MEDICAL BOARD OF CALIFORNIA
Executive Office

Embassy Suites LAX South
1440 Imperial Highway
El Segundo, CA 90245

January 29-30, 2009

MINUTES

In order to remain consistent with the record, the agenda items presented in these minutes are listed in the order discussed at the January 29-30, 2009 meeting.

Agenda Item 1 Call to Order/ Roll Call

Dr. Fantozzi called the meeting of the Medical Board of California (Board) to order on January 29, 2009 at 4:37 p.m. A quorum was present and notice had been sent to interested parties.

Members Present:

Richard Fantozzi, M.D., President
Jorge Carreon, M.D.
Hedy Chang
John Chin, M.D.
Shelton Duruisseau, Ph.D.
Gary Gitnick, M.D.
Reginald Low, M.D.
Mary Lynn Moran, M.D.
Janet Salomonson, M.D.
Gerrie Schipske, R.N.P., J.D.
Barbara Yaroslavsky
Frank V. Zerunyan, J.D.

Staff Present:

Fayne Boyd, Licensing Manager
Candis Cohen, Public Information Officer
Janie Cordray, Research Specialist

Randy Freitas, Business Services Office
Abbie French, Telemedicine and Special Projects Manager
Kurt Heppler, Department of Consumer Affairs Staff Counsel
Kimberly Kirchmeyer, Deputy Director
Ross Locke, Business Services Office
Armando Melendez, Business Services Office
Kelly Nelson, Legislative Analyst
Cindi Oseto, Licensing Analyst
Pat Park, Licensing Analyst
Debbie Pellegrini, Chief of Licensing
Paulette Romero, Associate Analyst
Teresa Schaeffer, Program Analyst
Kevin Schunke, Regulation Coordinator
Anita Scuri, Department of Consumer Affairs Supervising Legal Counsel
Kathryn Taylor, Licensing Manager
Renee Threadgill, Chief of Enforcement
Linda Whitney, Chief of Legislation

Members of the Audience:

Steve Adler, Supervising Deputy Attorney General
Yvonne Choong, California Medical Association
Zennie Coughlin, Kaiser Permanente
Julie D'Angelo Fellmeth, Center for Public Interest Law
Dr. Furmanski
Tara Leigh Kittle, Blue Diamond Foundation
Francesca Lucero, Blue Diamond Foundation
Brett Michelin, CMA
Carlos Ramirez, Senior Assistant Attorney General
Spencer Walker
Pam Wortman

Agenda Item 2 Introduction and Swearing In New Board Member

Dr. Fantozzi introduced and swore in Dr. Jorge Carreon as a new member of the Board.

Agenda Item 3 Update on Federation of State Medical Boards (FSMB)

Ms. Chang introduced Dr. Barbara Schneidman, Interim President and Chief Executive Officer of the Federation of State Medical Boards (FSMB), and Dr. Regina Benjamin, Chair of the Board of the Federation of State Medical Boards. Dr. Schneidman and Dr. Benjamin provided an update on the Federation's mission, composition, function, and goals.

The meeting was adjourned at 5:42 p.m.

Agenda Item 4 Call to Order/ Roll Call

Dr. Fantozzi called the meeting of the Medical Board of California (Board) to order on January 30, 2009 at 9:05 a.m. A quorum was present and notice had been sent to interested parties.

Members Present:

Richard Fantozzi, M.D., President
Jorge Carreon, M.D.
Hedy Chang
John Chin, M.D.
Shelton Duruisseau, Ph.D.
Gary Gitnick, M.D.
Reginald Low, M.D.
Mary Lynn Moran, M.D.
Janet Salomonson, M.D.
Gerrie Schipske, R.N.P., J.D.
Barbara Yaroslavsky
Frank V. Zerunyan, J.D.

Staff Present:

Fayne Boyd, Licensing Manager
Candis Cohen, Public Information Officer
Janie Cordray, Research Specialist
Randy Freitas, Business Services Office
Abbie French, Telemedicine and Special Projects Manager
Kurt Heppler, Department of Consumer Affairs Staff Counsel
Howard Kaminsky, M.D., Medical Consultant
Kimberly Kirchmeyer, Deputy Director
Ross Locke, Business Services Office
Armando Melendez, Business Services Office
Kelly Nelson, Legislative Analyst
Cindi Oseto, Licensing Analyst
Pat Park, Licensing Analyst
Debbie Pellegrini, Chief of Licensing
Paulette Romero, Associate Analyst
Kevin Schunke, Regulation Coordinator
Anita Scuri, Department of Consumer Affairs Supervising Legal Counsel
Teresa Schaeffer, Program Analyst
Kathryn Taylor, Licensing Manager
Renee Threadgill, Chief of Enforcement
Linda Whitney, Chief of Legislation

Members of the Audience:

Steve Adler, Supervising Attorney General
Yvonne Choong, California Medical Association

Zennie Coughlin, Kaiser Permanente
Julie D'Angelo Fellmeth, Center for Public Interest Law
Amy Edelen, DCA Legislative & Policy Review
Joseph P. Furman, Furman Healthcare Law
Dr. S. Furmanski
Faith Gibson, L.M., Midwifery Advisory Council
Tara Leigh Kittle, Blue Diamond Foundation
Francesca Lucero, Blue Diamond Foundation
Russell Iungerich, California Academy of Attorneys for Health Care Professionals
Brett Michelin, CMA
William Norcross, UCSD Physician Assessment & Clinical Education Program (PACE)
Carlos Ramirez, Senior Assistant Attorney General
Spencer Walker

Agenda Item 5 Approval of Minutes from the November 6-7, 2008 Meeting

Ms. Yaroslavsky made a motion to approve the minutes from the November 6-7, 2008 meeting. Dr. Low asked that the minutes accurately reflect the dates he was present at the November 6-7, 2008 meeting. The motion to approve the minutes as corrected was seconded and carried.

