DISCUSSION REGARDING APPLICATION OF CALIFORNIA CODE OF REGULATIONS SECTION 4125 – REPRESENTATION.

Attached for review are the following:

- Letter dated May 31, 2011. from the American Occupational Therapy Association
- Letters from the National Board for Certification in Occupational Therapy
  - March 30, 2011
  - June 3, 2011

AOTA The American Occupational Therapy Association, Inc.

Occupational Therapy: Living Life To Its Fullest

May 31, 2011

California Board of Occupational Therapy
2005 Evergreen Street, Suite 2050
Sacramento, California 95815

RE: Adopted Regulatory Language – CCR Section 4125

Dear Board Members:

On behalf of the American Occupational Therapy Association, Inc. (AOTA), and its 3,200 members in California, I am requesting that the Board provide guidance to licensees regarding the adopted regulatory language that adds Section 4125 to the California Code of Regulations. This letter is being sent as a follow up to AOTA's previous letters dated October 25, 2010; June 7, 2010; and January 28, 2010. While we appreciate that Section 4125 was adopted on March 14, 2011, we request that the Board clarify the intent of the regulation for the benefit of all licensees.

In the Board's "Final Statement of Reasons" affecting CCR Section 4125, the Board states:

> The Board is not attempting to regulate the trademarks OTR and COTA, which are credentials issued by a private organization nor is the Board trying to enforce registration with a private organization or require possession of a credential issued by a private organization or other entity. The use of specified titles or initials without a license issued by the Board is currently prohibited and therefore, grounds for disciplinary action.
>
> This regulation does not expand Board's authority to take disciplinary action against those misrepresenting themselves in California; the Board currently has the authority to take disciplinary action for violation of BPC Section 2570.18 and 2570.3 and CCR Section 4170.

The Board's summary continues:

> This language is intended to clarify statutory requirements so that there is *no confusion.* Even if registered with NBCOT, representing oneself in California as an occupational therapist or occupational therapy assistant and/or using specified initials, is prohibited unless or until a license is obtained from the Board.

AOTA understands that the Board's intentions are to prevent confusion; however, we believe that the intentions of the regulation should be further clarified on the Board's website in the General Frequently Asked Questions section online at: http://www.bot.ca.gov/forms_pubs/gen_faqs.shtml.

We believe that the addition of new as well as revised frequently asked questions, in addition to amending the regulatory language, could be used to communicate the intent of the regulation.

The American Occupational Therapy Association, Inc.
4720 Montgomery Lane
Bethesda, MD 20814-3425
301-652-2682
301-652-7711 Fax
800-377-8555 TDD
www.aota.org

We suggest the following questions and answers be changed or added:

General Frequently Asked Questions
http://www.bot.ca.gov/forms_pubs/gen_faqs.shtml

Underlined Text = Suggested Text

Proposed Revisions to Existing FAQs on CBOT's website

Q. Do we need to continue to be certified by NBCOT in order to renew our license?
A. No. NBCOT owns the trademarks "OCCUPATIONAL THERAPIST REGISTERED OTR" and "CERTIFIED OCCUPATIONAL THERAPY ASSISTANT COTA." If you wish to use the trademarks, contact NBCOT.

Q. Now that I'm licensed, what letters do I put after my signature?
A. OTPA section 2570.18 lists all the abbreviations you may use once you are licensed. NBCOT owns the trademarks "OCCUPATIONAL THERAPIST REGISTERED OTR" and "CERTIFIED OCCUPATIONAL THERAPY ASSISTANT COTA." If you wish to use the trademarks, contact NBCOT.

Proposed FAQs

Q. If I choose to use OTR or COTA after my signature, will CBOT require me to submit proof of current certification with NBCOT?
A. No. Section 4125 of Title 16, California Code of Regulations (CCR) requires that occupational therapists that wish to use OTR and occupational therapy assistants who wish to use COTA must be licensed.

Q. I am not licensed but I am currently certified with NBCOT. May I use OTR or COTA after my signature?
A. No. Section 4125 of Title 16, California Code of Regulations (CCR) provides that only licensed occupational therapists may use OTR and only licensed occupational therapy assistants may use COTA.

Thank you for the opportunity to share our request with the Board regarding the adopted regulatory language adding Section 4125 to the California Code of Regulations. We would be happy to discuss our request further with the Board. If that would be helpful, please contact AOTA's Director of State Affairs Chuck Willmarth at 301/652-6611 ext 2019 or via email at cwillmarth@aota.org.

