearly appears to be correct, the applicability of the Sherman Act to a state law which prohibits members of allied health professions from performing tasks for which they are licensed or certified except under the supervision of another professional can also be approached from another perspective, that of the "state action" exemption. As the U.S. Supreme Court found in Parker v. Brown, 317 U.S. 341 (1943), and as reported in Meyer & Smith, Bates and a Beginning, 20 Ariz. Law Review 437, this exemption is founded on the state's right, as sovereign, to legislate, and exempts from the antitrust laws anticompetitive activity prescribed by state law that would ordinarily be an antitrust violation if effected by a private person. In order to come

within the "state action" exemption, the U.S. Supreme Court found that the anticompetitive activity must be compelled by "the state acting as a sovereign". (See Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).) Goldfarb involved the establishment of minimum fee schedules by the state bar association. In this case, the court held that such schedules were anticompetitive and therefore violated the Sherman Act. The fee schedules were not state action since they were set by the county bar association. By contrast, in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), the U.S. Supreme Court determined that the "state action" exemption applied to a state supreme court ban against lawyer advertising. The exemption so applied because, as the high court noted, the state supreme court was "the ultimate body wielding the state's power over the practice of law". (See Bates v. State Bar of Arizona, *supra*, at 360.) (The high court subsequently overturned the ban on lawyer advertising on first amendment grounds.)

Since the requirement under Arizona Revised Statutes sections 32-1281 and 32-1294 that licensed dental hygienists and certified denturists practice only under the supervision of a licensed dentist is a requirement that has been imposed by the state legislature, one can certainly make an effective argument that it comes within the state action exemption from the Sherman Act.

While the supervisory requirement for practice of the allied health professions in question would thus appear to be protected under the state action exemption, it must be remembered that unfair methods of competition or practices in commerce may violate section 45 of the Federal Trade Commission Act (see 15 U.S.C. 45 et seq.). Available case law offers no guidance as to whether an attack on Arizona Revised Statutes sections 32-1281 and 32-1294 on FTC grounds would succeed where a challenge to these sections on antitrust grounds would fail.

Arizona law relating to antitrust and restraint of trade is found in Arizona Revised Statutes Title 44, chapter 10, article 1. This article is derived from the Uniform State Antitrust Act. (As of August 1978, Arizona was the only signatory to this uniform legislation.) Arizona Revised Statutes section 44-1402 provides in full that:

A contract, combination or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce, any part of which is within this state, is unlawful.

The primary objective of the uniform law is to impose what amounts to a "Sherman Act" at the state level; that is, to prevent any act which results in a restraint of trade or a monopoly to the injury of the public.

There is no state case law directly on the point of whether state antitrust and restraint of trade laws control the stated fact situation. Presumably, (litigation would again be required) this question will be decided on a case-by-case basis.

Some indication, however, of the approach which might be taken by the state Supreme Court can be derived from Arizona State Board of Dental Examiners v. Hyder, 114 Ariz. 544, 562 P. 2d 717 (1977). This case involved the high court's review of the Superior Court's failure to grant an injunction against certain persons operating as denturists for practicing dentistry without a license. The Supreme Court ruled that the Superior Court had erred in refusing to grant the injunction. The opinion did not confront the question of whether state law regulating dentistry resulted in an unlawful restraint of

trade. Instead, the high court affirmed that the regulation of a profession involves the exercise of the state's police power for the health and general welfare of the public interest. The court went on to note that:

Where the legislature has declared that the public interest is served by requiring the practice of a profession be licensed and that attempts to act without the required license may be enjoined, the granting or denying of the license is not within the discretion of the trial court.

While the Arizona Supreme Court did not, in this case, address the antitrust question, it may be noted that other state courts have taken the position that the prevention of trusts, monopolies and combinations in restraint of trade yields to the more important consideration of reasonably exercising the police power over a business or profession having a vital relation to public health and welfare. (See Arnold v. Board of Barber Examiners, 45 N.M. 57, 109 P. 2d 779 (1941); and U.S. v. Maryland State Licensed Beverage Ass'n, 138 F. Supp. 685, reversed on other grounds, 240 F. 2d. 420 (1957).)

Coverage of the stated fact situation under state antitrust laws can thus be viewed as being potentially in conflict with the right of the legislature, within the scope of the police power, to regulate the professions, trades or business especially where considerations of public health are involved. The police power has been defined by Black's Law Dictionary (4th edition, page 1317) as:

The power vested in the legislature to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they judge to be for the good and welfare of the commonwealth, and of the subjects of the same. (See also Commonwealth v. Alger, 7 Cush. (Mass. 53, 85 (1853).)

Given the fact that dentistry and allied health professions relate to public health, there can be little disagreement as to the authority of the legislature to regulate dentistry and other allied health professions to safeguard the public health and welfare and to protect the public against ignorance, incapacity, deception or fraud because of incompetent or unscrupulous practitioners. (See State v. Borah, 51 Ariz. 318, 76 P. 2d 757 (1938); Barskey v. Board of Regents of State of New York, 347 U.S. 442 (1954); People v. Kenter, 320 Ill. App. 600, 51 N.E. 2d. 812 (1943); and Bigelow v. Virginia, 421 U.S. 809 (1974).)

(2,3) As to whether there is any need for the reasonable protection of the public to require certified denturists and licensed dental hygienists to practice only under the supervision of a dentist, a definitive answer can be offered only following a review of the functions of such allied health professionals and the need for supervision from a public health standpoint. It seems likely, however, that a reasonable case can be made to exempt denturists within a certain limited scope of practice from any such supervisory requirement given the fact that in certain states, such as Oregon, denturists can offer services directly to the public. There is no information presently available as to whether dental hygienists can offer services directly to the public in any other state. There would again appear to be little public health reason, for example, to require that such services offered by dental hygienists as teeth cleaning be offered only under the personal

supervision of a licensed dentist. This conclusion would seem to be especially true if the State Dental Board continued to exercise a form of entry control requiring that certain qualifications be met in order to be licensed.

CONCLUSIONS:

(1) Litigation would be necessary to determine whether it is a violation of any state restraint of trade statute to prohibit certified denturists or licensed dental hygienists from performing tasks for which they are specifically certified and licensed except under the supervision of a dentist. Case law research suggests that any attempt to apply any state restraint of trade statute to the stated fact situation would be carefully weighed against the unquestioned right of the legislature to regulate, using the police power, professions and occupations to ensure the public peace, health and safety.

With respect to the application of federal antitrust laws to the stated fact situation, it would appear that the "state action" exemption developed by the U.S. Supreme Court in Parker v. Brown, 317 U.S. 341 (1943) effectively protects the stated fact situation from a Sherman Act challenge.

(2,3) It is a substantive public policy question as to whether certified denturists and licensed dental hygienists should be permitted to practice without being under the direct supervision of a dentist. Given the maintenance of some form of entry control by the State Dental Board over the licensing of dental hygienists and the certification of denturists, there would seem to be little reason from a public policy standpoint not to permit certain forms of limited independent practice.

ARIZONA LEGISLATIVE COUNCIL

MEMO

June 14, 1979

TO: Douglas R. Norton, Auditor General
FROM: Arizona Legislative Council
RE: Request for Research and Statutory Interpretation (O-79-44)

This is in response to a request made on your behalf by Gerald A. Silva in a memo dated May 31, 1979.

FACT SITUATION:

The State Dental Board's complaint and review process occurs as follows:

1. Receipt of formal complaint by board office.
2. Complaint sent to a review committee.
3. Review committee attempts to determine the validity of the complaint.
4. Complaint committee writes up findings of facts on resolution sheet and returns complaint file to board office.
5. A member of the board reviews the complaint file and the findings of the complaint committee and determines what type of action to take.
6. In many cases the complaint committee finds the dental work performed to be substandard or inadequate and the action taken consists of a letter to the dentist advising him to make a refund or resolve the problem in some way. Often the dentist has the choice of taking the board's advice or going through an informal interview.

QUESTIONS PRESENTED:

1. Is the Dental Board acting in accordance with section 32-1263, subsection C, Arizona Revised Statutes, when a representative of the Board finds evidence of substandard care yet the Board does not hold an informal interview?
2. Is the Dental Board acting in accordance with section 32-1263, subsection D, paragraph 1, Arizona Revised Statutes, when one Board Member can terminate the Board's investigation of a complaint?

ANSWERS:

1. Section 32-1263, Arizona Revised Statutes, provides the grounds for which and the procedures whereby the state dental board may censure, prescribe probation or suspend or revoke a license issued under its jurisdiction. Subsection B of that section states:

The board on its motion may investigate any evidence which appears to show the existence of any of the causes set forth in subsection A of this section,* as grounds for censure, probation, suspension or revocation of a license. The board shall investigate the report under oath of any doctor of dentistry, the Arizona state dental association, any component society, or any other person, which appears to show the existence of any of the causes set forth in subsection A of this section as grounds for censure, probation, suspension or revocation of a license. Any person reporting under this section who provides such information in good faith shall not be subject to liability for civil damages as a result thereof.

Thus, subsection B divides the initiation of action against a licensee into two parts - investigation of evidence by board motion and investigation of a report under oath from a third person.

The first sentence of section 32-1263, subsection C provides that:

If, in the opinion of the board, it appears such information is or may be true, the board shall request an informal interview with the dentist or dental hygienist concerned.

The intent of the language is clearly mandatory ("shall request") but the question to be resolved is what the term "such information" refers to. If the reference is to both parts of subsection B, the board is in violation of the mandatory informal interview requirement regardless of the source of the evidence tending to show a violation of the section. If "such information" refers only to a report of misconduct given under oath by a third person, the board's procedure as stated in the first question presented in your request would not violate the statute if the investigation is conducted on the board's own motion.