Agenda Item 6 Public Comment on Items Not on the Agenda

Russell Iungerich, California Academy of Attorneys for Health Care Professionals (CAAHCP), brought several issues before the Board reflecting defense counsel concerns he would like the Board to address. He expressed his opinion that, given current budgetary constraints, the Board should make the investigation of doctors caught possessing less than one ounce of marijuana or shoplifting a low priority. Mr. Iungerich concluded by questioning the value of filing cases against attending and resident physicians for things that happen in residency programs, since these individuals seldom receive the support of the hospital in defending against the Board's charges.

Tara Leigh Kittle, Blue Diamond Foundation, asked the Board to consider altering standards of care, or what is considered a medical error, to accommodate the needs of health care consumers. Ms. Kittle encouraged the Board to develop a plan to guide lawmakers toward change, such as limiting the number of hours residents can work in a day, putting a cap on medical malpractice insurance rates, and eliminating health insurance companies' ability to deny patient's access to care. She relayed her own experience with the health care industry and her difficulty in receiving treatment and concluded by expressing her desire for patients to be able to have more of a voice in directing their own care.

Dr. S. Furmanski, representing himself as a taxpayer, spoke about the Board's Contingency Fund, which is limited by statute to two months of reserve. The State Auditor's report showed the Board was overfunded and out of conformity. He stated the Board was required to refund the

excess funds under two statutes and to report the amount in the reserve on a monthly basis. He asked the Board to respond to and grant his petition and begin the refund process. Dr. Furmanski also referred to his administrative petitions to appoint a person to expedite the process of issuing refunds, as well as a voluntary receiver to distribute the refunds.

Agenda Item 7 President's Report

Dr. Fantozzi reported on December 3, 2008, he and Barb Johnston met with Secretary Rosario Marin, State Consumer Services Agency, and Carrie Lopez, Director of the Department of Consumer Affairs, to discuss Board matters. On December 8, 2008, the Executive Committee met and finalized the Executive Officer evaluation from the November 6-7, 2008 meeting. Barb Johnston, Linda Whitney, and Dr. Fantozzi met with Bill Gage from the Senate Business and Professions Committee to discuss Board related issues for the upcoming year. A subsequent meeting with the Board's executive staff and the president and CEO of the California Medical Association (CMA) to discuss Board matters was very positive with consensus and agreement found on several issues.

Agenda Item 8 Executive Director's Report

Ms. Kimberly Kirchmeyer, Deputy Director, delivered the Executive Director's report in the absence of Barb Johnston.

A. Budget Overview and Staffing Update

Ms. Kirchmeyer directed the members to tab 8 of their packets, indicating the Board's budget and spending were exactly where staff projected they would be at this time. No problems are anticipated.

Ms. Kirchmeyer was pleased to announce the Enforcement IT System Feasibility Study Report was recently approved by the Office of the Chief Information Officer. She indicated the Budget Change Proposal (BCP) funding this program was considered premature at this time by the State and Consumer Services Agency. Nevertheless, staff will continue to go forward with existing resources to obtain a position to work on this project in the next fiscal year, and will submit a BCP in Fiscal Year (FY) 10/11 to fund the project.

Two BCPs are currently in the budget process. The Probation Monitoring Program BCP includes a request for five positions. The Board has been asked to absorb the funding for these positions using existing resources. The Operation Safe Medicine BCP requests six positions for a temporary program for the next two years. The Board has been asked to absorb the funding for this program as well. Staff will be gathering data to justify these positions and will submit a new BCP for FY 11/12.

The Board's vacancy rate remains at 7%, with continuous efforts to fill open positions. Beginning February 6, 2009, under the Governor's Executive Order, state offices, including the

Medical Board's office, are required to close on the first and third Friday of each month. This will result in a 10% reduction in pay of staff and will also affect the time frames for licensing and enforcement.

B. Update on Board Mandated Reports

Ms. Kirchmeyer announced that all mandated reports are completed, with the exception of the Vertical Enforcement (VE) Study. The Public Disclosure and Malpractice Study Reports will be reported on later in the meeting. Ms. Threadgill will speak on the VE Study later in the meeting.