Sincerely,

Christina A. Metzler
Chief Public Affairs Officer
American Occupational Therapy Association

cc: Shawn Phipps, MS, OTR/L, President, Occupational Therapy Association of California

Arent Fox

March 30, 2011

Michael A. Grow
Attorney
202.857.6389 DIRECT
202.857.6395 FAX
grow.michael@arentfox.com

VIA E-MAIL AND FIRST CLASS MAIL

Brian J. Stiger
Director of Consumer Affairs
California Department of Consumer Affairs
1625 North Market Blvd., Suite N 112
Sacramento, CA 95834

Re: NBCOT's Certification Marks

Dear Mr. Stiger:

We understand that your department oversees the regulation of the practice of occupational therapy in the state of California. Accordingly, I am writing on behalf of the National Board for Certification in Occupational Therapy ("NBCOT"), which owns the federally registered certification marks OCCUPATIONAL THERAPIST REGISTERED, OTR, CERTIFIED OCCUPATIONAL THERAPY ASSISTANT, and COTA. (Copies of our client's registration certificates are attached as Exhibit A to this letter.)

Background Information Concerning NBCOT

NBCOT is an independent, non-profit, non-stock corporation, which serves and protects the public and assists regulatory authorities by performing the following functions:

(1) setting standards related to the skills and knowledge for certification in the field of occupational therapy;

(2) administering examinations designed to test the skills and knowledge of individuals desiring to practice in the field of occupational therapy; and

(3) providing accurate, up-to-date and relevant information about the credentials of occupational therapy practitioners.

By setting standards and administering examinations, NBCOT has helped preserve the integrity of the profession while at the same time assisting state regulators in their efforts to promote public health, welfare and safety. NBCOT's efforts to enhance the image of the profession by providing certification and recertification standards have been very well received by both

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Washington, DC 20036-5339
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1675 Broadway
New York, NY 10019-5820
T 212.484.3900 F 212.484.3990

555 West Fifth Street, 48th Floor
Los Angeles, CA 90013-1065
T 213.629.7400 F 213.629.7401

practitioners and state regulators. Most interested parties have recognized that an independent entity such as NBCOT is in the best position to oversee the certification process.

Clarification as to Interpretation of California Statutes and Regulations

Our main purpose in writing to you is to seek clarification as to the interpretation of certain California statutes and regulations pertaining to the field of occupational therapy. In our view, these laws and regulations are consistent with NBCOT's rights in its certification marks. However, it appears that some individuals may have construed the regulations to mean that California may preclude the use of those marks by individuals who meet NBCOT's standards.

Our concern arises in part from a letter dated September 28, 2010, from enforcement analyst Krista Kopplinger to Kathleen Schwartz. (A copy of this letter is attached as Exhibit B) Ms. Schwartz has met the certification requirements established by NBCOT and she is currently in good standing. Thus, under NBCOT's policies she is entitled to use the certification mark so long as she does not do so in a manner that falsely suggests she is authorized to practice occupational therapy. Ms. Kopplinger's letter seems to suggest, however, that the California Board of Occupational Therapy ("CBOT") may prevent educators and others who comply with NBCOT's certification requirements from using NBCOT's federally registered "OTR" or "COTA" certification marks, under any circumstances, unless the person is licensed to practice in California.

While the state obviously has an interest in precluding individuals from engaging in the unauthorized "practice" of occupational therapy, it should not prevent a qualified person from using NBCOT's certification marks so long as that person is not engaging in the unauthorized practice of occupational therapy and so long as the person has no intent to represent falsely that he or she is authorized to practice.

Because of the confusion that seems to have arisen on this issue, we respectfully request that you provide us with a response confirming that the neither the statutes nor the regulations should be construed to prevent the use of NBCOT's certifications marks by individuals who have met NBCOT's standards, except to the extent such individuals use the marks in connection with the unlicensed practice of occupational therapy.

As we had indicated in our correspondence with the California Board of Occupational Therapy in 2009, NBCOT allows individuals to use its certification marks **for informative purposes to indicate they have met NBCOT's certification standards.** (A copy of our prior correspondence is attached as Exhibit C.)

NBCOT does not authorize individuals to use its marks in connection with the "practice" of occupational therapy unless they comply with state licensing requirements. However, there are

many educators, administrators and other individuals throughout the country who do not practice occupational therapy but who nonetheless have a need to use NBCOT's marks fairly to communicate the fact that they have met the certification standards. Other states do not attempt to interfere with the use of NBCOT's marks by such individuals, even though the individuals may not hold active state licenses. Accordingly, NBCOT respectfully requests that your office acknowledge and respect the right to use NBCOT's marks by such individuals who meet NBCOT's standards, even though they many not currently hold active licenses

California Statutes and Regulations Relating to Occupational Therapy

The confusion that has arisen may be due in part to the fact that references to NBCOT's certification marks are found in Sections 2570.18(b) and (c) of the California Occupational Therapy Practice Act:

§ 2570.18(b) states:

"Unless licensed to practice as an occupational therapist under this chapter, a person may not use the professional abbreviations "O.T.," "O.T.R.," or O.T.R./L/," or "Occupational Therapist," or "Occupational Therapist Registered," or any other words, letters, or symbols **with the intent to represent** that the person practices or is authorized to practice occupational therapy."