A close reading of section 32-1263, Arizona Revised Statutes, indicates that an informal interview is only required when a formal complaint is filed and not when the board investigates evidence of misconduct on its own motion. The following reasons support this conclusion:

1. The term "such information" in subsection C is the same term used in the last sentence of subsection B which in turn clearly refers only to that information provided under oath by a third person and not evidence obtained independently by the board.
2. Section 32-1263, subsection D, Arizona Revised Statutes, speaks of "such informal interview, if requested" (emphasis added). If subsection C is applicable to both parts of subsection B, an interview would in all cases be required and the term "if requested" would be unnecessary. (The same reasoning would apply to the phrase "the informal interview authorized" in subsection D, paragraph 3 of this section.)

*Subsection A of section 32-1263, Arizona Revised Statutes, allows the board to take such action for unprofessional conduct, conviction of certain crimes and incompetence to practice the profession.

It would appear, however, that in all cases of an outside "formal complaint" stated in the facts of your request, an informal interview is required.

You may wish to recommend a clarification of section 32-1263, Arizona Revised Statutes, by statutory revision.

2. In response to your second question, section 32-1263, subsection D, paragraph 1, Arizona Revised Statutes, provides that:

If the board finds that the evidence obtained under subsections B and C of this section does not warrant censure, probation, or suspension or revocation of a license, it shall so notify the dentist or hygienist concerned and terminate its investigation.

Although there is no statutory authority in title 32, chapter 11, Arizona Revised Statutes, or rule or regulation of the dental board that defines "board" for the purpose of determining the number of members required to exercise its decision-making powers, section 1-216, Arizona Revised Statutes, is clearly applicable and provides:

A. Words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving the authority to a majority of the officers or persons unless it is otherwise expressly declared in the law giving the authority.

B. A majority of a board or commission shall constitute a quorum.

The terms "board", "it" and "its" in section 32-1263, subsection D, paragraph 1, Arizona Revised Statutes, thus indicates that a majority of the dental board would be required to terminate an investigation held pursuant to that subsection.

CONCLUSIONS:

1. The dental board is not acting in accordance with Arizona Revised Statutes section 32-1263, subsection C if a representative of the board finds evidence of substandard care pursuant to a report filed with the board under oath by any doctor of dentistry, the Arizona state dental association, any component society, or any other person and the board does not conduct an informal interview. An informal interview would not be required for such a finding arrived at after an investigation on the board's own motion.

2. The dental board is not acting in accordance with Arizona Revised Statutes section 32-1263, subsection D, paragraph 1 if one board member terminates the board's investigation of a complaint. Action by a majority of the board members is required.

cc: Gerald Silva,
Performance Audit Manager

ARIZONA LEGISLATIVE COUNCIL

MEMO

June 20, 1979

TO: Douglas R. Norton, Auditor General
FROM: Arizona Legislative Council
RE: Request for Research and Statutory Interpretation (O-79-45)

This is in response to a request made on your behalf by Gerald A. Silva in a memo dated June 14, 1979.

FACT SITUATION

Many complaints to the State Dental Board are resolved as follows:

1. Investigations of complaints are terminated upon the agreement of the dentist to make a refund or restitution to the complainant.
2. In some cases in which substandard care has been determined, the dentist is advised to make a refund or restitution as an alternative to the Board initiating disciplinary proceedings.

QUESTIONS PRESENTED

1. Is the Dental Board obligated to pursue complaints involving possible substandard professional care even if the dentist agrees to make a refund or provide restitution to the patient?
2. Is it appropriate for the Dental Board to recommend that the dentist make a refund or provide restitution to the patient without holding any type of formal or informal hearing, or in lieu of initiating disciplinary proceedings?
3. Could a refund or restitution be required by statute as a term of probation?

ANSWERS

1. In a memo (O-79-44) issued by this office on June 14, 1979, we concluded that the State Dental Board must conduct an informal interview in all cases in which the board finds evidence of substandard care following an outside formal complaint. If the information in a complaint "is or may be true" the board is required to request an informal interview with the dentist or dental hygienist concerned (Arizona Revised Statutes section 32-1263, subsections B and C). If the evidence found by the board indicates that a possibility of substandard care exists, the issuance of a letter by the board requesting a fee refund does not satisfy the statutory requirements. In this situation, the statutory mandate is clear. The board is obligated to make a written request for an informal interview which must take place not less than ten days from the date of the written notice. Id.

Once such an interview and investigation are completed, Arizona Revised Statutes section 32-1263, subsection D prescribes the options available to the board:

1. If the board finds that the evidence obtained under subsections B and C of this section does not warrant censure, probation, or suspension or revocation of a license, it shall so notify the dentist or hygienist concerned and terminate its investigation.

2. If the board finds that the evidence obtained under subsections B and C of this section does not warrant suspension or revocation of a license but does warrant censure or probation, it may either:

(a) Issue a decree of censure.

(b) Fix such period and terms of probation best adapted to protect the public health and safety and rehabilitate and educate the dentist or dental hygienist concerned. Failure to comply with any such probation shall be cause for filing a complaint and holding a formal hearing as hereinafter provided in paragraph 3 of this subsection.

3. If the board finds that the evidence obtained under subsections B and C of this section warrants suspension or revocation of a license issued under this chapter, or if the dentist or dental hygienist concerned refuses to attend the informal interview authorized in subsection C of this section, then a complaint shall be issued and formal proceedings for the revocation or suspension of such license shall be initiated. All proceedings under this paragraph shall be conducted in accordance with the provisions of title 41, chapter 6, article 1.

If at this stage the board finds no evidence of substandard professional care, the investigation must be terminated. However, if such evidence does exist, the board may prescribe censure or probation, or it may conduct a formal license suspension or revocation hearing. Id. Only at this point in the proceedings is it appropriate for the board to recommend a fee refund or restitution as a term or probation.

2. It is inappropriate for the Dental Board to recommend fee refunds or restitution prior to holding at least an informal interview. See discussion in point 1 of this memo.

3. Arizona Revised Statutes section 32-1263 could be amended to include the use of fee refunds or restitution as a term of probation, however, the existing language of subsection D, paragraph 2, subdivision (b) is sufficiently broad so as to permit the use of fee refunds or restitution as terms of probation.

CONCLUSIONS

1. The Dental Board must conduct an informal interview in response to a formal outside complaint involving possible substandard professional care.

2. It is inappropriate for the Dental Board to recommend fee refunds or restitution prior to holding at least an informal interview.

3. Fee refunds or restitution could be specifically required by statute as a term of probation, however, existing statutory language already permits their use. Additionally if the current informal procedures of the Dental Board are found to be preferable, the statutes could be amended to conform to those procedures.

cc: Gerald A. Silva
Performance Audit Manager

ARIZONA LEGISLATIVE COUNCIL

MEMO

July 6, 1979

TO: Douglas R. Norton, Auditor General
FROM: Arizona Legislative Council
RE: Request for Research and Statutory Interpretation (O-79-48)

This is in response to a request submitted on your behalf by Gerald Silva in a memo dated June 20, 1979.

FACT SITUATION:

Arizona Revised Statutes section 32-1294 prescribes that:

(n)o more than two denturists may perform their professional duties under a dentist's supervision at any one time.

A Dental Board regulation, A.C.R.R. R4-11-49, paragraph B, prescribes that:

(n)o more than two Dental Hygienists may perform their professional duties under a Dentist's supervision at any one time.

QUESTION PRESENTED:

Would enforcement of the above statute and rule and regulation represent a violation of state or federal laws regarding restraint of trade?

ANSWERS:

1. Arizona Revised Statutes section 32-1294

The applicability to this section of federal or state laws regarding restraint of trade has previously been discussed by this office in a memo (O-79-36) dated May 22, 1979. We concluded that even if this section constituted anticompetitive activity, it would fall within the "state action" or "public service aspect" exemptions* to the federal Sherman Act. Additionally we have previously concluded that a "person's action that is prescribed by the state legislature is not subject to the state antitrust law." (O-79-32 dated May 30, 1979 at p. 3.) Even if it is assumed that state antitrust law does apply, a strong argument could be made that the right of the legislature to regulate using the police power should prevail over the application of the state antitrust law (see O-79-36 at pp. 4, 5).

*For additional treatment of these exemptions, see the following memos issued by this office: O-79-32 dated May 30, 1979, O-79-33 dated June 6, 1979 and O-79-34 dated May 21, 1979.

2. A.C.R.R. R4-11-49

In our earlier memo, O-79-32, we noted that:

recent cases have indicated that actions by state agencies and boards are not state-compelled and thus not entitled to an exemption under the state action theory. (citations omitted)

The state Dental Board has the authority to "make rules not inconsistent with this chapter for . . . regulating the practice of dentists and auxiliary personnel, provided . . . regulation of auxiliary personnel shall be based upon . . . the necessary degree of such supervision of such personnel by dentists." (Arizona Revised Statutes section 32-1207, subsection A, paragraph 1, subdivision (a).) More specifically the board is required to "adopt rules and regulations governing the practice of dental hygienists, not inconsistent with the provisions of this chapter (Arizona Revised Statutes section 32-1284, subsection B).

In 1974, the legislature amended Arizona Revised Statutes section 32-1281 to prescribe that "(d)ental hygienists shall practice under the supervision of a dentist licensed by this state." (Laws 1974, chapter 74, section 18.) Prior to amendment in 1974, Arizona Revised Statutes section 32-1289 provided that "(n)o licensed dentist shall have more than one hygienist under supervision at one time." Thus it would seem that the intent of the 1974 amendments was to remove the number restriction on supervised dental hygienists. Yet in 1976 the dental board, with the adoption of A.C.R.R. R4-11-49, reinstated a number restriction.

We must conclude that it is questionable whether the board's rule is consistent with the statutory scheme occasioned by the 1974 legislative amendments. Arizona courts have long held that:

it is a fundamental principle of administrative law that an administrative agency must function in the exercise of its rule-making authority within the parameters of its statutory grant. To operate otherwise would be an administrative usurpation of the constitutional authority of the legislature. Kennecott Copper Corp. v. Industrial Commission of Arizona, 115 Ariz. 184, 564 P.2d 407 (1977).

