

AMERICAN NURSES ASSOCIATION

COMMENTS ON GOVERNOR'S REORGANIZATION PLAN ONE: REFORMING
CALIFORNIA'S BOARDS AND COMMISSIONS

FEBRUARY 4, 2005

Thank you for allowing the American Nurses Association to submit comments to the Little Hoover Commission on Governor Schwarzenegger's Reorganization Plan One: Reforming California's Boards and Commissions. The American Nurses Association is the only full-service professional organization representing the nation's 2.7 million Registered Nurses through its 54 constituent associations. ANA advances the nursing profession by fostering high standards of nursing practice, promoting the economic and general welfare of nurses in the workplace and projecting a positive and realistic view of nursing, and by lobbying the Congress and regulatory agencies on health care issues affecting nurses and the public. On behalf of the American Nurses Association, we are commenting on the following:

- * The rationale proffered by Governor Schwarzenegger for the elimination of licensure boards and its application to the California Board of Registered Nursing structure, function and organization;
- * The strengths and weaknesses of the current structure of the RN Board; and
- * The strengths and weaknesses of the proposed structure as it relates to the regulation of nursing

Comments on the rationale proffered by Governor Schwarzenegger for the elimination of licensure boards and its application to the California Board of Registered Nursing structure, function and organization.

In opposition to the California Performance Review Report and the Little Hoover Commission Recommendations, the Reorganization Plan of Governor Schwarzenegger recommended the elimination of all health care boards, to include the Board of Registered Nursing (“hereinafter RN Board”). The reasons for board elimination offered by the Governor include the following:

- * Board functions were never centralized under the 1970 Consumer Affairs Act;
- * Desire for centralization of licensing and regulatory functions in one agency;
- * Duplication of administrative services;
- * Proliferation of boards and commissions
- * Lack of consumer accessibility to board activities, hearings and meetings
- * Lack of accountability of appointed board members
- * Need to separate the board regulatory function from the adjudicatory function

We believe that the Little Hoover Commission and the California Performance Review (“CPR”) work done to date reflects a sensitivity to the work of the Board of Registered Nursing and to the structure and function of the RN Board., This work calls for additional review and evaluation before the Board is summarily dismantled. While the CPR recommended streamlining for certain boards and commission, the RN Board was not among those recommended to be eliminated.

The RN Board regulates over 300,000 registered and advanced practice nurses, with a nine (9) member board, of which four (4) are consumers. One of the earlier licensure boards in the state (1913)¹, the Board of Registered Nursing is one of the most

¹ In 1913, the California Legislature formed the Bureau of Registration of Nursing under the State Board of Health. The Bureau was charged with administering the examination, registering qualified registered

technologically innovative and creative entities in state government. Consistently looking for administratively efficient approaches to regulating nursing, the California RN Board was one of the first nurses boards to utilize a standardized examination for the licensure of RN practice (1946); restructured the board to include public members (1977); utilized a national exam which incorporated the computer adaptive testing protocol (1994); replaced paper licenses with tamper-resistant plastic card licenses (1997); implemented live-scan procedures for fingerprinting applicants (2000) and entered a computerized national disciplinary data exchange program (2000); and provided online professional licensing and verification services (2001). The RN Board also expanded its consumer services with the development of a Board Web page (2000) which provides an explanation of the complaint process and a frequently asked questions (FAQs) section to inform consumers about the complaint process and online forms.

When reviewing the above listed technological innovations, one quickly realizes that the RN Board has already implemented many strategies which have streamlined and standardized its operation. We believe this is one of the reasons neither the Little Hoover Commission nor the California Performance Review recommended dissolution of the RN Board. If the recommendations made by the Governor were based solely on data, we believe the RN Board would not be placed in the position of facing abolishment when other government-sanctioned review entities recommended otherwise.

The Governor has expressed concern about the lack of accountability of the various boards, including, presumably, the RN Board. One should bear in mind that if the RN Board is not performing in accordance with proper expectations, the Governor

nurses, accrediting nursing schools, and revoking licenses of nurse found to be unsafe to practice, but registration was voluntary.

has the authority to remove the members. Thus, accountability exists within the current structure – it may simply need to be exercised.