§ 2570.18(c) states:

"Unless certified to assist in the practice of occupational therapy as an occupational therapy assistant under this chapter, a person may not use the professional abbreviations "O.T.A.," "C.O.T.A.," C.O.T.A./C." or "Occupational Therapy Assistant," or "Certified Occupational Therapy Assistant," or any other words, letters, or symbols, **with the intent to represent** that the person assists in, or is authorized to assist in, the practice of occupational therapy as an occupational therapy assistant."

References to NBCOT's certification also are contained in recent amendments to Section 4125 of Division 39 of Title 16 of the California Code of Regulations which now reads as follows.

Sections 4125 (a)(2) and (b)(2) state:

(a)(2) Unless licensed as an occupational therapist by the Board, and currently registered with the National Board for Certification in Occupational Therapy (NBCOT), a person may not use the professional abbreviations "O.T.R.," or O.T.R./L/," or refer to themselves as "Occupational Therapist, Registered," or "Registered Occupational Therapist" or use any other words, letters, symbols,

> manner, or means, **with the intent to represent** that the person practices or is authorized to practice occupational therapy in California.
>
> (b)(2) Unless licensed as an occupational therapy assistant and currently registered with NBCOT, a person may not use the professional abbreviations "C.O.T.A." or C.O.T.A./L/," or refer to themselves as "Certified Occupational Therapy Assistant" or use any other words, letters, symbols, manner, or means, **with the intent to represent** that the person practices or is authorized to practice occupational therapy in California.

Both the California Statutes and the newly adopted regulations clearly indicate that a person may use NBCOT's federally registered certification marks OTR and COTA, even though they are not licensed by the State of California, so long as the person does not use them with "**the intent to represent** that the person practices or is authorized to practice occupational therapy."

Thus, educators, administrators and others who comply with NBCOT's certification requirements should be allowed to use NBCOT's federally registered certification marks so long as they do not represent or intend to represent that they are authorized to practice occupational therapy.

We respectfully request that you confirm that our interpretation of the statute and regulations is correct and that the state will not interfere with the use of NBCOT's marks by individuals who are certified by NBCOT, so long as such individuals do not falsely represent that they are authorized to practice occupational therapy.

As we had indicated in our prior correspondence in 2009, NBCOT allows individuals to use its certification marks **for informative purposes to indicate they have met NBCOT's certification standards.** NBCOT does not authorize individuals to use the marks in connection with the practice of occupational therapy unless they comply with state licensing requirements. However, there are many educators and other individuals throughout the country who do not practice occupational therapy but who nonetheless have a need to use NBCOT's marks to communicate the fact that they have met the certification standards. Accordingly, NBCOT respectfully requests that your department acknowledge and respect the right of individuals to do so.

If we may provide additional information regarding this matter or if you believe it would be helpful to schedule a time to discuss this matter in greater detail, please let us know.

Arent Fox

We look forward to hearing from you at your earliest convenience.

Sincerely,

Michael A. Grow

Enclosures

cc: Paul Grace
Shaun Conway
Thomas F. Fitzgerald, Esq.

EXHIBIT A

United States of America

United States Patent and Trademark Office

OTR

Reg. No. 3,922,049

Registered Feb. 22, 2011

CERTIFICATION MARK

PRINCIPAL REGISTER

NATIONAL BOARD FOR CERTIFICATION IN OCCUPATIONAL THERAPY, INC.
(MARYLAND CORPORATION)
12 S. SUMMIT AVENUE
GAITHERSBURG, MD 20877

FOR: OCCUPATIONAL THERAPY SERVICES, IN CLASS B (U.S. CL. B).

FIRST USE 12-0-1932; IN COMMERCE 12-0-1932.

OWNER OF U.S. REG. NOS. 1,942,364 AND 2,578,639.

THE STIPPLING IS FOR SHADING PURPOSES.

THE MARK CONSISTS OF THE STYLIZED LETTERS "OTR".

THE CERTIFICATION MARK, AS USED BY AUTHORIZED PERSONS, CERTIFIES THAT SUCH PERSONS MEET STANDARDS AND TESTS OF COMPETENCY, SKILL AND KNOWLEDGE ESTABLISHED BY THE CERTIFIER.

