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MEMORANDUM

DATE	May 11, 2023
TO	OMBC Board Members
FROM	Terri Thorfinnson, Administrative Service Program Manager
RE:	Agenda item 14(B) - OMBC Legislative Policy Proposals for Enforcement

Background.
The following enforcement policy proposals have been proposed by the Medical Board of California (MBC) as part of their "new issues" they are proposing for Legislative consideration as part of their Sunset Hearing process this year. The theme of these proposals is how to streamline enforcement and eliminate delays that are detrimental to timely investigation of enforcement cases. The proposals represent policies that OMBC should consider and determine whether they support any or all of them. For proposals that the board takes a position on, it will allow the Board to take a position on them this legislative session; and for any that do not get signed into law, OMBC can include them in our Oversight Report next year.

Proposal #1: Establishing a Fee for Disciplined Licensees Seeking to Modify or Terminate Probation or to Reinstate Their License.

Background.
Even though the Board receives cost recovery for a portion of its enforcement work, those cost recovery amount are often determined by Administrative Law Judges (ALJ) hearing cases, or the amount of cost recovery amount is a negotiated term in a stipulated settlement. Either way, the amount of cost recovery is far less than the cost of enforcement. The nature of enforcement that requires expert reviewers, expert witnesses, investigators, the Attorney General (AG), ALJ, Court Reporters and transcripts of hearings is expensive. As such, enforcement is a major cost driver for the Board. Over the past several years, the Board has weathered unexpected increases in the hourly rates charged for formal investigations and the Attorney General costs. Authorized budget augmentations had to be pursued to balance the budget.

In evaluating enforcement cost drivers, petitions by disciplined licensees seeking to modify, terminate probation or reinstate their license was identified as a cost driver for the Board for which there is no authorized cost recovery as there is with formal discipline. Petitions are much more expensive than simply holding a Board meeting because they involve a hearing that

generates AG costs, ALJ costs and court reporter costs and travel. Charging a fee for petitions not to exceed "reasonable costs" would provide the Board with a portion of reimbursement for its petition hearing costs. The MBC has similarly come to the same conclusion and is proposing statutory language that would authorize the establishment of a fee not to exceed the "reasonable cost" for licensees requesting to modify or terminate probation or reinstate their license in their sunset report.

Discussion.
In reviewing the past three years of petition, the Board heard 8 petitions with total costs averaging $40,000/ year for a three-year total of $117,000. The licensees petitioning the Board do not have to bear any of the costs incurred as a result of the petition beyond their own attorney fees. To mitigate the petition costs the Board incurs for petition hearings, staff is recommending that a request similar to the MBC request that a section be added to the Medical Practice Act that authorizes the Board to establish an application fee for petitioners, not to exceed the Board's "reasonable costs" to process and adjudicate petitions for reinstatement, early termination of probation, or modification of probation.

Recommendation: Support statutory amendments to authorize the establishment of a fee for disciplined licensees requesting to modify or terminate probation or reinstate their license for OMBC that would not exceed "reasonable costs."

Proposal #2: Change the Evidentiary Standard to Preponderance of the Evidence.

Background.
Evidentiary standard refers to the standard of proof required to make a finding that the respondent has in fact violated the statutory or regulatory law or standard of care. There are three evidentiary standards: "clear and convincing", "preponderance of the evidence" and "beyond a reasonable doubt."

The Board does not have jurisdiction to enforcement criminal codes statutes that is the jurisdiction of the local district attorneys and other criminal prosecutors. For criminal cases, the standard of proof or the evidentiary standard is "Beyond a Reasonable Doubt." This is not the standard that we are considering today.

The Board's enforcement cases are administrative actions based on enforcement of civil statutory requirements which are not considered criminal even though the underlying cause of action may involve criminal action and convictions. In contrast to criminal cases, the standard of proof or evidentiary standard are considered much lower. Civil cases have "preponderance of

the evidence" or "clear and convincing" standards. The legislature determines which standard apply to which statutes.