Ms. Kirchmeyer reported Dr. Fantozzi and Barb Johnston met with CMA to discuss working together this year on the Board's Wellness activities. In January 2009, Ms. Johnston, Ms. Threadgill, and Ms. Kirchmeyer visited Dr. Norcross and his staff at the Physician Assessment and Clinical Education (PACE) program offices in San Diego to receive an update on the program and tour the facility. Ms. Johnston and Ms. Kirchmeyer also attended a DCA meeting on January 8, 2009 regarding SB 1441 to discuss the Board's participation in developing standards and guidelines for boards and bureaus regarding substance abusing licensees. Ms. Johnston has been meeting monthly with Director Lopez at her request to provide updates on Board issues. Ms. Johnston also attended a lunch meeting on January 12, 2009 with Frank Zerunyan, Director Lopez, and Agency Secretary Marin.

On November 12, 2008, Ms. Johnston and Ms. Kirchmeyer attended the California Health Care Foundation sponsored meeting on e-prescribing at the invitation of Secretary Belshe' of the California Department of Health and Human Services Agency. After the meeting, the Foundation visited the Board's offices in Sacramento to meet with executive staff and the Executive Officer of the Pharmacy Board. The Foundation has requested the Medical Board and Pharmacy Board work together with them and other stakeholders to develop educational programs for physicians and pharmacists regarding e-prescribing. Ms. Kirchmeyer asked for the Board's approval to move forward with these programs. Ms. Chang made a motion for staff to work with the Pharmacy Board on e-prescribing issues; Ms. Yaroslavsky seconded and the motion carried.

Agenda Item 9 Presentation on Physician Assessment and Clinical Education (PACE)

Dr. William Norcross delivered a presentation on PACE's history, mission, and physician assessment and monitoring guidelines. The PACE program assesses the competence of physicians, determines if they are safe to practice, and provides remediation of deficiencies, with the ultimate goal of protecting the public. PACE has assessed over 800 physicians and provided educational services to over 2000 physicians, with 75% of their business generated from actions taken by the Board. PACE is part of the University of California, San Diego School of Medicine and operates independently of the Board, with all fees being paid directly to PACE by participants.

A question and answer session followed with a question posed by Dr. Furmanski about the PACE program using written competency tests; he stated the Business and Professions Code required competency tests to be administered orally and asked for clarification on this matter.

Agenda Item 16 Consideration of Refund or Credit of Licensing Fees Paid in FY 08/09

Ms. Linda Whitney, Chief of Legislation, and Mr. Kevin Schunke, Regulation Coordinator, along with Pam Wortman, Fiscal Officer for the Department of Consumer Affairs, reported on the refund or credit of licensing fees. Mr. Schunke stated current law states the Board must reduce license and renewal fee, if the diversion program is eliminated. During 2008, the Board voted to adopt regulations to implement this reduction in fees due to the elimination of Diversion. The effective date is proposed to be July 1, 2009. This rulemaking was submitted to the Department of Consumer Affairs in November 2008 for review and approval; if approved, the fees will be reduced by $22 per licensee.

During the public comment period for these regulations, the CMA submitted comments, contending the Board did not move quickly enough to reduce the licensing and renewal fees in a timeframe to match the elimination date of the Diversion Program. CMA's position is that the elimination of the Diversion Program took effect on July 1, 2008 and any money collected thereafter violates the law and equals an unfair revenue gain for the Board. The law requiring the reduction in fees did not include any timeframe during which the fees must be reduced. The law, therefore, must have contemplated the need for a formal rulemaking process which traditionally takes many months. This is particularly true in light of the fact the Board could not have known whether the Diversion Program would actually sunset or another program be created in its place to be funded in whole or part by the Board's fees. Lastly, the statute did not provide for a penalty for failure to promptly reduce the fees. At the November 2008 Board meeting, the Board voted to adopt the proposed regulations and move forward with the fee reduction effective July 1, 2009. However, at that same meeting, staff was directed by the Board to prepare a comprehensive evaluation and look into the feasibility of issuing a credit or refund to those 57,500 physicians who paid a license fee in FY 08/09.

In response to the argument the Board should have acted sooner, the Board could seek to refund or credit $22 to each of these 57,500 physicians. The refunded credit would total approximately $1.27 million dollars; this would cover those persons whose fees were paid after the date the Diversion Program was eliminated and before the effective date of the proposed regulations. DCA has worked closely with the Board and with the State Controller's Office to identify the most cost efficient and least labor intensive credit process.

Mr. Schunke referred members to the staff memo which described various options. He directed members to Option #5 of the memo which would conceptually issue refunds by actually lowering the license renewal fees in FY 10/11. Internal computer programming changes to renewal notices can be made by staff and changes to the on-line renewal process can be made by DCA staff. These modifications to the computer codes would ensure the renewal fees paid in FY 10/11 are reduced by $22 for those impacted licensees and the renewal notices would be printed

with the amount due. This is the only option which ensures the licensee only pay that which is due and which relieves the Board, DCA, and the State Controller's Office from having to issue refund checks. This option, however, would not be completed until the summer of 2011 when those impacted licensees actually pay their renewal fees. However, since the credit is an entirely internal process, staff believes it would cause less confusion and generate relatively few questions and phone calls from licensees, thus, requiring limited additional staff resources. This is also the only option with negligible implementation costs.