The Governor also expressed concern because licensure board meetings have not been made accessible to the public and the format does not provide adequate consumer input. We beg to differ. The RN Board is extremely accessible, as evidenced by its website materials. In addition, it has already given notice for all of its 2005 hearings on its website. The hearings will be conducted in Berkeley, Ontario and Glendale. The RN Board's publication of information reflects a desire to provide the public with the opportunity to participate in the licensure process.

Much has been made about the need to separate the regulatory function from the adjudicative function of licensure boards. However, it is well settled law that due process is not denied when a licensing body both investigates and adjudicates a complaint within its jurisdiction. See, e.g., *Withrow v. Larkin*, 421 U.S. 35 (1975). Moreover, maintenance of the adjudicative function within the RN Board ensures that the regulations are applied with the understanding of the practice that is being regulated.

When the hearing function is transferred from licensure boards to so-called independent adjudicatory bodies, other issues arise related the disciplinary process. While some believe that the use of administrative law judges (hereinafter referred to as ALJ) reduces the appearance of bias, the ALJ often needs the professional expertise of a registered nurse to properly review the case. Presently states use three types of administrative adjudication arrangements, two of which build in the retention of professional expertise. One approach allows the board and staff to assist with the review, evaluation and hearing of the case; another allows an ALJ to hear the case, but the

decision remains subject to board acceptance, rejection or modification. The third approach gives an administrative court exclusive jurisdiction over statutorily defined contested cases, but fails to incorporate the necessary profession-specific expertise.

We contend that the Governor's preference for the third approach of a separation of the regulatory and adjudicatory functions is flawed for the following reasons:

- * State licensure regulations and causes of action have been written to provide licensure boards with the flexibility to adjudicate and apply discipline. When evaluated by lawyers in the context of an administrative proceeding, the ALJ tends to find the regulation confusing with respect to application, so he or she needs professional assistance in determining the infraction and the severity of the action/inaction.
- * Licensees effectively work with their peers to address issues/concerns related to practice. The licensee tends to approach the board as a partner/colleague who is working to address a wrong in an equitable fashion. Few see board discipline as an adjudicatory process and more of a professional, remedial process. Reorganizing the agency will require additional costs to reeducating the licensee on the board's administrative process.
- * Decentralization often slows down the adjudicatory process. By using non-nurse investigators and non-nurse ALJs, the time needed to investigation and initiate administrative action often increases. States which have reported lengthened investigation periods with board centralization include South Carolina and Colorado.
- * Nursing boards discipline errant nurses. Unlike other licensing boards, boards of nursing have some of the highest disciplinary rates (on complaints brought to the board). Thus, the RN board does not need a centralized agency to increase public confidence in its action. If Boards of Nursing are informed of deficiencies in practice, they take action.
- * Without added training, ALJs don't learn to make distinctions between applicable standards for non-physician practice. Since attorneys are educated to understand the medical standard of practice, nurses and other nonphysician professionals are faced with the challenge of educating the ALJs assigned to work on disciplinary and other actions to cease their review of all health professions through one standard. The insensitivity and lack of focus on the differences in scopes and standards of practice

create an environment which resists change and promotes utilization of medical standards.²

The strengths and weaknesses of the current structure of the RN Board

In addition to some of the strengths and weaknesses discussed above, we ask the Little Hoover Commission to consider the implications the proposed restructuring will have on the RN Board and other non-physician licensure boards. As noted by Safriet and Hadley, scopes for nursing practice paralleled their medical counterparts and were written to avoid conflict in nursing practice.³

Consolidation of board functions requires the government to mediate scope and practice issues and concerns. Nurses and nonphysician practitioners are placed in the unenviable position of explaining their scopes in relation to medical practice as the education, technology and marketplace expands to accommodate nonphysician providers. Economic and regulatory restraints on practice will require reconciliation, while the evolution of new and expanded licensure categories will better serve the public. With a centralized process of regulation, how will the state handle growth of the professions? How will the government evaluate/address economic barriers to practice? Won't reconciliation require the state to spend additional funds studying the issue and attempting to resolve the problem?