The current California case law on point is Ettinger v. Board of Medical Quality Assurance (1982) 135 Cal.App.3d 853, 856 which overturned the Board of Medical Quality Assurance decision and trial court finding that preponderance of evidence was the correct standard to apply to enforcement cases involving physicians and surgeons. This opinion appears to pivot on the fact that caselaw involving other enforcement cases in other professions by regulatory boards the court applied a higher standard "clear and convincing." The Ettinger court did not want two separate standards. Case law involving enforcement cases stem from licensees appealing Board enforcement decisions and orders. When there is silence in the statute on issues, the court turns to case law to decide the case. The Board feels that the Medical Practice Act should clearly specify the standard of proof for enforcement cases. If the Board agrees, the Board would support the MBC proposal.

Discussion.
There are several reasons to change the standard of proof to "preponderance of the evidence. The first is from a public safety protection perspective, "clear and convincing" standard of proof is too high to serve the interests of protecting public safety. The Board's mission to protect public safety through ensuring licensee are competent and to bring enforcement actions against licensees that violate the law. This standard begs the question of whose interest is being protected. From the Board's perspective, having to meet a higher standard of proof is a barrier to protecting public safety. A slightly lower standard of proof would better serve the interest of protecting public safety.

A professional license is not an unconditional individual right. Individual rights are typically unconditional and do not require the individual to comply with statutory requirements in order to obtain that right. In order to obtain a license to practice medicine, one must comply with the licensure requirements set forth by the Legislature. This is not an individual right and thus the standard of proof applied to enforcement cases is too high. The standard of proof should be the same as other civil actions: "preponderance of the evidence."

Additionally, according to the Federation of State Medical Boards (FSMB) survey of standards of care in each state found that most states require the "preponderance of evidence" for medical board enforcement cases.: FSMB Standard of Evidence National Survey
https://www.fsmb.org/siteassets/advocacy/key-issues/standard-of-proof-by-state.pdf
According to the Federation of State Medical Boards survey of standard of proof by state, they found:

- 44 state board exclusively used a "preponderance of evidence" standard
- 10 Boards exclusively used a "clear and convincing evidence" standard

- 2 Boards used a different standard than clear and convincing or preponderance of the evidence

- 11 Boards have varying standards according to the nature of the violation

Changing to the preponderance of evidence standard would better protect public safety and make it easier and less costly for the Board to bring enforcement actions. Higher standard of proof means higher costs for enforcement. As the Ettinger case demonstrates, licensees that appeal their cases not only overturn Board decisions but also generate substantial costs to the Board to defend these cases in court.

Recommendation: Approve the proposed policy and support MBC's proposed Policy to Change the standard of proof to "Preponderance of the Evidence."

Addendum: FSMB Standard of Evidence National Survey
https://www.fsmb.org/siteassets/advocacy/key-issues/standard-of-proof-by-state.pdf

Proposal #3: Enhance Medical Record Inspection Authority

Background.
For many enforcement cases, medical records are the heart of the evidence. One of the main causes of delay in cases is obtaining patient medical records. Many of such delays involve patients refusing consent to release the records or the doctor failing to comply with the medical release and request by the Board. The Medical Board is proposing statutory language that would remove some of these barriers and delays to obtaining medical records.

Discussion.
Here is the explanation they provided in their sunset report and legislature explaining the reason for the change:

The Board is subject to significant limitations in its authority to inspect and review medical records in the possession of a licensee. Generally, the Board must obtain patient consent prior to requesting records from a licensee. However, obtaining patient consent (for example, in cases involving inappropriate prescribing of opioids) may be difficult. If the patient refuses to give consent, then the Board must establish good cause to issue a subpoena and may have to file a motion to compel in superior court to enforce the subpoena. Without quick access to records, investigations take longer to complete. In some cases, the Board is required to close complaints because its investigation cannot proceed without relevant medical records.

BPC section 2225(a) limits any in-office review of records to those that pertain to patients who have complained to the Board. Given that limitation, in most cases investigators will simply request a copy of records pursuant to a release signed by the patient, rather than inspecting the records in the office of the licensee.

To support the timely completion of investigations, the Board seeks enhanced authority to inspect patient records held by licensees without the need for patient consent or a subpoena. Like authority provided to certain Medi-Cal fraud investigators (See Government Code section 12528.1), this statutory change would help the Board to determine at an earlier stage if further investigation is warranted and, if necessary, to prepare more effective subpoenas to further an investigation.