Dr. Fantozzi asked for clarification as to whether the $22 was a credit or a refund. Ms. Scuri stated the $22 is considered a credit. Ms. Yaroslavsky made a motion to approve the staff recommendation as outlined under Option #5 in the staff report; Dr. Salomonson seconded the motion.

Dr. Low stated the only minor glitch with this option would be those who do not renew would not receive the credit. Mr. Schunke directed members to page 4 of the staff memo which addresses this issue; it is believed the limited number of licensees who fall into this category could be identified by running reports and those identified then would be issued a check, with the number being small enough to handle manually.

The motion to approve the staff recommendation as outlined under Option #5 carried.

Agenda Item 10 Ethical Decision Making for Regulators

This agenda item was postponed to the May 2009 meeting.

Agenda Item 11 Board Member Disclosure of Communications Discussion

Dr. Fantozzi referred members to page 74 of their packets regarding interested party communications with individual Board Members. A motion was made to adopt the staff's recommendation of Option #3 which was for members to disclose at Board meetings all discussions and communications with interested parties regarding any item pending before the Board. This information would then be included in the meeting minutes. Ms. Yaroslavsky seconded the motion.

Dr. Fantozzi reviewed the discussion from the November 2008 Board meeting on this issue. Ms. Yaroslavsky asked for clarification on the type of communications which would need to be disclosed, as well as a definition of what was included under the heading of "advocacy groups". Dr. Fantozzi provided clarification on these issues. He stated an agenda item would be added to future Board meetings with members queried and asked to disclose any relevant communications. Ms. Schipske indicated there is a state report that discusses ex parte communication for state agencies and boards, including clear scenarios of the types of communications that would be disclosed. Ms. Scuri has researched how other agencies handle this issue and shared examples.

Ms. Schipske asked staff to provide a copy of the aforementioned report to Board members. Dr. Fantozzi suggested that staff make a presentation to the Board so these disclosure issues are fully understood.

The motion to adopt Interested Party Communications Option #3 carried.

Agenda Item 12 PACT Agreement

Dr. Fantozzi stated the Professionals Achieving Consumer Trust (PACT) Agreement was presented at the November 2008 DCA Summit. At the November 2008 Board meeting, which preceded the PACT Summit, the Board had voiced concerns with the document and voted to give the Board President authority to sign the PACT Agreement if these concerns were addressed. Ms. Chang made a motion to endorse the current form of the agreement and authorize the Board President to sign the PACT Agreement; the motion was seconded.

Discussion among members followed on the intent, scope, and potential interpretation of the Agreement. Mr. Spencer Walker, DCA Senior Advisor to the Director, clarified this was a ceremonial document with no legal effect whatsoever. He stated the Board was the only board that had not signed the document and encouraged the Board to join with the other DCA boards and sign.

Public comment was made by Tara Leigh Kittle, who opposed the Board signing the agreement. A vote was taken to endorse and approve the signing of the PACT Agreement and the motion carried (7-4).

Agenda Item 13 Discussion of Report on Malpractice Insurance for Physicians Offering Voluntary Unpaid Services

Abbie French, Telemedicine and Special Projects Manager, discussed the report on Malpractice Insurance for Physicians Offering Voluntary Unpaid Services. Ms. French directed members to page 78 of their packets. As required by AB 2342, the Board was directed to study the issue of providing medical malpractice insurance for physicians who provide voluntary unpaid services to the medically underserved and to report the findings to Legislature. The study was to include the cost and process of administering such a program, options for providing medical malpractice insurance, how the coverage could be funded, and whether the voluntary licensure surcharge fee is sufficient to provide the provision of medical malpractice insurance for the physicians. The report did not thoroughly address the use of the voluntary licensure surcharge fee since this fee is mandated to be used solely for the Loan Repayment Program. Legislation would be required to allow a portion of the fee to be used for the malpractice insurance funding.

UC Davis performed the study which was received on December 31, 2008. As identified in the handout, there were three models for liability protection. They are:

1. Enactment of immunity statutes in which the provider is not liable for common negligence, but only for gross negligence or willful misconduct.

2. Enactment of immunity statutes in which, under circumstances proscribed by the state, a physician volunteer would be considered a state employee when providing uncompensated care.

3. A State-established malpractice insurance program in which the state either purchases insurance for the physician volunteers or establishes a self-insured pool.

In addition to the liability protection models, the study found that *if* California desires to promote physician volunteerism, then legislation must determine the settings where liability protection would apply (free clinics, non-profits, hospitals, private physician offices, etc.), as well as whether there would be any limitation to the type of care that may be rendered (surgical, anesthesia, minor procedures, primary care, etc.). The legislation must also identify what patients would be covered under the program and must establish a clinic and physician registration process.

Ms. French indicated there were additional findings included in their packets and the full report could be found on the Board's website under the publications area. As required by law, the report was submitted to the Legislature and any implementation of a program would require legislation. At this point, staff recommends the Board wait to see what the legislative interest is in this subject.

The report was also sent to the Health Professions Education Foundation (HPEF), but there has not yet been an opportunity to discuss the report with HPEF. The Access to Care Committee heard and discussed the report on Thursday, January 29, 2009 and determined the Board should convene a meeting with all interested parties to discuss the study and determine the best implementation of this report. This information could then be provided to any legislative member who wishes to propose legislation based on this study. Staff requested a member be appointed to assist Ms. French with this project.