SER. NO. 77-961,520, FILED 3-17-2010.

INGA ERVIN, EXAMINING ATTORNEY

David J. Kappos

Director of the United States Patent and Trademark Office

United States of America

United States Patent and Trademark Office

COTA

Reg. No. 3,922,048

Registered Feb. 22, 2011

CERTIFICATION MARK

PRINCIPAL REGISTER

NATIONAL BOARD FOR CERTIFICATION IN OCCUPATIONAL THERAPY, INC.
(MARYLAND CORPORATION)
12 S. SUMMIT AVENUE
GAITHERSBURG, MD 20877

FOR: OCCUPATIONAL THERAPY SERVICES, IN CLASS B (U.S. CL. B).

FIRST USE 6-1-1961; IN COMMERCE 6-1-1961.

OWNER OF U.S. REG. NOS. 1,952,606 AND 2,578,638.

THE STIPPLING IS FOR SHADING PURPOSES.

THE MARK CONSISTS OF THE STYLIZED LETTERS "COTA".

THE CERTIFICATION MARK, AS USED BY AUTHORIZED PERSONS, CERTIFIES THAT SUCH PERSONS MEET STANDARDS AND TESTS OF COMPETENCY, SKILL AND KNOWLEDGE ESTABLISHED BY THE CERTIFIER.

SER. NO. 77-961,509, FILED 3-17-2010.

INGA ERVIN, EXAMINING ATTORNEY

UNITED STATES PATENT AND TRADEMARK OFFICE
DEPARTMENT OF COMMERCE

David J. Kappos

Director of the United States Patent and Trademark Office

Prior U.S. Cl.: B

Reg. No. 1,942,364

United States Patent and Trademark Office Registered Dec. 19, 1995

CERTIFICATION MARK
PRINCIPAL REGISTER

OCCUPATIONAL THERAPIST REGISTERED OTR

AMERICAN OCCUPATIONAL THERAPY CERTIFICATION BOARD (MARYLAND CORPORATION)
4 RESEARCH PLACE
ROCKVILLE, MD 20850

FOR: OCCUPATIONAL THERAPY SERVICES, IN CLASS B (U.S. CL. B).

FIRST USE 12-0-1932; IN COMMERCE 12-0-1932.

THE CERTIFICATION MARK, AS USED BY AUTHORIZED PERSONS, CERTIFIES THAT SUCH PERSONS MEET STANDARDS AND TESTS OF COMPETENCY, SKILL AND KNOWLEDGE ESTABLISHED BY THE CERTIFIER

SEC. 2(F) AS TO "OCCUPATIONAL THERAPIST REGISTERED".

SER. NO. 74-571,292, FILED 9-8-1994.

KIMBERLY KREHELY, EXAMINING ATTORNEY

Prior U.S. Cl.: B

Reg. No. 1,952,606

United States Patent and Trademark Office Registered Jan. 30, 1996

CERTIFICATION MARK
PRINCIPAL REGISTER

CERTIFIED OCCUPATIONAL THERAPY ASSISTANT COTA

AMERICAN OCCUPATIONAL THERAPY CERTIFICATION BOARD (MARYLAND CORPORATION)
4 RESEARCH PLACE
ROCKVILLE, MD 20850

FOR: OCCUPATIONAL THERAPY SERVICES, IN CLASS B (U.S. CL. B).
FIRST USE 6-1-1961; IN COMMERCE 6-1-1961.
THE CERTIFICATION MARK, AS USED BY AUTHORIZED PERSONS, CERTIFIES THAT SUCH PERSONS MEET STANDARDS AND TESTS OF COMPETENCY, SKILL AND KNOWLEDGE ESTABLISHED BY THE CERTIFIER.

SEC. 2(F).

SER. NO. 74-571,291, FILED 9-8-1994.

KIMBERLY KREHELY, EXAMINING ATTORNEY

EXHIBIT B

STATE OF CALIFORNIA
dca
DEPARTMENT OF CONSUMER AFFAIRS

STATE AND CONSUMER SERVICES AGENCY • ARNOLD SCHWARZENEGGER, GOVERNOR

BOARD OF OCCUPATIONAL THERAPY
2005 Evergreen Street, Suite 2050, Sacramento, CA 95815-3831
T: (916) 263-2294 F: (916) 263-2701
E-mail: cbot@dca.ca.gov Web: www.bot.ca.gov

September 8, 2010

Kathleen Schwartz
5634 Domaine Drive
San Jose, CA 95118

RE: Inquiry # OT 2008-441

Dear Ms. Schwartz:

California Board of Occupational Therapy (Board) acknowledges receipt of your explanation in regards to our unlicensed practice and misrepresentation inquiry. Confirmation received indicates you have not provided occupational therapy services since April 2007. Further, during the time in question you chose to keep your CA license on "inactive" status, which permitted you to represent yourself using the abbreviation OTR or OTR/L. However, be advised if at any point you choose not to elect either "active" or "inactive" status, you must cease representation of OTR credentials in the State of California. Due to the above information, the Board has closed its inquiry with no violation.