The Board is not seeking this authority to unilaterally seize records, but rather to quickly identify patients from whom to seek authorization for a copy of their records or to determine whether good cause exists for a subpoena to obtain records relevant to its investigation. If a subpoena is necessary, the Board would still need to demonstrate good cause to be able to enforce it, which respects the privacy of patients and ensures that records sought are appropriately tailored to the areas at issue in the case.

The proposed legislation below is like that in Government Code section 12528.1, enacted in 2005, which permits the Bureau of Medi-Cal Fraud and Elder Abuse (BMFEA) to conduct inspections of Medi-Cal providers for the underlying purpose of carrying out the investigation and enforcement duties of the BMFEA.

This authority is expected to support the timely resolution of cases, including possibly closing a case earlier.

Recommendation: Support Medical Board proposal and proposed amendments from their sunset report.

Proposal #4: Pausing the Statute of Limitations for Subpoena Enforcement

Background.
One of the worst consequences in enforcement is to lose statute of limitations (SOL) for a critical case caused by various delays, some out of the Board's control. Any delay poses a risk that the board will lose statute of limitations in a case. As mentioned earlier, delays in receiving records requested to licensees can result in losing the statute of limitations and being unable to prosecute the case further. One narrowly constructed solution is to modify the current tolling provisions in Business and Professions Code 2225.5(b)(1). This is what the MBC is proposing in

their sunset hearing proposal. Here is the explanation they provided in their sunset report and legislature explaining the reason for the change:

Discussion.
With certain exemptions, the Board generally must file an accusation against a licensee either within three years after it discovers the alleged act or omission or within seven years (10 years for sexual misconduct) following the date the alleged act or omission occurred. If the Board is unable to meet the statute of limitations (SOL), then the complaint must be closed, in accordance with BPC section 2230.5.

If a licensee fails to produce medical records pursuant to a lawful subpoena of the Board, the investigative process is needlessly drawn out. During this often-lengthy process, the Board faces a growing risk that it will fail to meet the SOL as the Board litigates a petition for subpoena enforcement in superior court. Even where the Board proceeds at the quickest pace possible to obtain a superior court order compelling production, this litigation often severely delays resolution of the case, sometimes leaving very little time to fully develop an investigation, obtain expert review of the subpoenaed records, and draft and file an Accusation. Under current law, the SOL is paused (known as tolling) if the licensee is out of compliance with a court order to produce records.
BPC section 2225.5(b)(1) currently reads:

(b)(1) A licensee **who fails or refuses to comply with a court order**, issued in the enforcement of a subpoena, mandating the release of records to the board shall pay to the board a civil penalty of one thousand dollars ($1,000) per day for each day that the documents have not been produced after the date by which the court order requires the documents to be produced, up to ten thousand dollars ($10,000), unless it is determined that the order is unlawful or invalid. Any statute of limitations applicable to the filing of an accusation by the board shall be tolled during the period the licensee is out of compliance with the court order and during any related appeals.

Until receiving a court order to produce documents, a licensee has an incentive to delay complying with a lawful subpoena. Consequently, the Board believes that for the purposes of public protection and for evidence and resource preservation, the date of the superior court's issuance of the order to show cause would be an appropriate time to toll the statute of limitations.

Requested change in statute**:** Amend BPC section 2225.5(b)(1) to read as follows (additions shown in underline):

(b)(1) A licensee who fails or refuses to comply with a court order, issued in the enforcement of a subpoena, mandating the release of records to the board shall pay to the board a civil penalty of one thousand dollars ($1,000) per day for each day that the documents have not been produced after the date by which the court order requires the documents to be produced, up to ten thousand dollars ($10,000), unless it is determined that the order is unlawful or invalid. Any statute of limitations applicable to the filing of an accusation by the board shall be tolled upon the service of an order to show cause pursuant to Government Code section 11188, until such time as the subpoenaed records are produced, including any period the licensee is out of compliance with the court order and during any related appeals, or until the court declines to issue an order mandating release of records to the board.

Recommendation: Support MBC proposed amendments to narrowly expand the tolling provision.

Proposal #5: Mandate Additional Reports to the Board Regarding Physician Misconduct

Background.
The question of whether the required reporting of physician conduct by Business and Professions Code sections 805, 805.01 are resulting in the reporting of all physician conduct continues to be posed to the Board. The answer is we do not know what is not being reported. Additionally, the Board often receives reports of a Physician and Surgeon that is being investigated but the Physician and Surgeon voluntarily terminates employment and disappears to go work somewhere else. Since there was no completed investigation, the Board does not have sufficient evidence to open a case to investigate further and may not be able to obtain the documents from the reporting entity it needs.