Ms. Schipske made a motion to approve the committee's recommendation that the Board serve as a convener of stakeholders to make a joint recommendation to the legislature regarding AB 2342; the motion was seconded. During public comment, Tara Leigh Kittle voiced her support for this motion. The motion carried.

Dr. Fantozzi asked members who are interested in assisting in this project to speak with him or Ms. French.

Agenda Item 14 California Research Bureau Report on Public Disclosure

Ms. Kirchmeyer directed members to page 80 of their packets. B&P Code Section 2026 required a study be performed on the role of public disclosure in the public protection mandate of the

Board. The California Research Bureau completed this study and has presented its report tothe Legislature. The four main observations include:

1. National data suggests the volume of quality of care complaints received by the Board are significantly lower than the number of serious injuries people receive in hospitals due to negligence.

2. Consumers would benefit from expanded public disclosure and internet displays.

3. Other state's medical boards provide more accessible information about physicians on their website.
4. The Board has not emphasized research strategies to support enforcement strategies.

The report also listed several policy options included in Ms. Kirchmeyer's memo. Options 1, 2, 4, 5, 7 and 10 would require legislation. Options 3, 6, and 9 the Board is currently working to implement. This includes the development of a physician profile on the Board's website which will include specialized information and should be available on March 1, 2009.

Option 8 would direct the Board to provide on its website links to evidence-based physician level performance information provided specifically by organizations such as the California Physician Performance Initiative. Creating a link to another website might not require legislation, depending on the data available at the linked website. The Education Committee could review this option once the new profiles are on-line.

Julie D'Angelo Fellmeth, Center for Public Interest Law, expressed her support for the report in that it reinforces the importance of the public disclosure function that the Board carries out to its public protection mandate. She highlighted policy Options 2, 3, 6 and 7 on page 85 of the packet. She stated there was a great deal of variation in the information provided by the Board depending on how a person asks for it (e.g., going to the internet, filing a written request, placing a call, or filing a public records act request) without reason; disclosure should be standardized across the board. The Board should be complying with Option 3 as this is current law, and, as Ms. Kirchmeyer indicated, this is under way. Option 6, which would require physicians to notify patients about the existence of the Board, is being addressed by the Education Committee. Option 7, which calls for expanding the kind of information provided on the internet under physician profiles to include biographical data such as age, gender, and training, has been identified as being potentially controversial in the staff report. Nevertheless, Ms. Fellmeth pointed out the Board just heard from Dr. Norcross in his report on the PACE program that age and gender may be predictive factors of future disciplinary problems. Additionally, there are many consumers who would like to know the age and gender of physicians they may choose.

Dr. Salomonson expressed her discomfort with the inclusion of information on age or gender in the physician profile.

Agenda Item 15 Legislation

A. Status of Regulatory Action

Ms. Linda Whitney, Chief of Legislation, directed the Board Members to page 86 of their packets to view the status of pending regulations. Ms. Whitney indicated the Continuing Medical Education regulations are complete and being implemented by the Board. The fee reduction to offset elimination of Diversion Program regulations has gone to the Department and needs to be forwarded to the Office of Administrative Law for adoption by March 29, 2009.

Ms. Yaroslavsky asked Spencer Walker, DCA, to provide information as to when the regulation could be expected to move forward. Mr. Walker stated he would look into it.

B. Legislation and Proposals

Ms. Whitney directed Board Members to the legislative packet that was mailed to Board Members. The packet includes a Tentative Legislative Calendar with critical dates for the Board.

Ms. Whitney referred Members to the 2009 Board Legislative Proposals in their packets.

1. Wellness Committee codified in statute. This proposal was placed in AB 2443 which was vetoed. The Board elected to pursue this codification again due to the importance of the issue.

   Dr. Duruisseau reported on the Wellness Committee's discussion of this bill. In preparing suggested language for the legislative findings regarding this bill, the Committee was asked to consider a suggestion by the CMA to make the program on Wellness permissive, rather than mandatory. The recommendation, which Committee members felt would help gain support from the administration, was approved. Dr. Duruisseau asked the Board to approve an amendment to the proposal to change the wording from "shall establish" to "may establish a program to promote physician wellness" and to move forward pursuing Physician Wellness legislation. Ms. Yaroslavsky made a motion to approve the wording and pursue Physician Wellness legislation; the motion was seconded, and carried.

2. Set a "cap" or "ceiling" on the initial / renewal fee, allowing the Board to set the fee in regulation, and allow the Board to have two to six months funding in its reserve. Although this bill failed last year, Ms. Whitney has had discussions with Assembly Member Yamata who has agreed to carry the legislation with the reserve funding set at four months. Ms. Yaroslavsky made a motion to allow the Board to have up to four months of funding in reserve; the motion was seconded and carried.

3. Develop an Initial Limited License. This would allow applicants who cannot practice medicine in a full and unrestricted manner to voluntarily limit their license at time of

application. Dr. Emmerson, Vice Chair of the Assembly Business and Professions Committee has agreed to carry this bill.