Thank you for your continued cooperation in this matter.

Sincerely,

Krista Koppinger
Enforcement Analyst

EXHIBIT C

Arent Fox

February 3, 2009

Michael A. Grow
Attorney
202.857.6389 DIRECT
202.857.6395 FAX
grow.michael@arentfox.com

VIA E-MAIL AND FACSIMILE

Heather Martin
Executive Officer
California Board of Occupational Therapy
2005 Evergreen Street, Suite 2050
Sacramento, CA 95814
Fax: (916) 263-2701

Re: NBCOT's Certification Marks

Dear Ms. Martin:

We represent the National Board for Certification in Occupational Therapy, Inc. ("NBCOT") and we are writing to follow up on issues raised in your recent conversation with Shaun Conway, NBCOT's Director, Credentialing Services. From time to time, questions have been asked by other states concerning the circumstances under which it is appropriate to use NBCOT's federally registered certification marks "Occupational Therapist Registered OTR" and "Certified Occupational Therapy Assistant COTA." We are attaching copies of NBCOT's registrations for its certification marks, which were issued by the United States Patent and Trademark Office.

We understand that the California Board of Occupational Therapy ("CBOT") has taken the position that educators who comply with NBCOT's certification requirements may not use NBCOT's "OTR" or "COTA" certification marks under any circumstances unless the educator has been licensed to practice by the state, even if that individual is not engaging in the practice of occupational therapy. If that is the policy of the state, we respectfully request that the policy be changed as follows;

- educators and others should be permitted to use NBCOT's certification marks OTR and COTA, in accordance with federal law, to truthfully represent fairly and in good faith that they have met NBCOT's certification standards even if they are not licensed to practice occupational therapy.

- no one should be permitted to use NBCOT's certification marks OTR and COTA in a manner that falsely suggests they are licensed to practice in the field of occupational therapy even it they have met NBCOT's certification standards.

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Washington, DC 20036-5339
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New York, NY 10019-5820
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555 West Fifth Street, 48th Floor
Los Angeles, CA 90013-1065
T 213.629.7400 F 213.629.7401

Arent Fox

It is true that NBCOT's certification marks, including "OTR" and "COTA", may only be used **in connection with the practice** of occupational therapy where an individual also meets the license requirements imposed by the state. However, there are occasions when non-practitioners such as educators, professors, health care administrators, and retired individuals may wish to indicate that they have met the OTR or COTA certification standards established by NBCOT. In some instances, they may truthfully wish to inform students, employers and others that they have complied with NBCOT's certification requirements. So long as an individual has met NBCOT's standards, NBCOT permits non-practitioners to use its certification marks **for informative purposes to indicate they have met NBCOT's certification standards**.

NBCOT believes the state should have no objection to use of its marks **for informative purposes** by certified individuals so long as they make no untruthful representations **for purposes of indicating the right to practice** occupational therapy. Of course, NBCOT neither condones nor permits the use of its certification marks in connection with the practice of occupational therapy by individuals who have not complied with local licensing laws.

We hope that the information contained in this letter and the California Occupational Therapy Practice Act itself will be sufficient to allow the CBOT to conclude that educators and others who have met NBCOT's certification standards are entitled to use the OTR or COTA marks merely to indicate that they are certified so long as they do not use the marks to untruthfully suggest that they are authorized to engage in the unauthorized practice of occupational therapy.

Background Information Concerning NBCOT

NBCOT is an independent, non-profit, non-stock corporation organized under the laws of the State of Maryland. It is not a membership organization. Rather, its purposes are to serve and protect the public and to assist regulatory authorities by performing the following functions:

(1) setting standards related to the skills and knowledge for certification in the field of occupational therapy,

(2) administering examinations designed to test the skills and knowledge of individuals desiring to practice in the field of occupational therapy, and

(3) providing accurate, up-to-date and relevant information about the credentials of occupational therapy practitioners.

NBCOT is governed by an independent Board of Directors comprised of individuals with considerable, experience, skill and expertise in the field of occupational therapy. Some of the

members are practitioners and some are drawn from other segments of the health education and health care profession.