Since there may be significantly more unreported conduct that would involve competence or professional conduct that is reasonably like to be detrimental to patient safety or to the delivery of patient care, a proposed solution to gain more unreported conduct would be to expand the number of agencies that may have knowledge of such conduct. The effect of this proposal would cast a large net involving agencies and entities that may be aware of such conduct. This is what the MBC is proposing in their sunset hearing proposal. Here is the explanation they provided in their sunset report and legislature explaining the reason for the change:

Discussion.
Current law Business and Professions Code sections 805 and 805.01 generally requires a report to be filed with the Board when a peer review body takes, or recommends, certain

actions (e.g. change in staff privileges or termination of employment) against a Physician and Surgeon due to a "medical disciplinary cause or reason" or other unprofessional conduct. The statute defines medical disciplinary cause or reason as "that aspect of the licentiate's competence or professional conduct that is reasonably likely to be detrimental to patient safety or to the delivery of patient care." In addition, BPC section 805.8, mandates that health care facilities and postsecondary educational institutions report certain complaints of sexual misconduct about a healing arts professional to the appropriate licensing entity. Failure to meet these reporting requirements may result in substantial penalties.

While helpful, these reporting requirements are not sufficient to ensure that the Board is aware of possible Physician and Surgeon unprofessional conduct. Therefore, the Board seeks to require additional appropriate organizations with knowledge of possible Physician and Surgeon unprofessional conduct to provide a report to the Board.

Requested changes in statute:

1. Amend BPC section 805.8 to clarify that "wellness committees," medical groups, health insurance providers, health care service plan providers, and locum tenens agencies are required to report complaints of alleged sexual misconduct to the appropriate licensing entity. This proposal would include additional health care organizations involved in the coordination and delivery of health care and that are likely to become aware of alleged Physician and Surgeon sexual misconduct.

2. Add or amend statute to require any organization that employs a Physician and Surgeon to report to the Board any employment-related discipline imposed (up to and including termination) due to a medical disciplinary cause or reason.

Similarly, require any organization that contracts with a Physicians and Surgeon, or other organization (e.g. a medical group or locum tenens provider) for Physician and Surgeon services, to report to the Board when a Physician and Surgeon is dismissed from service, or the contract is terminated, due to a medical disciplinary cause or reason.

Recommendation: Support MBC proposed amendments to expand the agencies and entities that must report potential physician unprofessional conduct.

Proposal # 6: Increase Wait Times for Disciplined Licensees Seeking to Modify or Terminate Probation or to Reinstate their License

Background.
The current length of time disciplined licensees must wait before they are eligible to petition for reinstatement, modification or termination of their probation are too short and cause the Board to expend already limited enforcement resources on petitions for reinstatement, probation modification or termination. When the Board determines the conditions of the disciplinary order or adopts and agreed upon stipulated order, it is the Board's expectation that it is an appropriate outcome or length of probation that should not be shortened or modified. In the interest of balancing the Board's limited enforcement resources, the Board would like to extend the period before which licensees can petition the Board for reinstatement, modification, or termination of their probation.

Current law BPC section 2307 specifies the length of time for each circumstance. For licensees whose license has been revoked or surrendered are required to wait for at least three years before being eligible to petition for reinstatement. Licensees on probation for three or more years must wait two years to petition for termination of their probation. To request modification of probation, probationers must wait one year. This is what the MBC is proposing in their sunset hearing proposal. Here is the explanation they provided in their sunset report and legislature explaining the reason for the change:

Discussion.
There are two main reasons to make this change. First, the current time frames are too short; as result, probationers are not ready to end their probation from the Board's perspective. When considering the time frame for probation, the Board follows their disciplinary guidelines based on the nature of the violation. If the probation is set for five years, the Board intended the probation term to last 5 years and not be petitioned to end the probation at 2 years. The second reason is balancing the Board's limited resources with the cost of petitions that include Attorney General time and travel, the Administrative Law Judge time and travel, court reporter time and travel for each petition hearing.