4. Use of "M.D." by residents. This would allow those who have graduated from medical school and are in residence training to use the initials M.D. The Board is working with the UC system and various medical associations to finalize the language. Dr. Emmerson has agreed to include this proposal in his limited license bill if agreement can be found on the language.

5. Sunset Review – Extension of the Board. The Board has been told by the Senate Business and Professions Committee it would only like to extend the sunset dates for one year to allow time to re-examine the entire sunset review process. In doing so, numerous enhancements cannot be placed in the sunset legislation. As such, Ms. Whitney has sought other authors to carry the following enforcement enhancements, possibly as a separate bill:

    a. Certified Medical Records. This proposal would require that when records are requested by the Complaint Unit, those records must be certified records. Staff is looking at the workload this would cause physicians, hospitals, and their offices, and if a simplified form could be developed. Once this information is gathered, the Board will be able to move ahead with the proposal.

    b. Vertical Enforcement (VE)/ Prosecution - Sunset of Pilot. This proposal may or may not be included in the Sunset Review legislation, depending on whether the VE report suggests the VE program should be extended, terminated, enhanced, or amended. The report will be done in July 2009 and this information will be placed into a bill.

    c. Require reporting, at time of renewal, of any criminal, civil or disciplinary action. This has already been implemented to some degree on the renewal form for physicians and other health care licensees, but the Board felt it should be codified and is requiring this information be provided under penalty of perjury.

    d. Require all physicians who have an active license and have not submitted fingerprints to the Board to do so by January 1, 2012. The staff is in the process of determining the number of licensees impacted and then will bring the regulatory language to the full Board at the May 2009 meeting in order to set this for hearing in July 2009. Hence, this is no longer a legislative proposal.

    e. Business and Professions 801.1 Reporting Revisions. The Board continues to work on language for revisions to this section of law.

f. Obtain Medical Records Without Subpoena. The Board would like to expedite obtaining medical records from physicians without patient authorization; there is a concern the Board might overstep its authority and obtain records that it should not receive. The language being developed must be reviewed to ensure the Board has provided public protection and to satisfy the legislature that the Board cannot overstep its authority.

g. Cap the Amount the Board can Assess for Licensee's Failure to Provide Medical Records. While there is a cap on the amount the Board can assess hospitals for failure to provide requested medical records within 15 days, no such cap exists for the amount that may be assessed a licensee for the same violation. This proposal would place a cap on the amount that could be assessed licensees.

With regard to Sunset Review, Ms. Yaroslavsky asked staff to provide an informational report on the impact the reduction in the size of the Board has had in its effectiveness in doing its work. Ms. Whitney believed this issue would be addressed in the sunset review questions about the functions of the Board, but staff could also report how the Board transitioned to the reduction and how that is progressing with the establishment of panels and committee assignments.

6. Omnibus (usually carried by the Senate Business and Professions Committee). These are technical "clean up" provisions. There will be two bills this year: the first duplicating last year's bill that was vetoed, and the second which will encompass newly identified issues requiring clean up.

Ms. Whitney directed members to the last page of the Legislative packet where she spoke about the proposal for Licensing/Accreditation of Outpatient Surgery Settings that may come from the Administration. The Board may wish to co-sponsor.

Ms. Yaroslavsky voiced her concern that the law prohibits the Board President from serving on a panel, even when there is not a full complement of Board Members, such as the current situation. Currently, at least one Board Member is forced to serve on both Board panels. She felt this was not an effective use of members' time, especially when the Board is not at its full membership of 15. Ms. Yaroslavsky proposed a legislative change to section 2008 of the Business and Professions Code to allow the Board President to serve on a panel when there is not a full complement of members and made a motion. Dr. Salomonson seconded the motion. As Board President, Dr. Fantozzi highlighted the significant time demands required of the President's position. A vote was taken and the motion carried.

Ms. Whitney reported there are currently only two pieces of legislation that have been introduced that directly impact the Board. More related legislation may be introduced at the end of February. Ms. Whitney referred to SB 58 (Aanestad) that is a placeholder for peer review; this legislation emerged from the Lumetra report on peer review which was presented to the Legislature. A meeting has been scheduled and there is a hearing on March 9, 2009 at the Senate

Business and Professions Committee, with Dr. Low serving as the Board's representative. The Board should not yet take a position on this legislation, as many changes and amendments are anticipated.

Ms. Whitney referred Members to the handout with information on AB 120 (Hayashi) which deals with disclosure of information by health care providers and makes it unprofessional conduct if a physician fails to disclose specified information that has been added to the Health and Safety Code. Since a full analysis of this bill has not yet been completed by staff, the Board should not take a position.

Ms. Whitney concluded by requesting authority to schedule an Executive Committee meeting for mid to late March, allowing the Board to take positions on bills for policy hearings that will take place in late March and early April. Dr. Fantozzi directed staff to schedule the requested Executive Committee meeting.

Agenda Item 17 Standard of Care Training

Mr. Steve Adler, Supervising Deputy Attorney General for the Health Quality Enforcement Section of the Office of the Attorney General in San Diego, delivered a lunchtime training presentation on the Standard of Care. Mr. Adler provided definitions of the standard of care for health care professionals and medical specialists and stressed that all standard of care conclusions or determinations can only be based on expert testimony.