The Certification Marks Owned by NBCOT

NBCOT has established certification standards and administers examinations in two certification categories in the field of occupational therapy. Individuals who meet NBCOT's certification requirements in these fields are authorized to use one of the following federally registered certification marks:

OCCUPATIONAL THERAPIST REGISTERED OTR
CERTIFIED OCCUPATIONAL THERAPY ASSISTANT COTA

To be authorized to use the certification marks, an individual must (a) satisfy NBCOT's educational and fieldwork requirements, (b) successfully complete a certification examination, and (c) meet periodic recertification requirements. Individuals who have been certified may lose the right to use the certification marks through disciplinary action. The grounds for such action include failure to engage in the safe, proficient or competent practice of occupational therapy.

The United States Patent and Trademark Office recognized NBCOT's ownership rights in the certification marks by issuing Reg. Nos. 1,942,364, 1,952,606, 2,578,638 and 2,578,639. Thus, these marks may be used only by individuals who meet NBCOT's certification standards.

As indicated on the face of NBCOT's registrations, the "certification mark, as used by authorized persons, certifies that such persons meet standards and tests of competency, skill and knowledge established by the certifier." Federal registrations such as those owned by NBCOT, provide "conclusive evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and the registrant's exclusive right to use [or permit others to use] the registered mark in commerce ... on or in connection with the goods or services specified in the certificate." 15 U.S.C. § 1057(b). Moreover, the United States District Court for the District of Maryland found in September 1998 that NBCOT is the lawful owner of the certification marks and declared the marks and their registrations to be valid. *See National Board for Certification in Occupational Therapy, Inc. v. American Occupational Therapy Ass'n*, 24 F. Supp. 494 (D. Md. 1998).

As the lawful owner of the certification marks, NBCOT has the right to control the manner in which the marks are used. Accordingly, it has set certain standards practitioners must meet before they may use the marks. Specifically, practitioners must (a) satisfy NBCOT's educational and fieldwork requirements, (b) successfully complete a certification examination, and (c) meet periodic recertification requirements. Individuals who have been certified may lose

the right to use the certification marks through disciplinary action. The grounds for such action include failure to engage in the safe, proficient or competent practice of occupational therapy.

NBCOT provides the following guidelines concerning the circumstances under which use of the certification marks is permitted:

- Those who meet NBCOT's certification requirements may not use the certification marks in connection with the practice of occupational therapy unless they meet all applicable state licensing requirements.
- Those who are licensed to practice occupational therapy by a particular state **may not** use the certification marks unless they also meet all of NBCOT's certification standards.
- Individuals may use the certification marks fairly in good faith to indicate that they have obtained NBCOT certification, even if they are not licensed by a particular state, so long as they do not engage in any unauthorized practice of occupational therapy.

Federal Statutes Relating to Certification Marks

Common law ownership rights in a name or mark are established by the first person or entity to use it in connection with an established trade or business. Registration is not a prerequisite to the acquisition of rights in a mark. However, to enhance rights acquired under the common law, Congress has enacted a variety of laws which provide among other things for the issuance of registration certificates by the United States Patent and Trademark Office to owners of marks. The current federal law is the Trademark Act of 1946, 15 U.S.C. § 1051 et seq. This is often referred to as the Lanham Act.

Section 45 of the Lanham Act, 15 U.S.C.§ 1127, contains definitions for various types of marks that may be registered. The term "certification mark" is defined as "any word, name, symbol, or device, or any combination thereof--

(1) used by a person other than its owner, or

(2) which its owner has a bona fide intention to permit a person other than the owner to use in commerce and files an application to register on the principal register established by this Act, to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of such person's goods or services or that the work or labor on the goods or services was performed by members of a union or other organization."

The certification marks owned by NBCOT fall within this definition in that they consist of combinations of words used, by individuals who meet NBCOT's certification standards, to certify the quality and other characteristics of the services they perform.

The California Occupational Therapy Practice Act

The California Occupational Therapy Practice Act, Cal. Bus. & Prof. Code § 2570 *et seq.* (the "Act"), prohibits a person from "representing to the public by title, by description of services, methods, or procedures, or otherwise, that the person is authorized to practice occupational therapy in this state, unless authorized to practice occupational therapy under this chapter." *Id.* § 2570.18(a). The Act further specifies that "unless licensed to practice as an occupational therapist under this chapter, a person may not use the professional abbreviations "O.T.," "O.T.R.," or "O.T.R./L.," or "Occupational Therapist," or "Occupational Therapist Registered," or any other words, letters, or symbols *with the intent to represent that the person practices or is authorized to practice occupational therapy. Id.* § 2570.18(b) (emphasis added). The Act also states that "[u]nless certified to assist in the practice of occupational therapy as an occupational therapy assistant under this chapter, a person may not use the professional abbreviations "O.T.A.," "C.O.T.A.," "C.O.T.A./C." or "Occupational Therapy Assistant," or "Certified Occupational Therapy Assistant," or any other words, letters, or symbols, *with the intent to represent that the person assists in, or is authorized to assist in, the practice of occupational therapy as an occupational therapy assistant. Id.* at § 2570.18(c) (emphasis added).