An argument can be made that the adoption of A.C.R.R. R4-11-49 by the board was inconsistent with legislative intent and thereby was an exercise of rule-making authority that exceeded its statutory grant.

Action by the board outside of its statutory grant could certainly be deemed to be not state-compelled so that the "state action" exemption would not apply. If a court found this to be the case, the standard antitrust analysis would then be applied to test whether or not the board's action illegally restrains trade. (See O-79-32 at p, 4.) Although we cannot predict how a court might rule in this matter we must conclude that an argument can be made that this type of regulation unduly restricts the freedom of dental hygienists as well as creating unfavorable economic effects for the consumers of services provided by dental hygienists.

CONCLUSIONS:

1. Enforcement of Arizona Revised Statutes section 32-1294 would not violate state or federal laws regarding restraint of trade.

2. The enforcement of A.C.R.R. R4-11-49, paragraph 3 would seem to violate legislative intent. Additionally, while we cannot predict how a court might rule in this matter, arguments could be made that enforcement of this regulation would violate restraint of trade laws.

cc: Gerald A. Silva
Performance Audit Manager

ARIZONA LEGISLATIVE COUNCIL

MEMO

July 12, 1979

TO: Douglas R. Norton, Auditor General
FROM: Arizona Legislative Council
RE: Request for Research and Statutory Interpretation (0-79-50)

This is in response to a request submitted on your behalf by Gerald A. Silva in a memo dated July 3, 1979.

FACT SITUATION:

The State Dental Board initiated investigations against denturists involved with the denturism movement from 1976 through 1978. In late 1976 and early 1977 the Arizona State Dental Association (ASDA), a professional organization, paid for the investigations because the Dental Board did not have sufficient funds. The Dental Board made no attempt to request a supplemental appropriation from the Legislature.

QUESTIONS PRESENTED:

1. Are there any prohibitions, statutory or otherwise, against allowing a professional organization, such as the ASDA, to pay for investigations which are in the purview of the Board?
2. In addition, do the above circumstances constitute a circumvention of the legislative budgetary review process?

ANSWERS:

1. There are no statutory prohibitions against allowing a professional organization such as the Arizona State Dental Association (ASDA) to pay for investigations which are in the purview of the State Dental Board. Indeed, the Board would probably characterize the financial assistance as a gift intended to help them carry out the purposes of Title 32, chapter 11, Arizona Revised Statutes. Many state agencies are expressly authorized by statute to accept and expend public and private gifts and grants (e.g., see Arizona Revised Statutes section 41-1304.04, permitting the Legislative Council to accept such gifts and grants). No such statutory authorization has been given to the Dental Board. In fact, only one Title 32 agency, the State Board of Pharmacy, is authorized by statute to accept monies and services (Arizona Revised Statutes section 32-1904, subsection B, paragraph 4). The Arizona Supreme Court has held that administrative officers and agencies have no common law or inherent powers, Kendall v. Malcom, 98 Ariz. 329, 404 P.2d 414 (1965), and that the powers and duties of an administrative agency are to be measured by the statute creating them. Pressley v. Industrial Commission, 73 Ariz. 22, 236 P.2d 1011 (1951). The application of this rule to the Dental Board statutes results in an argument

that, since the statute creating the dental board failed to include the power to accept gifts, the Board has no authority to do so. This argument is bolstered by the fact that the Legislature has expressly given this power to some agencies and not to others.

However, it can also be argued that the power to accept gifts and grants is an implied power which is necessary to carry out the powers expressly granted to the Dental Board (see Commercial Life Ins. Co. v. Wright, 64 Ariz. 129, 166 P.2d 243 (1946) and also Arizona Revised Statutes section 32-1207, subsection A, paragraph 11). Additionally, the Attorney General has commented that Arizona Revised Statutes section 35-149 (discussed in part 2 of this memo) indicates legislative intent to permit agencies to receive private funds to defray expenses. Op. Atty. Gen. No. R75-748 (1976).

We are unable to predict how an Arizona court would resolve these arguments.

In spite of the fact that no statutory provisions prohibit the ASDA from paying for investigations of the State Dental Board and even assuming that the Board has authority to accept a gift, we believe that certain fundamental ethical and equitable principles compel the conclusion that such activities are highly inappropriate for an administrative agency investigation. A hearing before an administrative agency exercising judicial, quasi-judicial or adjudicatory powers must be fair, open and impartial. The applicable principle has been described by one state court as the doctrine of appearance of fairness. Hill v. Dept. of Labor and Industries, 90 Wash. 276, 580 P.2d 636 (1978). Under that principle, members of commissions having the role of conducting fair and impartial fact-finding hearings must, as far as practical, be free of entangling influences and execute their duties with the appearance as well as the reality of fairness. King County Water District No. 54 v. King County Boundary Review Board, 87 Wash. 2d 536, 554 P.2d 1060 (1976). Where a professional organization opposed to the denturism movement pays for an "impartial" public investigation of the movement, a disinterested person could easily conclude that the appearance of fairness doctrine has been violated. In order to insure that administrative agencies act in an impartial manner activities such as those taken by the ASDA should be discouraged.

Additionally, while not applicable to members of administrative boards, both the Code of Professional Responsibility (for attorneys) and the Code of Judicial Conduct require that even the appearance of impropriety be avoided in all activities. To promote public confidence in the integrity and impartiality of state administrative agencies, we believe that officers of those agencies should follow similar ethical guidelines.

2. The circumstances described in the fact situation would not appear to constitute a circumvention of the legislative budgetary review process. Arizona Revised Statutes section 35-146 prescribes that all monies received by budget units must be deposited with the state treasurer. The disposition of private contributions is provided in Arizona Revised Statutes section 35-149. The controls prescribed by this section would seem to indicate that adequate information on the acceptance of private monies is available for purposes of budgetary review. While there is a need for the Arizona Legislature to consider the extent of private monies received by budget units when it makes an appropriation of state funds to them, the receipt of ASDA monies by the Dental Board would not violate any state law concerning the budget review process.

CONCLUSIONS:

1. There are no statutory prohibitions against allowing a professional organization such as the ASDA to pay for investigations which are in the purview of the State Dental Board. However, ethical and equitable principles indicate that such activity is inappropriate in an impartial administrative proceeding.

2. The described factual circumstances do not circumvent the legislative budgetary review process.

cc: Gerald A. Silva
Performance Audit Manager

ARIZONA LEGISLATIVE COUNCIL

MEMO

September 13, 1979

TO: Douglas R. Norton, Auditor General
FROM: Arizona Legislative Council
RE: Request for Research and Statutory Interpretation (O-79-55)

This is in response to a request submitted on your behalf by Gerald A. Silva in a memo dated September 7, 1979.

Your request quoted the following portion of Arizona Revised Statutes section 32-1263, subsection B: "The board shall investigate the report under oath of any doctor of dentistry, . . ."

QUESTION:

Will a report which is signed by the complainant fulfill the "under oath" requirement or must the report be notarized or otherwise certified by some third party?

DISCUSSION:

An elementary rule of statutory construction is that each word of a statute will be given effect. Sutherland, Statutory Construction, 4th Ed., section 46.06. State v. Superior Court for Maricopa County, 113 Ariz. 248, 550 P.2d 626 (1976).

It is apparent that meaning must be given to the words "under oath" in Arizona Revised Statutes section 32-1263, subsection B.

The words of a statute are to be given their common meaning unless it appears from the context or otherwise that a different meaning is intended. Ross v. Industrial Commission, 112 Ariz. 253, 540 P.2d 1234 (1975).

No special definition of "under oath" is provided in Arizona Revised Statutes section 32-1263, subsection B. A definition of "oath" is specified in Arizona Revised Statutes section 1-215, paragraph 22: "'Oath' includes affirmation or declaration." Again, no special definition is provided. The legislature apparently intended that "oath" should be given its common meaning.

Webster's Third New International Dictionary defines "under oath" as "under the solemn obligation of an oath". The phrase "under oath" connotes

something of the notion that the person is first sworn, or at least that the oath is administered by someone. 67 Corpus Juris Secundum, Oaths and Affirmations, section 5.

"Oath" is defined by Webster's as "a solemn usually formal calling upon God or a god to witness to the truth of what one says . . .", "a usually formal affirmation made solemn by being coupled with invocation of something viewed as sacred or of something highly revered" or "a usually formal affirmation that is some way made solemn without such an appeal or without such an invocation".

Black's Law Dictionary 966 (5th Ed. 1979) defines oath as "an outward pledge by the person taking it that his attestation or promise is made under an immediate sense of responsibility to God" and "a solemn appeal to the Supreme Being in attestation of the truth of some statement".

The legislature has acknowledged the importance of the "solemn calling upon God", "the outward pledge" and the "immediate sense of responsibility to God" by authorizing by statute only certain persons to administer oaths. Arizona Revised Statutes section 12-2222 specifies the persons who may administer oaths in this state:

Every executive and judicial officer, clerk or deputy clerk of courts of record and all notaries public may administer and certify oaths required to be administered or taken under any law of this state. Other officers or deputies may administer oaths which pertain to the duties of their office.

In addition, the legislature has specified the manner in which an oath should be administered and its significance, in Arizona Revised Statutes section 12-2221, subsection A:

A. An oath or affirmation shall be administered in a manner which will best awaken the conscience and impress the mind of the person taking the oath or affirmation, and it shall be taken upon the penalty of perjury.

Unfortunately no Arizona court has interpreted these statutory sections, nor apparently has the Attorney General issued a formal opinion interpreting them.

However, an Appeals Court in Ohio has decided a case which we believe is pertinent. The facts of Youngstown Steel Door Co. v. Kosydar, 33 Ohio App.2d 277, 294 N.E.2d 676 (1973), involved a statute specifying tax assessment appeals procedures. The relevant portion of the statute, Ohio Rev. Code Ann. section 5739.13, is the following: " . . . a petition in writing, verified under oath by said vendor, . . .".