BPC section 2307 currently provides the following time frames:

(a) Except as provided in subdivision (i), a person whose certificate has been surrendered while under investigation or while charges are pending or whose certificate has been revoked or suspended or placed on probation, may petition the board for reinstatement or modification of penalty, including modification or termination of probation.

(b) The person may file the petition after a period of not less than the following minimum periods have elapsed from the effective date of the surrender of the certificate or the decision ordering that disciplinary action:

(1) At least three years for reinstatement of a license surrendered or revoked for unprofessional conduct, except that the board may, for good cause shown, specify in a revocation order that a petition for reinstatement may be filed after two years.

(2) At least two years for early termination of probation of three years or more.

(3) At least one year for modification of a condition, or reinstatement of a license surrendered or revoked for mental or physical illness, or termination of probation of less than three years.

More reasonable time frames that balance the limited resources of the Board with the petitioner's opportunity to petition include:

- Lengthening the petition for reinstatement from 3 years to 5 years
- Lengthening the petition for early termination of probation to after they have served more than half of their probation
- Eliminate the option to petition after one year if the license was revoked or surrendered due to mental or physical illness
- Provide for automatic rejection of the petition for early termination if the Board files a petition to revoke probation while the early termination petition is pending.
- For repetitive petitions that the Board may deny without hearing or argument any petition filed within three years of the prior petition.

Recommendation: Approve the policy change and support the above MBC proposed amendment to revise the time frames for eligibility to petition.

Proposal #7: Addressing Licensees Who Ask Patients to Rescind a Medical Records Release

Background.

Obtaining medical records is the heart of enforcement an investigation; and it is also where many obstacles that cause delays occur. Oddly enough, it has become a problem that a respondent or someone acting on behalf of the respondent causes the patient to rescind their consent to release medical records. In this instance, the board has been granted consent to receive the patient medical records but when the Board attempts to request the records from the respondent, the Board suddenly receives a rescission of the original consent to release the records. Now, the Board is back to square one with respect to obtaining the medical records

and the statute of limitations clock is ticking. This is a problem that causes delays, extra workload and increases the costs to obtain these records. To solve this problem, the MBC has proposed the following in their sunset report:

Discussion.
According to the HQIU, some physicians under investigation have asked their patients to rescind their consent to release their medical records to HQIU investigators. Although the frequency of this is not tracked, HQIU staff suspect this has happened on numerous occasions. Without quick access to medical records, a Board investigation can be delayed, likely increasing enforcement timeframes, and possibly increasing costs if the legal action is required to pursue enforcement of a subpoena.

Pursuant to Business and Professions Code (BPC) section 2220.7, a physician is prohibited from including in a civil settlement agreement with a patient or other party any provision that prohibits anyone from:

- Contacting or cooperating with the board.
- Filing a complaint with the board.
- Withdrawing a complaint previously filed with the board.

Further, Penal Code section 136.1 states that it is a crime for anyone to knowingly and maliciously prevent or dissuade (or attempt to) any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

While the above code sections may address other behavior that impedes a government investigation or prosecution, current law does not state that it is unprofessional conduct for a licensee or their representative to ask an individual to rescind a release for medical records or otherwise not cooperate with a Board investigation and prosecution.

The solution would be to add the following language to BPC section 2234 to specify that this conduct constitutes unprofessional conduct:

- Any action of the licensee, or another person acting on behalf of the licensee, intended to cause their patient or their patient's authorized representative to rescind consent to release the patient's medical records to the board or the Department of Consumer Affairs, Health Quality Investigation Unit.

Recommendation: Approve policy proposal and support MBC amendments.

Proposal #8: Add Deadline to Participate in an Investigatory Interview

Background.
Another example of delays in investigations that are beyond the Board's control is when licensees under investigation are requested to participate in an interview with the Board and they engage in a series of delays. This is a problem for both OMBC and MBC. To solve this problem, the MBC has proposed the following solution in their sunset report.

Discussion.
Under current law BPC section 2234 (g), licensees of the Board are required to attend and participate in an interview requested by the Board when that licensee is under investigation. Failure to participate "in the absence of good cause" is considered unprofessional conduct and could result in discipline of their license. Unfortunately, allowing interviews to be postponed for "good cause" is subject to abuse, which leads, in some instances, to unacceptably long delays in a Board investigation.