The Act does not prevent a person from displaying the OTR and COTA marks so long as there is no intent to untruthfully represent that the person is entitled to practice or assist in the practice of occupational therapy. Notwithstanding this fact, we understand the CBOT may have sent letters to occupational therapy education program directors in California instructing them that they may not use the "OTR" or "COTA" designations in connection with their teaching positions if they are not licensed by the state.

On December 22, 2008, Shaun Conway, NBCOT's Director, Credentialing Services, spoke with you via phone regarding these issues. You and Mr. Conway then exchanged e-mails regarding the substance of the phone conversation, in which you disagreed with the statement in his summary of the phone conversation that you had indicated that the "Board will not take action against an individual for misrepresentation of credentials when the issue in question involves an unlicensed practitioner who refers to him or herself as either an OTR or COTA." In your e-mail of January 29, 2009, you indicated that CBOT would accept from NBCOT a written opinion on this issue for consideration at CBOT's next meeting on March 19, 2009. Consequently, we are submitting this letter for CBOT's consideration.

In our view, the Act should not be construed to prevent *all* uses of OTR and COTA except by individuals holding state licenses. Under the Act, unlicensed educators and others who use the OTR and COTA designations to indicate they have obtained the OTR and COTA certification are not prohibited from using the marks unless they have a demonstrable "intent to represent that the person practices or is authorized to practice occupational therapy" or to assist in the practice of occupational therapy under the Act. So long as any such persons merely use the OTR and COTA marks to indicate that they have obtained NBCOT certification, they should not be deemed to have violated California law.

The California Occupational Therapy Practice Act contains various provisions relating to the practice of occupational therapy. Certain of these statutes prohibit an unlicensed practitioner from representing to the public that he or she is authorized to practice occupational therapy in California:

- CAL. BUS. & PROF. CODE § 2570.3 : "No person shall practice occupational therapy or hold himself or herself out as an occupational therapist or as being able to practice occupational therapy, or to render occupational therapy services in this state unless he or she is licensed as an occupational therapist under the provisions of this chapter. No person shall hold himself or herself out as an occupational therapy assistant or work as an occupational therapy assistant under the supervision of an occupational therapist unless he or she is certified as an occupational therapy assistant under the provisions of this chapter."

- CAL. BUS. & PROF. CODE § 2570.18(a): "On and after January 1, 2003, a person shall not represent to the public by title, by description of services, methods, or procedures, or otherwise, that the person is authorized to practice occupational therapy in this state, unless authorized to practice occupational therapy under this chapter."

- CAL. BUS. & PROF. CODE § 2570.18(b): "Unless licensed to practice as an occupational therapist under this chapter, a person may not use the professional abbreviations "O.T.," "O.T.R.," or "O.T.R./L.," or "Occupational Therapist," or "Occupational Therapist Registered," or any other words, letters, or symbols *with the intent to represent that the person practices or is authorized to practice occupational therapy.*" (Emphasis added).

- CAL. BUS. & PROF. CODE § 2570.18(c): "Unless certified to assist in the practice of occupational therapy as an occupational therapy assistant under this chapter, a person may not use the professional abbreviations "O.T.A.," "C.O.T.A.," "C.O.T.A./C." or "Occupational Therapy Assistant," or "Certified Occupational Therapy Assistant," or any other words, letters, or symbols, *with the intent to represent that the person assists in, or*

is authorized to assist in, the practice of occupational therapy as an occupational therapy assistant." (Emphasis added).

There is no conflict between these provisions and the standards developed by NBCOT, which govern the manner in which the OTR and COTA certification marks may be used. Instead, California law prohibits only the use of OTR and COTA where the person uses those designations "with the intent to represent that the person practices or is authorized to practice occupational therapy." Generally, an educator who is not licensed may use OTR or COTA to communicate compliance with NBCOT certification standards so long as the person does not also practice or represent that the person is licensed to practice or assist in the practice of occupational therapy in California or elsewhere. This interpretation does not require CBOT to "refuse to enforce" the Act, as you indicated in your e-mail of January 29, 2009, and CBOT should indeed continue to enforce the Act against individuals who use OTR and COTA "with the intent to represent that the person practices or is authorized to practice occupational therapy."