In Youngstown the taxpayer sent a letter requesting a hearing, setting out the grounds of his objections to the tax assessment and closing with:

Under the penalties of perjury, I declare that I have been authorized . . . to make this petition that to the best of my knowledge and belief the statements made therein are true and correct . . . Id. at 678.

The letter was not notarized and did not appear to have been signed in the presence of any person authorized to take oaths or anyone else, according to the court. The court held that this letter did not comply with the statute because it was not "under oath". The court interpreted "under oath" to mean that the person writing the letter must first be sworn to tell the truth or that someone must have administered an oath to the person thereby putting him under a solemn obligation to attest to the truth of his statements.

The court distinguished between verification which the taxpayer clearly did by formally declaring the truth of his statements and signing the statements and verification under oath which required " . . . some further formal act or presence calculated to bring to bear upon the declarant's conscience the full meaning of what he does." Id. at 679.

It is reasonable to conclude that the Arizona legislature intended that persons complaining of unprofessional conduct by a dentist should swear to the truth of their statements. Under Arizona Revised Statutes section 32-1263, subsection B, the dental board is required to investigate a report under oath of professional wrongdoing or incompetence filed by certain named persons or groups.

Another statute contains similar language. Arizona Revised Statutes section 44-1524, paragraph 1 authorizes the Attorney General, when he receives a signed complaint relating to consumer fraud, to:

1. Require such person to file . . . a statement or report in writing, under oath, as to all the facts . . .

The Attorney General's staff informed us that they interpret "under oath" to mean that the statement must be notarized or made while under oath.

The language of Arizona Revised Statutes section 32-1263, subsection B which relates to a "report under oath" of unprofessional conduct of a dentist is probably no longer desirable. There appears to be a trend away from requiring a report under oath in similar situations.

Chapter 1, 1st Special Session, 1976 Ariz. Sess. Laws (the medical malpractice act) amended Arizona Revised Statutes sections 32-1451 and

32-1855 to, among other things, remove "under oath" from the reporting provisions. Arizona Revised Statutes section 32-1451 concerns the board of medical examiners and relates to reports of incompetence or unprofessional conduct of doctors. Arizona Revised Statutes section 32-1855 concerns the osteopathic board and also relates to reports of unprofessional conduct or incompetence of osteopaths.

CONCLUSION:

A report which is signed by a complainant will not fulfill the "under oath" requirement of Arizona Revised Statutes section 32-1263, subsection B, unless it is attested to by the complainant who has been sworn by a person, including a notary, authorized to administer oaths.

cc: Gerald A. Silva

APPENDIX II

ARIZONA REVISED STATUTE 32-1201(10)

PROFESSIONS AND OCCUPATIONS § 32-1201

3. "Dental hygienist" means anyone engaged in the general practice of dental hygiene and all related and associated duties.

4. "Dental laboratory technician" means any person, other than a licensed dentist, who, pursuant to a written work order of a dentist, fabricates artificial teeth, prosthetic appliances or other mechanical and artificial contrivances designed to correct or alleviate injuries or defects, both developmental and acquired, disorders or deficiencies of the human oral cavity, teeth, investing tissues, maxilla or mandible or adjacent associated structures.

5. "Dentistry," "dentist" and "dental" includes and embraces the general practice of dentistry as well as all specialties or restricted practices thereof.

6. "Denturist" means a person practicing denture technology pursuant to article 5 of this chapter.¹

7. "Licensed" means licensed in this state.

8. "Recognized dental hygiene school" means a dental hygiene school maintaining standards of entrance, study and graduation approved by the board as satisfactory.

9. "Recognized dental school" means a dental school maintaining standards of entrance, study and graduation approved by the board as satisfactory.

10. "Unprofessional conduct" means the following acts, whether occurring in this state or elsewhere:

(a) Willful betrayal of a professional confidence or willful violation of a privileged communication except as either of these may otherwise be required by law. This provision shall not be deemed to prevent members of the board from the full and free exchange of information with the licensing and disciplinary boards of other states, territories or districts of the United States or with foreign countries or with the Arizona state dental association or any of its component societies or with the dental societies of other states, counties, districts, territories or with those of foreign countries.

(b) Use of drugs, including narcotic drugs, as defined in title 36, chapter 9, article 1,² dangerous drugs, as defined in title 32, chapter 18, article 1,³ or hypnotic drugs, including acetylurea derivatives, barbituric acid derivatives, chloral, paralydehyde, phenylhydantoin derivatives, suffonmethane derivatives or any compounds or mixtures or preparations that may be used for producing hypnotic effects, or alcohol to the extent that it affects the ability of the dentist or dental hygienist to practice his profession.

(c) Prescribing, dispensing or using drugs for other than accepted therapeutic purposes.

(d) Gross malpractice, or repeated acts constituting malpractice.

(e) Acting or assuming to act as a member of the board when such is not the fact.

(f) Procuring or attempting to procure a certificate of the national board of dental examiners or a license to practice dentistry or dental hygiene by fraud, misrepresentation or by knowingly taking advantage of the mistake of another.

(g) Having professional connection with or lending one's name to an illegal practitioner of dentistry or any of the other healing arts.

(h) Representing that a manifestly not correctable condition, disease, injury, ailment or infirmity can be permanently corrected, or that a correctable condition, disease, injury, ailment or infirmity can be corrected within a stated time, if such is not the fact.

(i) Offering, undertaking, or agreeing to correct, cure or treat a condition, disease, injury, ailment or infirmity by a secret means, method, device or instrumentality.

§ 32-1201 PROFESSIONS AND OCCUPATIONS

- (j) Refusing to divulge to the board, upon reasonable notice and demand, the means, method, device or instrumentality used in the treatment of a condition, disease, injury, ailment or infirmity.
- (k) Giving or receiving, or aiding or abetting the giving or receiving of rebates, either directly or indirectly.
- (l) Knowingly making any false or fraudulent statement, written or oral, in connection with the practice of dentistry.
- (m) Refusal, revocation or suspension of license by any other state, territory, district or country, unless the board finds that such was not occasioned by reasons which relate to the ability to safely and skillfully practice dentistry or to any act of unprofessional conduct.
- (n) Any conduct or practice contrary to recognized standards of ethics of the dental profession or any conduct or practice which does or would constitute a danger to the health, welfare or safety of the patient or the public.
- (o) Obtaining a fee by fraud or misrepresentation, or willfully filing a fraudulent claim with a third party for services rendered or to be rendered to a patient.
- (p) Employing unlicensed persons to perform work which can be done legally only by licensed persons.
- (q) Practicing dentistry under a false or assumed name in this state, other than as allowed by § 32-1262.
- (r) Willfully causing or permitting a dental hygienist or dental auxiliary personnel operating under his supervision to commit illegal acts or perform an act or operation other than that permitted under the provisions of article 4 of this chapter and by the rules and regulations adopted by the board pursuant to § 32-1282.
- (s) Violating or attempting to violate, directly or indirectly, or assisting or abetting the violation of or conspiring to violate any of the provisions of this chapter or rule or regulation promulgated by the board.
- (t) The following advertising practices:
 - (i) The publication or circulation, directly or indirectly, of any false, fraudulent or misleading statements concerning the skill, methods or practices of himself or of any other person.
 - (ii) Advertising that the performance of any dental operation does not cause pain.
 - (iii) The advertising in any manner which tends to deceive or defraud the public.
 - (iv) The claiming or inferring in advertising matter superiority over other practitioners.
 - (v) The publishing of reports of cases or testimonials of patients in any public advertising media.
 - (vi) The advertising of any free dental services except x-rays or examinations; or the giving or offering to give away merchandise as an inducement to secure dental patronage.
 - (vii) The employment of a solicitor to obtain patronage.
 - (viii) Advertising by the public exhibition of or use of specimens of dental work.
 - (ix) Advertising by means of billboards or off-site signs. As amended Laws 1978, Ch. 134, § 1, eff. June 2, 1978.

¹ Section 32-1293 et seq.

² Section 36-1091 et seq.

³ Section 32-1901 et seq.

APPENDIX III

LETTER FROM THE PRESIDENT OF THE
ARIZONA STATE DENTAL ASSOCIATION

ARTHUR DALPIAZ, D.D.S.
PRESIDENT

WILLIAM E. HAWKINS, D.D.S.
PRESIDENT ELECT

WILLIAM L. LABADIE, D.D.S.
VICE PRESIDENT

DAVID H. UTZINGER, D.D.S.
SECRETARY

THOMAS R. TRANDAL, D.D.S.
TREASURER

MRS. HELEN H. GIBBS
EXECUTIVE DIRECTOR



APPENDIX III

ARIZONA STATE DENTAL ASSOCIATION

3800 North Central Avenue
Phoenix, Arizona 85012

PHONE 264-4522

June 29, 1979

Mr. Steve Wallace
Auditor General's Office
112 N. Central, Suite 600
Phoenix, Arizona 85004

Dear Mr. Wallace:

Our Executive Director, Mrs. Helen Gibbs, recently advised me of some of your inquiries relating to your audit of the State Board of Dental Examiners in connection with the so-called "Sunset Review".

Malpractice Insurance: You inquired about reports received from the Davidson Insurance Agency. The ASDA does not routinely receive reports on insurance cases, since each dentist carries his own insurance. However, we have requested that the Dean Davidson Insurance Agency, which brokers the insurance for most of our members (and also the ASDA), provide our Insurance Committee with certain information, including the numbers and types of claims made in Arizona, dates of loss, and settlement amounts. Of course, no identification of any insured or claimant is requested or supplied.

Our Committee evaluates the data to determine the frequency and kinds of claims being made so that it can recommend what type of coverage Arizona dentists should try to obtain. This is beneficial to our members and, to the extent we can keep abreast of legal trends, can provide more and better coverage for potential claimants.

As the number of malpractice claims increases and the cost of coverage also increases, it is increasingly important to our members to know how to minimize risks and obtain adequate coverage. The ASDA hopes to continue its evaluation of claims to insure the best coverage at the lowest cost for the protection of Arizona dentists and their patients.