In evaluating expert witnesses, Mr. Adler shared it was not unusual for respondents' experts to be professional forensic expert witnesses with impressive credentials and skill in providing testimony. The experts the Attorney General's Office uses are typically not professional witnesses, but, rather, are often practitioners who are doing a public service. Board Members do not have to accept an expert's opinion. As with any other witness, it is up to the Member to decide whether he or she believes the expert's testimony and chooses to use it as a basis for their decision. In deciding whether to believe an expert's testimony, some of the factors that should be considered are: the expert's training and experiences; the facts the expert relied on; and the reasons for the expert's opinion.

In instances of conflicting expert testimony, Mr. Adler directed Members to weigh each opinion against the others, examining the reasons given for each opinion and the facts or other matters that each witness relied on. The expert's qualifications may also be compared.

Dr. Fantozzi stated the standard of care is community driven, with the standards varying across countries and cultures. Nevertheless, the standard would, for the most part, be the same throughout the state of California. While there is a difference between the *levels* of care offered at different facilities, the standard of care in terms of the knowledge, skill, and care provided by the health care professional or medical specialist would be the same.

Mr. Adler concluded by speaking on the test for clear and convincing evidence, namely that the party must persuade the member that it is *highly probable* that the fact is true.

Dr. Fantozzi asked Mr. Adler what percentage of cases go to trial versus a stipulated agreement. Mr. Adler indicated 20% go to trial.

Dr. Fantozzi requested staff to schedule a presentation by the Attorney General's Office on the general expectations and guidance of the law with respect to the expectations of the Board.

Agenda Item 18 Enforcement Chief's Report

A. Approval of Orders Restoring License Following Satisfactory Completion of Probation, Orders Issuing Public Letters of Reprimand, and Orders for License Surrender During Probation

Ms. Yaroslavsky made a motion to approve the orders; s/Gitnick; motion carried.

B. Enforcement Program Update

Ms. Threadgill reported the vacancy rate for investigators continues to fluctuate between 6% and 9%. Training is a current priority for staff, in order to facilitate improvement in the efficiency in which investigators are working. At the July 2008 Board meeting, Ms. Threadgill reported on recommendations to reduce the timelines. She provided an update on the implementation of those recommendations that had been approved. Executive staff met with Ron Diedrich, Director of the Office of Administrative Hearings, and came to agreement on several recommendations such as setting the cases for hearing within 120 days, mandatory early settlement conferences, and trial setting conferences for most cases. Carlos Ramirez, Senior Assistant Attorney General, Health Quality Enforcement Section, and Ms. Threadgill continue to meet and review ways to improve the accuracy of records and reduce timeframes. The changing of a policy on subpoenas has been implemented, allowing the Attorney General's Office to prepare the subpoenas when requested and to streamline the way in which the declarations are prepared.

Ms. Threadgill's staff is in the process of finalizing the report on the Investigator Pay Equivalency Study, with the final report expected from the vendor in a couple of weeks.

C. Expert Reviewer Survey and Expert Utilization Report Updates

Ms. Threadgill directed members to the handout on the Results of the Expert Survey Questionnaires.

D. Expert Reviewer Guidelines and Instructions

Ms. Threadgill thanked Dr. Salomonson and Ms. Schipske for their input on the Expert Reviewer Guidelines. She referenced the draft of the Guidelines on page 89 in the packets and invited members to add their thoughts and comments before it was finalized.

E. Disciplinary Guidelines

The disciplinary guidelines are still in the process of being updated and are expected to be delivered to the workgroup from the Board staff by the end of February.

Agenda Item 19 Vertical Enforcement Update

Mr. Carlos Ramirez stated one of the recommendations previously announced by Ms. Threadgill at the July 2008 meeting was that the AG's Office complete accusations within 60 days. While the assessment of this new policy has not been finished, it appears that the 60 day limit is being met; he will provide statistics at the May 2009 Board meeting. With regard to the 120 days to hearing recommendation, Mr. Ramirez is unsure if implementation will require additional staff, but, for now, the AG's Office is moving ahead with trying to meet this deadline.

Ms. Yaroslavsky asked how the Governor's Executive Order furloughing state employees would affect the implementation of the recommendations. Mr. Ramirez explained the furlough would affect Board staff, but not the Attorney General's Office staff. With the furloughs, he anticipates there will be delays on the investigation side. Ms. Threadgill indicated it would mean approximately 1600 hours of work time lost by investigators each month. In their meeting with Ron Diedrich, Ms. Kirchmeyer said he stated the Office of Administrative Hearings has an exemption from the furloughs for the months of February and April, though they will be required to furlough employees in March, then May and ongoing. Thus, Board hearings will also be affected during these months.