² In the ANA Response to the Pew Commission Report at <http://www.nursingworld.org/readroom/pew.htm> we state that consolidation of functions “would only complicate disciplinary processes and make them less effective. It would also markedly exacerbate interprofessional conflicts on scope of practice and related issues.”

³ Safriet, Barbara J. “Health Care Dollars and Regulatory Sense: The Role of Advanced Practice Nursing” 9 Yale J on Regulation 417, 9:2 (September, 1992) and Elizabeth Hadley’s article on “Nurses and Prescriptive Authority: A Legal and Economic Analysis” Amer. J of Law and Medicine, IV (2-3):245-266 also touches on the concept that organized medicine attempted to confine nurses to a largely complementary and supervised role through the development of all-inclusive medical scopes of practice.

ANA has consistently advocated careful consideration of any attempts to change the regulatory process and noted in its responses to the Pew Commission that consolidation of regulatory boards “would likely prove to be less effective, more contentious and even paralytic for . . . professions.”⁴ The ability to evolve to provide services wanted and needed still lies with the retention of an independent entity to regulate nursing licensure and practice.

For example, New Jersey Boards of Nursing and Medicine are engaged in a this type of situation. The New Jersey Board of Nursing has regulated registered nurse anesthetist practice since its inception (1920’s). Recently, the New Jersey Board of Medicine promulgated regulations to mandate direct, on-sight supervision of registered nurse anesthetists when providing anesthesia services in office settings. By doing so, the Board of Medicine has effectively required duplicative personnel to provide the service, and undermined employment of nurse anesthetists within the office setting. Affected nursing organizations and groups have challenged the rules; and the state board desired to do so and sought government permission to intervene in the lawsuit. The state attorney general who uses one attorney to provide legal counsel to the Board of Nursing and the Board of Medicine, determined that no conflict existed, and that the Attorney General had determined that the Board of Medicine had authority to promulgate rules. The Board of Nursing could not hire outside counsel to advocate its position in the litigation. Needless to say, this case represents the types of economic and regulatory conflicts that can occur under a centralized agency structure.⁵

⁴ See ANA Response to the Pew Commission Report 1996 at <http://www.nursingworld.org/readroom/pew.htm>

The strengths and weaknesses of the proposed structure as it relates to the regulation of nursing

In a perfect world, states could centralize licensure board functions and remove barriers to ensure full scopes of practice as espoused by the Governor and the Pew Commission. The reality is that for professions to evolve, scope and practice conflicts will occur. Economic efficiencies will be minimized by the costs associated with resolution of those concerns; which will frustrate both the government and the profession. Evolution of practice is needed to assure public availability of a full complement of accessible and affordable health care services. The government wants to promote such options. We have not seen any state which has centralized its functions reconcile the inequities created by centralized administration of board functions. We believe that any attempt to force centralization will create new issues and concerns. And, the Governor's Reorganization Plan does not address such

Conclusion

Centralization advocates tend to believe standardization of certain functions improve administrative efficiencies and reduce the cost of licensing health professions.⁶ However, such advocates minimize the value of boards to provide professional expertise on practice; insulate the board from political interference; promote innovative practice and growth of the profession; and provide professional accountability. We believe the California RN Board has streamlined its administrative and licensing functions by using technology and the services provided by the Department of Consumer Affairs. The citizens of California will not receive the perceived benefit of centralization, because any

⁶ See Roederer, D. and Shimberg, B. Occupational Licensing: Centralizing State Licensure Functions (Council of State Government, 1980)

additional efficiencies would be marginal, and there would be a negative impact from the loss of oversight of the profession of nursing by those with specialized expertise. For these and other reasons, we ask the Little Hoover Commission to carefully evaluate the proposal to centralize board functions and abolish licensure boards.