Hoffman Case: Dr. Bert Hoffman, an Air Force dentist licensed in Texas (I believe), sued the State Dental Board of Examiners after he



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failed the Arizona licensure examination for either the second or third time. He claimed that his test scores should have been averaged differently in order to give him a passing grade. The Board had determined from his examination that he was not qualified to practice dentistry. The Arizona Supreme Court eventually upheld the Board's determination.

The Attorney General's office was, at the time, quite overtaxed and unable to devote the time required to defend this case. The then Executive Director and the Chairman of the State Board requested Mr. Jon Kyl and the firm of Jennings, Strouss & Salmon to assist the Attorney General's office, and Mr. Kyl was appointed special assistant Attorney General for that purpose, by the Attorney General.

Jennings, Strouss & Salmon has represented the ASDA for over twenty years, and has, as a result, acquired a certain amount of knowledge about the profession. The ASDA agreed to pay their fees in handling the case since Mr. Kyl's appointment was without compensation by the State.

The ASDA's interest in the case was to insure that the State's position was adequately represented so that the legal standards for dental licensure in Arizona would not be circumvented by someone not found qualified by the licensure Board. We have verified with Mr. Kyl that, in representing the State in that case, he worked with the Attorney General's office and the State Board and that the litigation was totally controlled by the State. The ASDA did not seek to influence the course of the litigation and did not involve itself in any way whatsoever in the case.

Associated Detective Agency: The other recent instance in which the ASDA supplied assistance to the Dental Board involved the illegal practice of dentistry by several persons without any dental education or training at all. These persons (who called themselves "denturists") began openly providing denture care to members of the public.

The problem was brought to the attention of the State Dental Board which, in turn, requested assistance from the Attorney General's office. The Board advised the ASDA that neither the Attorney General's office nor the Board had the funds or the investigators to immediately investigate the alleged violations of law.

As a result, the ASDA hired an investigator to obtain evidence of any such violations, and that evidence was turned over to the Attorney General. The Board or Attorney General eventually provided its own



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investigation and the ASDA discontinued its efforts thereafter. The only purpose of the investigator was to obtain evidence of violations of law to assist the State in the cases it filed. The Arizona Supreme Court eventually upheld the State Board's efforts to enjoin the illegal practice and several injunctions resulted.

Again, the reason the ASDA became involved was to prevent circumvention of Arizona law, and again, its position in support of the protection of the public was vindicated by the Supreme Court. The ASDA will continue to do its best to see that the laws of the State of Arizona are not violated. Since the State Dental Board is the enforcing agency, the ASDA will cooperate in any proper way with the Board and the law enforcement agencies, including providing evidence of violations of law.

Purpose: The basic purposes of the Association are:

- a) To improve and protect the public's dental health and welfare;
- b) To ensure quality dental care that is appropriate for the health of our patients;
- c) To promote the art and science of dentistry; and
- d) To represent the interests of the members of the dental profession and the public which it serves.

In past years the State Board of Dental Examiners was primarily a licensing board. Recently the Dental Board has actively expanded its activities to areas of continuing education, patient complaint review, duties of auxiliaries, denturist licensure and other regulatory responsibilities.

The Board has not had sufficient funds to carry out its mandated responsibilities, and the ASDA has supported an increase in license renewal fees which will allow the Dental Board more revenue to meet its responsibilities.

The ASDA recommends qualified nominees for the Dental Board to the Governor. When a Board Member takes his oath of office, he becomes a representative of the State and not the profession.

The most efficient and practical way to regulate the practice of dentistry is by individuals knowledgeable in the profession. I



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feel it is perfectly proper, indeed essential, for interaction of the two entities. Members of the profession have the highest stake in maintaining the highest standards of the profession for the good of the public. The Dental Board should be continued in its present structure and even strengthened in its ability to properly regulate the practice of dentistry.

I sincerely hope that in making your recommendations you and your colleagues will research and consider the high quality of dental care that the existing system has provided.

Please call me or Mrs. Gibbs if we may supply any additional information or clarification with regard to your audit of the Arizona Dental Board. We appreciate the concern you have shown in studying the Board and our profession.

Cordially yours,

A handwritten signature in cursive script that reads "Arthur Dalpiaz, D.D.S.".

Arthur Dalpiaz, D.D.S.

AD:pre

APPENDIX IV

CORRESPONDENCE FROM THE
ASSOCIATED DETECTIVE AGENCY

DOUGLAS R. NORTON, CPA
AUDITOR GENERAL

BILLIE J. ALLRED, CPA
DEPUTY AUDITOR GENERAL

STATE OF ARIZONA
OFFICE OF THE
AUDITOR GENERAL

SUITE 600
112 NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85004
255-4385

SUITE 820
33 NORTH STONE AVENUE
TUCSON, ARIZONA 85701
882-5465


July 3, 1979

Bob Crawford
Associated Detective Agency
2701 East Camelback Road, Suite 500
Phoenix, AZ 85016

Dear Mr. Crawford:

The purpose of this letter is to confirm my understanding of our telephone discussion on July 3, 1979.

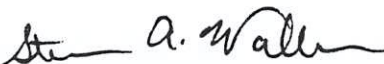
1. During all investigations concerning denturists and dentists involved in the denturism movement, which occurred from 1976 through 1978, the Associated Detective Agency was hired and employed by the Board of Dental Examiners.
2. All billings for investigations involving the denturism movement were made directly to the Board of Dental Examiners.


Bob Crawford
Associated Detective Agency

Please edit these statements to your satisfaction, sign where indicated and return the signed copy to our Office. A prepaid addressed envelope has been included for your convenience.

Thank you very much for your cooperation with our audit of the Board of Dental Examiners.

Sincerely



Steve Wallace
Performance Audit Division

SW/db

ASSOCIATED DETECTIVE AGENCY

2701 East Camelback Road
Suite 500
Phoenix, Arizona 85016
955-6791

July 17, 1979

Mr. Steve Wallace
Auditor General's Office
112 N. Central
Suite 600
Phoenix, Arizona 85004

Dear Mr. Wallace:

Per our telephone conversation last week, please disregard the correspondence from your office dated July 3, 1979. As we discussed, the letter contained erroneous statements, and I have since determined the following.

The Arizona State Dental Association, 3800 N. Central, Suite 320, Phoenix, Arizona, had paid a portion of the charges involved with our investigation of the denturists which began during the latter part of 1976 and ended in mid-1978. The following will provide you the dates of payment, the amounts, and by whom the payments were made:

10/18/76	\$472.20	Arizona State Board of Dental Examiners
10/29/76	344.60	" "
11/25/76	2831.84	Arizona State Dental Association
12/17/76	78.00	Arizona State Board of Dental Examiners
1/30/77	830.65	Arizona State Dental Association
3/23/77	500.00	" "
4/28/77	92.30	" "
5/24/77	533.53	" "
6/09/77	746.35	" "
7/22/77	790.90	" "
9/22/77	801.00	Arizona State Board of Dental Examiners
10/24/77	653.50	" "
12/09/77	412.30	" "
3/08/78	351.00	" "
5/03/78	940.35	" "
5/03/78	866.50	" "

Mr. Thomas P. Douglas is the Executive Secretary for the Arizona State Board of Dental Examiners. Ms. Helen Gibbs is the Executive Director of the Arizona State Dental Association. I also dealt with Mr. John L. Kyl, who is the lawyer representing the Arizona State Dental Association. He is associated with Jennings, Strouss and Salmon, 111 W. Monroe, Phoenix, Arizona 85003.

Mr. Steve Wallace

Mr. Wallace, I hope this letter clarifies the matter regarding your audit of the Board of Dental Examiners. However, if I can be of further assistance to you, please do not hesitate to contact me.

Sincerely,



Robert L. Crawford

sa

ASSOCIATED DETECTIVE AGENCY

2701 East Camelback Road
Suite 500
Phoenix, Arizona 85016
955-6791

July 24, 1979

Mr. Steve Wallace
Auditor General's Office
112 North Central Avenue
Suite 600
Phoenix, Arizona 85004

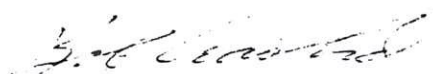
Dear Mr. Wallace:

Per our telephone conversation of Friday, July 20th., the following is a breakdown of the bills you requested:

10/18/76	\$472.20	Apache Denture Clinic	
10/29/76	\$344.60	Apache Denture Clinic	
11/25/76	\$2831.84	Jims Denture Clinic	\$426.50
		Arizona Denture Specialists	426.75
		Thomas Denture Studio	370.30
		Jims Denture Clinic	140.50
		Northwest Denture Clinic	167.45
		Arizona Denture Studio	387.70
		Don Dostell's Dental Lab	13.40
		Billco Dental Lab	76.50
		Colonial Denturist Office	542.31
		Border Dental Lab	244.43
12/17/76	\$78.00	Apache Denture Clinic	
1/30/77	\$830.65	Valley Denture & R.F. Bobo D.D.S.	
3/23/77	\$500.00	Dr. Bobo & J. Blenkle	
4/28/77	\$92.30	Dr. Bobo & J. Blenkle	
5/24/77	\$533.53	Cahill Denture	\$89.60
		Flagstaff Denture Clinic	320.13
		Mesa Denture Clinic	93.80
		Blenkle Dental Lab	30.00
6/9/77	\$746.35	Dr. Bobo	\$97.50
		Jims Denture, Valley Denture,	
		Thomas Denture & Arizona	
		Denture	57.00
		Flagstaff Denture Clinic	283.50
		Suntown Denture	219.10
		Apache Denture Clinic	89.25