The solution would be to amend BPC section 2234 (g) to require a licensee to participate in an interview no later than 30 calendar days after being notified by the Board.

Recommendation: Approve the policy proposal and support MBC's proposed amendment

Proposal #9: Require Earlier Exchange of Expert Testimony Information

Background.
Once an accusation has been served and is in effect on the respondent, negotiations between legal counsel begins in an attempt to come to agreement on terms of the final order. For cases that are proceeding to trial in which there are dueling experts witnesses scheduled, the need to exchange expert evaluations that will be introduced into evidence is critical for both sides of the case. The current law does not leave enough time for this exchange and the MBC is proposing to extend the time from trial for this exchange from 30 days to 90 days in the interest of justice and effective litigation. The MBC proposed this extension of time for exchange of expert testimony information in their sunset report with the following explanation.

Discussion.
The use of expert testimony is foundational in disciplinary proceedings. Experts retained by the Board and licensees under investigation may conflict with one another, which may lead to a hearing before an administrative law judge. BPC section 2334 requires the Board and counsel for the licensee to exchange expert opinions, and related information, no later than 30 calendar days prior to the originally scheduled hearing date. The Board feels that 90 days is a more reasonable time frame for each side to review expert testimony.

In the interest of justice, the solution is to amend BPC section 2334 to require the exchange of this information no later than 90 calendar days prior to the original hearing date. This change is expected to support the timely resolution of cases by requiring an earlier exchange of expert opinions which can result in productive settlement negotiations or provide grounds for an accusation being withdrawn. An earlier exchange of expert reports is also expected to reduce the number of delayed hearings.

Recommendation: Approve policy proposal and support MBC's amendments.

Proposal #10: Timely Access to Pharmacy Records

Background.
Cases that involve the need for pharmacy records are another obstacle for investigations that can cause delays in obtaining the records. Often these pharmacy records are pivotal and may dictate next steps for the investigation. Having defined time frames to respond to record requests instead of "reasonable time" prevents unnecessary delays and creates provides the board with authority to enforce the request. This is a problem shared by both OMBC and MBC. MBC has proposed a solution in their sunset report and the following explanation.

Discussion.
For certain investigations, the Board may require records in the possession of a pharmacy. Unfortunately, the Board may face delays obtaining those records, as it generally must allow a pharmacy to provide the requested records "within a reasonable time" BPC section 4332. This timeframe is unclear; therefore, Board may be required to wait an unacceptably long period of time, leading to avoidable delays in an investigation.

The Board of Pharmacy, by contrast, may require pharmacies provide requested records within as little as three business days See BPC section 4105 .

This indefinite delay would be solved with language that specifies the exact time frame for providing the records to the Board. Add a section to the Medical Practice Act to require pharmacies comply with Board requests for records in the same timeframe as requests from the Board of Pharmacy.

Recommendation: Approve policy proposal and support MBC's proposed amendments.

Proposal #11: Require Patient Records be Retained a Minimum of Seven Years

Background.
The time frame for requiring licensees to retain medical records needs to align with the current statute of limitations time frames; otherwise, critical records for cases with a seven year time frame for record retention may not be available. Most cases have a statute of limitations (SOL) of three years, but for cases involving sexual misconduct the statute of limitations can be up to seven years. This is a problem for both OMBC and MBC. MBC has proposed extending the record retention time frame to seven years in their sunset report with the following explanation.

Discussion.
Current law BPC section 2266 requires a Physician and Surgeon to maintain adequate and accurate records relating to the provision of services to their patients. In essence, this requires a Physician and Surgeon to maintain records for a length of time that corresponds to the standard of care (which may vary depending upon the services rendered), rather than for a specific time.

As discussed above, the SOL generally requires the Board to file an accusation against a licensee within three years after the Board becomes aware of the alleged act or omission or seven years of when the alleged act or omission occurred, whichever is sooner.

Aligning the minimum time frame to maintain records to the general SOL will help ensure records are available, if necessary, to support an investigation.

To ensure critical medical records in sexual abuse cases are available, the solution is to amend BPC section 2266 to require adequate and accurate records be maintained for at least seven years after the last date of service to a patient.

Recommendation: Approve the policy proposals and support MBC's proposed amendment.