Conclusion

Based on federal trademark law and California regulatory law, we respectfully submit that the following guidelines might be followed in evaluating whether use of NBCOT's certification marks is permissible in California:

(1) Only those individuals currently certified by and in good standing with NBCOT may use the marks OCCUPATIONAL THERAPIST REGISTERED, OTR, CERTIFIED OCCUPATIONAL THERAPY ASSISTANT, or COTA in any manner;

(2) Only persons who are both licensed to practice occupational therapy in California and who are currently certified by NBCOT may use NBCOT's marks in connection with the practice of occupational therapy; and

(3) Educators and other persons who are not licensed to practice occupational therapy in California but who are currently certified by NBCOT may use the marks OTR, COTA, OCCUPATIONAL THERAPIST REGISTERED and CERTIFIED OCCUPATIONAL THERAPY ASSISTANT marks to indicate compliance with NBCOT certification so long as the marks are not used in a manner that represents or reflects an intent to represent that the person is licensed to practice occupational therapy or to assist in the practice of occupational therapy in California.

We are hopeful that the foregoing explanation will be useful in addressing any instances that may arise in the future wherein concerns are expressed as to the circumstances under which

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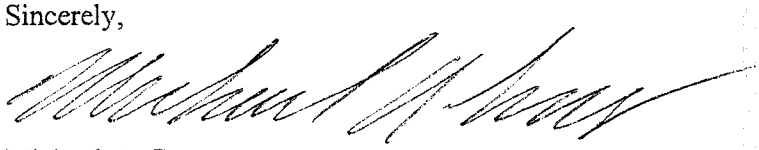
it may or may not be appropriate for an individual to use any of NBCOT's certification marks. If the CBOT or the Office of the California Attorney General have a different view of this matter or if there are any questions, please let us know. We look forward to hearing from you at your earliest convenience.

Sincerely,



Michael A. Grow

Enclosure

cc: Gillian E. Friedman, Deputy Attorney General
Thomas F. Fitzgerald, Esq.

Arent Fox

June 3, 2011

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Reference Number
019421.00016

VIA E-MAIL

Heather Martin (heather.martin@dca.ca.gov)
California Board of Occupational Therapy
2005 Evergreen Street, Suite 2050
Sacramento, CA 95815

Re: National Board for Certification in Occupational Therapy

Dear Ms. Martin:

On behalf of our client the National Board for Certification in Occupational Therapy ("NBCOT"), we want to thank you and Ms. Marks for taking the time to speak with us on May 10, 2011. We believe the discussion was very helpful in clarifying the concerns expressed in our letter of March 30, 2011.

We understand that the California Board of Occupational Therapy has a need to regulate the profession and to insure that no one engages in the unlicensed practice of occupational therapy. We also understand that you need to review matters on a case by case basis in accordance with the California statutes and regulations relating to the profession.

As indicated in our letter, NBCOT supports your efforts to prevent unauthorized acts by practitioners. At the same time, NBCOT needs to be able to answer questions from those individuals who meet NBCOT's certification standards and who are authorized to use the federally registered certification marks OCCUPATIONAL THERAPIST REGISTERED, OTR, CERTIFIED OCCUPATIONAL THERAPY ASSISTANT, and COTA (the "NBCOT Marks").

Most of those certified by NBCOT are engaged in the practice of occupational therapy. However, there are some who maintain their certification with NBCOT who do not actually practice. Certification has value for those who write articles or who work as administrators. In some cases, NBCOT certification is a prerequisite to obtaining certain jobs even though the jobs themselves do not entail the actual practice of occupational therapy.

Many of these individuals who do not practice need to use the certification marks to communicate the fact that they have met NBCOT's standards. NBCOT permits such individuals to use the marks for this purpose. However, if the individuals are not licensed to practice they must take steps to insure that they do not suggest that they are licensed.

In NBCOT's view, it is possible for individuals to use the NBCOT Marks without implying that they are authorized to practice.

During our conversation, you made it clear that you would not view the mere display of the NBCOT Marks by unlicensed individuals as a per se violation of the California statutes and regulations. This satisfies the primary concern raised in our letter.

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Obviously, the manner in which the NBCOT Marks are used must be reviewed from time to time by your organization and we understand that you reserve the right to take action if and when NBCOT Marks are used in combination with other statements or actions that falsely create the impression that someone has been licensed by the state. If NBCOT becomes aware of any such misuse, it too will take action to insure that members of the public are not deceived.
Please feel free to communicate directly with NBCOT whenever any issues arise with respect to the use of the NBCOT Marks.

Sincerely,

Michael A. Grow

cc: Norine Marks, Esq. (norine.marks@dca.ca.gov)
Paul Grace
Shawn Conway
Thomas F. Fitzgerald, Esq.

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