7/22/77	\$790.90	Sunnyslope	\$172.00
		American Dental Lab	249.00
		Sun Dental Lab	170.25
		Scottsdale Denture Service	199.65
9/22/77	\$801.00	Apache Denture Clinic	\$644.25
		Sun Dental Lab	31.50
		American Dental Lab	31.50
		Scottsdale Denture Clinic	93.75
10/24/77	\$673.50	Arizona Denture Clinic	\$94.50
		Apache Denture Clinic	360.00
		Jims Denture Clinic	174.00
		Scottsdale Denture Clinic	22.50
		Scottsdale Denture Service	22.50
12/09/77	\$412.30	Jims Denture Clinic	
3/08/77	\$351.00	Jims Denture Clinic	\$202.50
		Youngtown Denture Clinic	99.00
		West Plaza Denture Clinic	49.50
5/03/78	\$940.35	Jims Denture Clinic	\$125.40
		Suntown Denture Clinic	131.40
		Northwest Denture Clinic	95.25
		Arizona Denture Clinic	47.25
		West Plaza Denture Clinic	33.90
		Sun Dental Lab	53.70
		American Dental Lab	50.85
		Cahill Denture Studio	32.25
		Sunnyslope Denture Clinic	35.25
		Mesa Denture Clinic	87.00
		Arizona Denture Specialists	32.75
		Scottsdale Denture Service	15.90
		Scottsdale Denture Clinic	98.70
		Youngtown Denture Clinic	90.75
5/03/78	\$866.50	Apache Denture Clinic	\$550.50
		Jims Denture Clinic	95.00
		Scottsdale Denture Clinic	26.00
		Sunnyslope Denture Clinic	127.50
		Scottsdale Denture Service	67.50

Sincerely,


 Robert L. Crawford
 Associated Detective Agency

APPENDIX V

SUMMARY OF THE RESULTS OF AN AUDITOR GENERAL
SURVEY OF LICENSEES OF THE
STATE BOARD OF DENTAL EXAMINERS

STATE OF ARIZONA
OFFICE OF THE AUDITOR GENERAL
SURVEY OF REGISTRANTS
STATE BOARD OF DENTAL EXAMINERS

1. Please indicate the type of license you currently hold:

<u>250</u>	Dentist
<u>83</u>	Dental Hygienist
<u>3</u>	Denturist
<u>5</u>	Restricted

You are currently practicing:

<u>85</u>	Over 40 hours per week
<u>188</u>	30 - 40 hours per week
<u>30</u>	20 - 30 hours per week
<u>17</u>	10 - 20 hours per week
<u>15</u>	Less than 10 hours per week
<u>6</u>	No response

Your practice is located in a city with a population of:

<u>244</u>	More than 100,000
<u>26</u>	50,000 to 100,000
<u>23</u>	30,000 to 50,000
<u>14</u>	15,000 to 30,000
<u>26</u>	Less than 15,000
<u>8</u>	No response

2. How did you obtain your Arizona license?

<u>335</u>	Examination
<u>2</u>	Reciprocity
<u>4</u>	No response

3. If you took the exam do you feel that it was:

<u>11</u>	No response
<u>282</u>	A valid measure of the knowledge and skills required for your profession
<u>11</u>	Too difficult
<u>20</u>	Not difficult enough
<u>17</u>	Not a valid measure

4. If you applied for reciprocity do you feel that the present requirements are too restrictive?

<u>33</u>	Yes	If yes, why? _____
<u>107</u>	No	_____
<u>201</u>	No response	_____

5. How would you rate the potential harm to the public that is directly attributable to the services provided by each group:

	Risk of Severe Harm (Loss of Life)	Risk of Moderate Harm (Reparable Damage)	Discomfort	No Responses
Dentist	<u>127</u>	<u>87</u>	<u>77</u>	<u>5</u>
Restricted Dentist	<u>85</u>	<u>95</u>	<u>57</u>	<u>10</u>
Dental Hygienist	<u>36</u>	<u>122</u>	<u>124</u>	<u>5</u>
Denturist	<u>78</u>	<u>173</u>	<u>29</u>	<u>6</u>
Dental Assistant	<u>10</u>	<u>95</u>	<u>168</u>	<u>6</u>

6. In your opinion, the board's primary function should be:

<u>6</u>	1. To protect the profession	<u>51</u>	5. 2 and 3
<u>165</u>	2. To insure competence	<u>31</u>	6. 1, 2 and 3
<u>82</u>	3. To protect the public	<u>2</u>	7. 1 and 3
<u>2</u>	4. 1 and 2	<u>2</u>	8. No response

7. What is the best method of insuring continued competency?

<u>7</u>	6. 1 and 3	<u>25</u>	1. Periodic re-examination
<u>20</u>	7. 3 and 5	<u>37</u>	2. More stringent disciplinary actions
<u>16</u>	8. 2, 3 and 5	<u>144</u>	3. Peer review
<u>29</u>	9. 2 and 3	<u>6</u>	4. Other
<u>11</u>	10. No response	<u>46</u>	5. Continuing education

8. Have you ever been involved in the Board's complaint review process?

<u>41</u>	Yes
<u>298</u>	No
<u>2</u>	No response

9. If you have been involved:

	Yes	No	
- Was the matter resolved in a timely fashion?	<u>35</u>	<u>5</u>	<u>301</u>
- Was the resolution equitable?	<u>31</u>	<u>5</u>	<u>305</u>
- Was a formal hearing held?	<u>12</u>	<u>22</u>	<u>307</u>
- Was the Board's decision appealed?	<u>3</u>	<u>28</u>	<u>310</u>
- If appealed, was the decision reversed?	<u>0</u>	<u>10</u>	<u>331</u>

10. Have you had any contact with the Board's administrative office?

<u>149</u>	Yes
<u>190</u>	No
<u>2</u>	No response

If so:

Was your request dealt with in a timely manner?

<u>135</u>	Yes
<u>12</u>	No
<u>194</u>	No response

Was the quality of the response:

<u>85</u>	Excellent
<u>55</u>	Adequate
<u>6</u>	Substandard
195	No response

Any recommended changes for the office? _____

11. Have you had any contact with similar boards in other states?

<u>107</u>	Yes
<u>218</u>	No
<u>16</u>	No response

If yes, how would you rate Arizona's Board?

<u>40</u>	Superior
<u>57</u>	Equal
<u>10</u>	Inferior
234	No response

If it is inferior, how can Arizona's Board be improved?

12. Are you aware of:

Scheduled board meetings?	18	<u>109</u>	Yes	<u>214</u>	No
Proposed actions of the board?	23	<u>147</u>	Yes	<u>171</u>	No
Actions taken by the board?	25	<u>173</u>	Yes	<u>143</u>	No

13. In your opinion, has the board, through its licensing function, properly protected the profession from incompetent practitioners?

<u>208</u>	Yes
<u>119</u>	No
14	No response

Please return this questionnaire to:

Steve Wallace
 Office of the Auditor General
 112 N. Central Ave.
 Suite 600
 Phoenix, Arizona
 85004

APPENDIX VI

ATTORNEY GENERAL OPINION
REGARDING THE OPEN MEETING LAW

Department of Law
Opinion No. 75-8 (R-10) (R75-81)

August 29, 1975

REQUESTED BY: PAUL R. BOYKIN
Executive Director
Arizona State Board of Medical Examiners

- QUESTIONS:
1. Does the Arizona Open Meeting Law apply to the 90-10 agencies of this state?
 2. If the answer to the first question is yes, does the Open Meeting Law apply to the following:
 - A. Investigational proceedings of the Board of Medical Examiners?
 - B. Informal interview provided for in A.R.S. § 32-1451.B?
 - C. The personal deliberations and review of evidence by members of the Board of Medical Examiners following the completion of a hearing provided for in A.R.S. § 32-1451?

- ANSWERS:
1. Yes. See Department of Law Opinion No. 75-7, issued on August 19, 1975.
 2. See body of opinion.

Since the Arizona State Board of Medical Examiners is a "governing body" as defined in the Open Meeting Act and since there is no exception to the Act for contested case or quasi-judicial proceedings (see Opinion No. 75-7), the Board is subject to the Act in all the cases described in Question 2 to the extent that it is taking "legal action".¹ "Legal action" is defined in the Act as follows:

"Legal action" means a collective decision, commitment or promise made by a majority of the members of a governing body consistent with the constitution, charter or bylaws of such body, and the laws of this state.

A.R.S. § 38-431.2.

It is the opinion of this office that the term "legal action", as defined in A.R.S. § 38-431.2, must be construed to extend beyond the mere formal act of voting. Discussions and deliberations by members of the governing body prior to the final decision are an integral and necessary part of any "decision, commitment or promise", and we believe are included within the definition of "legal action". See *Times Publishing Company v. Williams*, 222 So.2d 470 (Fla. 1969).

¹It makes no difference what descriptive label or formality is accorded to the assemblage of board members. It may be called a formal or informal meeting or a luncheon. If legal action is taken, the assemblage is subject to the Act. See *Sacramento Newspaper Guild v. Sacramento Board of Supervisors*, 263 C.A. 41, 69 Cal.Rptr. 480, 487 (1968).

The declaration of policy as set forth in § 1, Ch. 138, Laws 1962, provides compelling authority for this conclusion.

It is the public policy of this state that *proceedings* in meetings of governing bodies of the state and political subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this act that their official *deliberations and proceedings* be conducted openly. (Emphasis added.)

This section indicates a legislative intent to expose to public view all "official deliberations and proceedings" of governing bodies. Likewise, A. R. S. § 38-431.01, which is the main operative section of the Open Meeting Act, provides in part that:

A. All official meetings at which any legal action is taken by governing bodies shall be public meetings and all persons so desiring shall be permitted to attend and *listen to the deliberations and proceedings* . . . (Emphasis added.)

Although the Act does not define "deliberations", it does define the term "proceedings" as follows:

"Proceedings" means the transaction of any functions affecting citizens of the state by an administrative or legislative body of the state or any of its counties or municipalities or other political subdivisions.

A. R. S. § 38-431.3.

"Deliberation" is defined in Black's Law Dictionary, 4th ed., as follows:

The act or process of deliberating. The act of weighing and examining the reasons for and against the contemplated act or course of conduct or a choice of acts or means.

The California Court of Appeals in the case of *Sacramento Newspaper Guild v. Sacramento Board of Supervisors*, 263 C.A. 41, 69 Cal.Rptr. 480 (1968), described the process of "deliberation" as follows:

To "deliberate" is to examine, weigh and reflect upon the reasons for or against the choice. (Citation omitted.) Public choices are shaped by reasons of facts, reasons of policy or both. Any of the agency's functions may include or depend upon the ascertainment of facts. (Citation omitted.) Deliberation thus connotes not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision.

69 Cal.Rptr. at 485.

Accordingly, it is clear that the words "deliberations" and "proceedings" encompass the entire decision-making process.

Not only does the language used by the Legislature compel a broad interpretation of "legal action", the case law in other states leaves little room for argument. The Florida Supreme Court probably best described the rationale for extending the scope of activities to be covered by an open meeting law in the case of *Times Publishing Company v. Williams*, *supra*, wherein it stated:

Every thought, as well as every affirmative act, of a public official as it relates to and is within the scope of his official duties, is a matter of public concern; and it is the entire decision-making process that the legislature intended to affect by the enactment of the statute before us. This act is a declaration of public policy, the frustration of which constitutes irreparable injury to the public interest. Every step in the decision-making process, including the

decision itself, is a necessary preliminary to formal action. It follows that each such step constitutes an "official act", an indispensable requisite to "formal action", within the meaning of the act.

* * *

It is our conclusion, therefore, that with one narrow exception which we will discuss later, the legislature intended the provisions of Chapter 67-356 to be applicable to every assemblage of a board or commission governed by the act at which any discussion, deliberation, decision, or formal action is to be had, made or taken relating to, or within the scope of the official duties or affairs of such body.

222 So.2d at 473-474.

In a recent case, the Supreme Court of Florida restated its interpretation of Florida's Open Meeting Law as follows:

One purpose of the government in the sunshine law was to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance. Rarely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. The statute should be construed so as to frustrate all evasive devices. This can be accomplished only by embracing the collective inquiry and discussion stages within the terms of the statute, as long as such inquiry and discussion is conducted by any committee or other authority adopted and established by a governmental agency, and relates to any matter on which foreseeable action is taken.

Town of Palm Beach v. Gradison, 296 So.2d 473 (Fla. 1974).

The fact that the Legislature amended the Act in 1974 to bring within the coverage of the Act committees and sub-committees of governing bodies, provides further support for a broad interpretation of "legal action". The California Court of Appeals considered this point in the case of *Sacramento Newspaper Guild v. Sacramento Board of Supervisors*, *supra*.

Without troubling the lexicographers, one recognizes a committee as a subordinate body charged with investigating, considering and reporting to the parent body upon a particular subject. Normally, committees investigate, consider and report, leaving the parent body to act. By the specific inclusion of committees and their meetings, the Brown Act [California's Open Meeting Act] demonstrates its general application to collective investigatory and consideration activity stopping short of official action.

69 Cal.Rptr. at 486.

The court went on to state that:

An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate those evasive devices. (Footnote omitted.) As operative criteria, formality and informality are alien to the law's design, exposing it to the very evasions it was designed to prevent. Construed in the light of the Brown Act's objectives, the term "meeting" extends to informal sessions or conferences of the board members designed for the discussion

of public business. The Elks Club luncheon, attended by the Sacramento County board of supervisors, was such a meeting.

69 Cal.Rptr. at 487.

It is also instructive to note that the Legislature in amending the Act in 1974 provided expressly for the use of executive sessions under five different circumstances. Specifically, A.R.S. § 38-431.03, added Laws 1974, provides for the use of executive sessions for the "discussion or consideration" of personnel matters (paragraph 1) and confidential records (paragraph 2) and for the "discussion or consultation" with attorneys for purposes of obtaining legal advice (paragraph 3), with representatives of employee organizations (paragraph 4) and for purposes of international and interstate negotiations (paragraph 5). This section also prohibits the governing body from taking any "final action or making any final decision" in the executive session. Obviously the Legislature, in making an express exception to the open meeting requirement for certain types of "discussions, considerations and consultation", must have considered such conduct generally subject to the requirements of the Act. In other words, to construe "legal action" to include only the final decision of a body, to the exclusion of the deliberations leading up to the decision, would render the executive session provisions found in A.R.S. § 38-431.03 idle and nugatory. Such a construction must be avoided. *State v. Edwards*, 103 Ariz. 487, 446 P.2d 1 (1968).

Not all "discussions, considerations and consultations", however, are required to be done in an open meeting. The definition of "legal action" contemplates actions by "a majority of the members of a governing body." Accordingly, it is our opinion that all discussions, deliberations, considerations or consultations among a majority of the members of a governing body regarding matters which may foreseeably require final action or a final decision of the governing body constitute "legal action" and must be conducted in an open meeting, unless an executive session is authorized. It should be pointed out, however, that such discussions and deliberations between less than a majority of the members of a governing body, or other devices, when used to circumvent the purposes of the Act, would constitute a violation which would subject the governing body and the participating members to the several sanctions provided for in the Act. See *Town of Palm Beach v. Gradison*, *supra*.

In regard to your second question, it is our opinion that, to the extent a majority of the members of the Board consider matters in investigational proceedings and informal interviews which may foreseeably require the Board to take final action or make a final decision, the members must conduct those proceedings in an open meeting, unless an executive session is authorized.

The final example given in Question 2 of the deliberations and review of evidence by members of the Board following an adjudicatory hearing is subject to the requirements of the Act and must be conducted in an open meeting.

held without at least twenty-four hours' notice to the members of the governing body and the general public. In case of an actual emergency, a meeting may be held upon such notice as is appropriate to the circumstances.

D. A meeting can be recessed and held with shorter notice if public notice is given as required in paragraph A of this section.

The Open Meeting Act when originally enacted in 1962 made no specific provision for the giving of notice. While the requirements set forth in the 1974 amendments provide some guidelines, the particular mechanics of giving notice have not been set forth. Moreover, the language used in the 1974 amendments relating to notice is ambiguous, confusing and often contradictory. Without engaging in a long discussion of the many problems involved, we offer the following guidelines to be followed in complying with the notice requirements of A.R.S. § 38-431.02. Although an agency in following these guidelines will in some cases do more than required by the Act, it should never fall short of the Act's requirements. Being over-cautious is certainly justified, however, in view of the serious consequences for violating the Act. For example, a decision made in a meeting for which defective notice was given may likely be declared null and void by reason of A.R.S. § 38-431.05.

A. *Statement to Secretary of State*

Each state agency which is a governing body as defined in A.R.S. § 38-431 must file a statement with the Secretary of State stating where notices of all its meetings and the meetings of its committees or subcommittees will be posted. See Appendix A for a sample statement. The purpose of the statement is to provide information to the public regarding the place where it can find notices of the governing body's meetings. Generally, a governing body will post notices of its meetings directly outside the door to its offices or on a bulletin board in the lobby of the building in which the governing body's offices are located. Governing bodies which hold regular meetings on the same day of each month may post notices of such meetings by providing the information under the body's name in the building directory. For example, the directory listing in the lobby of the building might look as follows:

Arizona Accountancy Board Room 202
(Regular meetings every 2nd Monday of each month)

B. *Regular Meetings*

Regular meetings are generally those required to be conducted on a regular basis by statute and the dates of which are set by statute, rule, ordinance, resolution or custom. For each regular meeting, the governing body must post a Notice of Regular Meeting at the place described in the statement filed with the Secretary of State as described above. See Appendix B for a sample Notice of Regular Meeting. The posting of this notice must be done as far in advance of the regular meeting as is reasonable and in no event less than 24 hours prior to the meeting. In addition, the governing body must give additional notice as is reasonable under the circumstances. Several types of additional notices which might be given are described in Paragraph F below.

C. *Special Meetings Other Than Emergency Meetings*

Special meetings are all meetings other than regular meetings. For each special meeting, the governing body must post a Notice of Special Meeting at the place described in the statement filed with the Secretary of State. See Appendix C for a sample Notice of Special Meeting. The governing body should also give such additional notice as is reasonable under the circumstances. See Paragraph F below. This additional notice must include notice both to the general public and each member of the governing body. The several notices given, including the Notice of Special Meeting posted as described above, must be accomplished at least 24 hours prior to the time of the special meeting, except in the case of an emergency meeting covered under Paragraph D below.

APPENDIX VII

ATTORNEY GENERAL MEMORANDUM
REGARDING PUBLIC INTEREST

Memorandum

August 19, 1975

To: All State Agencies
 From: Bruce E. Babbitt, Attorney General
 Re: The Public Notice and Minute Taking
 Requirements Under Arizona's Open
 Meeting Act, as amended Laws 1975

Several questions have arisen as to the specific requirements imposed by Arizona's Open Meeting Act with respect to the giving of notice of public meetings. In addition, the Legislature, in its last regular session, amended the Open Meeting Act by including specific requirements with respect to the taking of minutes of public meetings. This memorandum is designed to clarify the public notice requirements imposed under the Act and to inform all state agencies of the recently enacted minute taking requirements.

If you have any questions regarding this memorandum, please call Roderick G. McDougall, Chief Counsel of the Civil Division at 271-3562.

PUBLIC NOTICE REQUIREMENTS

It has been stated that an "open meeting" is open only in theory if the public has no knowledge of the time and place at which it is to be held. 75 Harv.L. Rev. 1199 (1962). The right to attend and participate in an open meeting is contingent upon sufficient notice being given. Like other acts, Arizona's Open Meeting Act affords few statutory requirements for the mechanics of giving notice of meetings of governing bodies.

A.R.S. § 38-431.02, added Laws 1974, which sets forth the public notice requirements, provides as follows:

- A. Public notice of all regular meetings of governing bodies shall be given as follows:
 - 1. The state and its agencies, boards and commissions shall file a statement with the secretary of state stating where all notices of their meetings and the meetings of their committees and subcommittees will be posted and shall give such public notice as is reasonable and practicable as to the time and place of all regular meetings.
 - 2. The counties and their agencies, boards and commissions, school districts, and other special districts shall file a statement with the clerk of the board of supervisors stating where all notices of their meetings and the meetings of their committees and subcommittees will be posted and shall give such public notice as is reasonable and practicable as to the time and place of all regular meetings.
 - 3. The cities and towns and their agencies, boards and commissions shall file a statement with the city clerk or mayor's office stating where all notices of their meetings and the meetings of their committees and subcommittees will be posted and shall give such public notice as is reasonable and practicable as to the time and place of all regular meetings.
- B. If an executive session only will be held, the notice shall be given to the members of the governing body, and to the general public, stating the specific provision of law authorizing the executive session.
- C. Meetings other than regularly scheduled meetings shall not be

D. *Emergency Meetings*

Emergency meetings are those special meetings in which the governing body is unable to give the required 24 hours notice. In the case of an actual emergency, the special meeting may be held "upon such notice as is appropriate to the circumstances". The nature of the notice required in emergency cases is obviously subject to a case by case analysis and cannot be specified by general rules. However, any relaxation or deviation in the normal manner of providing notice of meetings, either to the general public or to members of the governing body, must be carefully scrutinized and can be justified only for compelling practical limitations on the ability of the governing body to follow its normal notice procedures.

E. *Executive Sessions*

An executive session is nothing more than a meeting (regular or special) wherein the governing body is allowed under the Open Meeting Act to discuss and deliberate on matters in secret. See A.R.S. § 38-431.03. Separate notice need not be given of an executive session if it is held in conjunction with a properly noticed regular or special meeting. However, where only an executive session will be held, all notices of the meeting must state the specific provision of law authorizing the executive session, including a reference to the appropriate paragraph of Subsection A of A.R.S. § 38-431.03. See Appendix D for a sample Notice of Executive Session.

F. *Additional Notice*

In deciding what types of notice shall be given in addition to posting, governing bodies should consider the following:

1. *Newspaper Publications*

In many cases, notice of meetings can be disseminated by providing press releases to newspapers published in the area in which notice is to be given. In addition, paid legal notices in such newspapers may be purchased by the governing body.

2. *Mailing List*

Some bodies may wish to provide a mailing list whereby persons desiring to obtain notices of meetings may ask to be placed on a mailing list. All notices of meetings issued will then be mailed to those appearing on the current mailing list.

3. *Articles or Notices in Professional or Business Publications*

In addition, the governing body may obtain publication of articles or notices in those professional and business publications relating to the agency's field of regulation.

It is not necessary that all of these types of notices be given. Indeed, merely providing notice through the use of a mailing list and by posting should be sufficient in most cases. Neither should the above listings be considered exclusive and, to the extent other forms of notice are reasonably available, they should be used.

REQUIREMENTS FOR TAKING WRITTEN MINUTES

The first requirement for taking written minutes of meetings of governing bodies was included in the Open Meeting Act by the Legislature in 1974. The 1974 amendment, however, provided very little detail as to what the minutes must include. The original minute taking requirement read as follows:

* * *B. Governing bodies, except for subcommittees, shall provide for the taking of written minutes of all their meetings. Such minutes shall be

properly and accurately recorded as to all legal action taken and open to public inspection except as otherwise specifically provided by statute.

A.R.S. § 38-431.01.

In its last regular session, the Legislature amended this section to read in part as follows:

* * *B. All governing bodies, except for subcommittees, shall provide for the taking of written minutes of all their official meetings. Such minutes shall include, but not be limited to: (1) the day, time and place of the meeting, (2) the numbers of the governing body recorded as either present or absent, (3) an accurate description of all matters proposed, discussed or decided, and the names of members who proposed and seconded each motion.

C. The minutes or recording shall be open to public inspection three working days after the meeting except as otherwise specifically provided by this article. * * *

A.R.S. § 38-431.01, as amended Laws 1975 (eff. 9/12/75).

You should note that this section requires that the minutes or recording be open to public inspection, except as otherwise specifically provided by this article. The specific exception referred to is the provision in A.R.S. § 38-431.03 which provides that minutes of executive sessions shall be kept confidential.

APPENDIX VIII

ARIZONA REVISED STATUTE 32-352.02

§ 32-852.02. Insurers to report medical malpractice claims and actions

A. Any insurer providing professional liability insurance to a podiatrist licensed by the board pursuant to this chapter shall report to the board, within thirty days of its receipt, any written or oral claim or action for damages for personal injuries claimed to have been caused by an error, omission or negligence in the performance of such insured's professional services, or based on a claimed performance of professional services without consent or based upon breach of contract for professional services by a podiatrist.

B. Reports required by subsection A shall contain:

1. The name and address of the insured.
2. The insured's policy number.
3. The date of the occurrence which created the claim.
4. The date of claim if suit is not simultaneously filed.
5. The date the suit is filed.
6. A summary of the occurrence which created the claim as stated by claimant.
7. Such other reasonable information related to the claim as the board may require.

C. Every insurer required to report to the board pursuant to this section shall also be required to advise the board of any settlements or judgments against a podiatrist within thirty days after such settlement or judgment of any trial court.

D. The board shall maintain the reports filed in accordance with this section as confidential records. Statistical data derived from these reports shall be released only for bona fide research or educational purposes as authorized by the board.

E. The board shall institute procedures for an annual review of all records kept in accordance with this chapter in order to determine whether it shall be necessary for the board to take rehabilitative or disciplinary measures prior to the renewal of a podiatrist's license to practice.

F. The board shall annually report to the director of insurance the following statistical information reported by insurers pursuant to subsection B:

1. The number of claims.
2. The dates of the acts or omissions which form the basis of claims.
3. The final disposition of claims.

G. There shall be no liability on the part of and no cause of action of any nature shall arise against any insurer reporting hereunder or its agents or employees, or the board or its representatives, for any action taken by them in good faith pursuant to this section. Added Laws 1977, Ch. 134, § 12.

APPENDIX IX

STATEMENT BY THE BOARD'S EXECUTIVE SECRETARY
REGARDING PROGRESS OF THE COMPLAINT REVIEW PROCESS

Progress of Complaint Review Process
Since Inception in 1973

- 1) In 1973 no complaint process existed under the auspices of the Board.
- 2) In 1974 a complaint process was initiated by the Board to offer an opportunity to Arizona's citizens to present their grievances.
- 3) In 1974, to further refine the process, the Board began using the Chiropractic Board's complaint form which contained a notary statement. It was the Board's feeling that this would more formalize the complaint process. When it was discovered that the notarization was discouraging complaints, the Board removed the requirement for a notary.
- 4) From 1974 through 1977 the Board, during its meetings, reviewed and tried to resolve complaints that were filed and investigated by the Board office.
- 5) Recognizing that this was still not adequately serving the citizens of Arizona, the Board instituted regional complaint review committees in Tucson, Phoenix and Flagstaff. The duty of this committee was to investigate the complaint, examine the patient and report to the Board their findings.
- 6) The Board is also adopting guidelines for complaint review from a well established California peer review system. This will standardize the reporting.
- 7) The Board is now working on adding a lay person to each review committee to assure the patient that he or she will be fairly served and to assist in the investigation.
- 8) The consultant complaint review committee (7 at present, all dentists) spend many hours each week in response to complaints on a voluntary basis at no cost to the Board or the state. If each dentist spent only 3 hours a week for fifty weeks ($7 \times 3 \times 50 = 105$ hours), and was paid the consultant rate of \$7.50 per hour (\$60.00 per day) the cost to the state would be minimally ~~\$1585.00~~ ^{\$787.50}. This does not include the time the Board members spend on the same complaints nor the Board's staff. As evidenced by the report, the numbers of complaints grow each year and so would those costs.

The Board has also instituted, in consideration for the health and welfare of the public:

- 1) X-ray certification- The Board has certified approximately 1200 Dental Assistants.
- 2) General anesthesia, and evaluation of those administering such to assure quality of administration.
- 3) Continuing education for relicensure has been prepared, but not yet adopted. There are plans to adopt and put into practice in the near future.

The Board has developed and added a special examination for graduates of foreign dental schools in order that they may have the opportunity to be licensed in Arizona.

The following is an outline and approximation of duties performed and time spent by Board members in the performance of duties for the state.

- 1) Examinations for licensure require ten to fifteen days each year by Board members. In the instance of the president, his total days for examination in 1978 was twenty one days. The lay member appears at each state examination and was at the initial Western Regional examination in June 1978.
- 2) There were eleven Board meetings plus conference calls in 1978.
- 3) The Board has a representative or representatives at each meeting of the Western Conference of Dental Examiners and Dental School Deans and the American Association of Dental Examiners. There are six days of A.A.D.E. meetings and three days of Western Conference meetings.
- 4) Board members also have committee assignments such as:
 - A. Continuing education
 - B. X-ray certification
 - C. General anesthesia
 - D. Denturist curriculum
 - E. Dental advertising guidelines
 - F. Extramural dental school programs
 - G. Other rule construction assignments

These assignments do not preclude the members from handling other Board related items or assisting the committees.

- 5) Board members also meet with Attorney General to assist on cases. They also, at times, set as informal interviewing officers.
- 6) They appear before legislative committees and sometimes meet with the auditor's staff.

7) The lay member has sat with the complaint review committee in review of a special case.

8) Board members construct test items and theoretical examinations for the licensure examination and constructed a full examination for graduates of foreign dental schools.

9) Board members sit as judicial panel in formal administrative hearings.

The foregoing does not constitute all the activities of the Board members but is a good example of the wide ranging and multiple duties that must be performed by the members.

The amount of time involved in Board business per year is estimated to amount to approximately twenty days time for the lay member who is not intimately involved in the testing process to approximately forty-five days for the Board president who was in attendance at every examination. For the dental professional members, the estimated time spent was thirty-six days a year, at least fifteen of which were directly taken from dental practice time. It should be pointed out that when a professional member closes his office for Board business, he not only loses income but his fixed costs continue (staff salaries, rent, utilities, etc.).

The members gladly contribute this time to the citizens of Arizona but wish to have it recognized that there is more to being a Board member than the appointment to the Board.