Dr. Gitnick asked from the time a complaint is filed until it is finally resolved by the court, what percentage of that time is it under the auspices of the AG's office and what percentage of the time is it outside of the AG's office and under the Board. Ms. Threadgill stated, under the statute of Vertical Enforcement (VE), the time is combined and is not measured separately. Dr. Gitnick asked if state budget issues, such as the inability to pay court reporters and medical consultants, had adversely affected timelines. Ms. Threadgill stated that, indeed, both the investigation and prosecution side were negatively impacted. Given these impediments, Dr. Gitnick asked if he should expect to see worsening rather than improving timelines. Ms. Threadgill stated that was correct, though efforts were still being made to move forward, even in light of the impending furloughs.

With or without the challenges, Mr. Zerunyan felt the bottom line was the timelines are not acceptable. He felt the best course of action at this time was to identify where the breakdown

exists. Mr. Zerunyan asked Mr. Ramirez and Ms. Threadgill to prepare a timeline for the next meeting, indicating the number of days for each aspect of a case from the day it first arrives in the Board's offices. He felt this would identify where the bottlenecks are so they may be dealt with, whether through legislation or regulation or staffing. Dr. Gitnick asked that information be provided on how the lack of court reporters and furloughs figure into the timeline; he stated beyond these kinds of factors, the rest is a failure on our part (jointly). Dr. Fantozzi stated the Board already did a thorough examination of timelines in the summer of 2008. He added that some of the enforcement recommendations are being addressed through legislation, as reported by Ms. Whitney.

Ms. Threadgill reminded the members that some of the delays in the past were the result of an insufficient number of investigators, with a former vacancy rate as high as 31%, largely due to investigator pay differentials. Staff has been working hard to recruit and retain investigators in order to improve timelines. Further, Dr. Fantozzi reminded members of due process, where individuals are entitled to representation and where legal proceedings are commonly postponed.

Ms. Threadgill reminded Members that a report on the effectiveness of Vertical Enforcement is due to the Legislature on July 1, 2009. This report is to be done by an outside vendor to assure objectivity. Ms. Threadgill suggested the VE Report, which should be in draft form by May 2009, would provide the Board with enough information to determine what the real issues are with the timelines. Ms. Kirchmeyer suggested it may be more useful for the Board to await the VE report which will provide a more comprehensive picture of the individual phases, identify which group or individual is responsible for each phase, and determine how long it takes from the time an investigation begins until the closure of the case. Dr. Gitnick agreed to wait for the VE report rather than asking staff to prepare an additional report. Dr. Fantozzi asked Mr. Spencer Walker, DCA, to expedite the authorization of the contract so the Board may continue to move forward. Ms. Yaroslavsky echoed the need for an objective report by an outside entity, rather than creating or updating a report on timelines internally

Julie D'Angelo Fellmeth, Center for Public Interest Law, indicated, in 1990, Senate Bill 2375 enacted Business and Professions Code Section 2319 which said the Board shall set as a goal the improvement of its disciplinary system by January 1, 1992, so that an average of no more than 6 months will elapse between receipt of the complaint to completion of the investigation. Hence, the reduction of enforcement timelines has been a goal for the Board for quite some time. She also expressed her support of the Board securing an unbiased outside vendor to conduct data gathering and a review of the delay that occurs at each step of the enforcement process, as well as looking at the functioning of the Board's investigators and the HQE prosecutors to determine if they are complying with the VE Manual and guidelines which were adopted.

Agenda Item 20 Licensing Chief's Report

A. Licensing Program Update

Ms. Pellegrini directed Members to the Licensing Program workload counts for all operations on page 145 of their packets. She noted there was a correction to the report, with the number of

physicians and surgeons licensed in the first quarter being 1,191, not 1,429 as indicated. Ms. Pellegrini explained the lower number of licenses being issued in the second quarter was typical for the past four years, with a rebound usually occurring during the third quarter. Applications initially reviewed outside the regulatory requirements of 60 working days increased during the second quarter, but remained the same between December and January, with approximately 300 applications outside the regulatory requirements as of this week.

Several processing improvement initiatives have been undertaken in the past three months which should assist in improving the timeliness of applications. These improvements include the development of a policy and procedure manual, drafting electronic deficiency letters from the Application Tracking System (ATS), and a better data tracking system which allows for a more even distribution of application workload among staff. The Licensing Section has also added 8 new part-time employees and has removed some clerical responsibilities from licensing analysts, allowing them to focus solely on processing applications. Ms. Pellegrini also reported a new web based automated call center has been implemented, which is a great improvement over the Board's previous call system.

Agenda Item 21 Midwifery Advisory Council Report

Faith Gibson, Chair of the Midwifery Advisory Council, reported the Council met on January 15, 2009 where it concluded dealing with the 2007 licensed midwifery statistics and questionnaire; the questionnaire will be reworded for the December 2009 mailing to correct some problems. The questionnaire is available on the Board's website, with the data being reported back to the Office of Statewide Health Planning and Development (OSHPD).

A. Remedial Training as a Term of Probation

At the October 2008 Council meeting, Ms. Pellegrini reported the Council Members discussed remedial retraining of licensed midwives and approved a motion to seek Board approval to move forward with determining what type of education should be included in the term and condition of probation for quality of care cases and to also assess whether that type of education exists. Ms. Yaroslavsky made a motion to authorize the Midwifery Advisory Council to evaluate remedial training as a term of probation; the motion was seconded and carried.

Agenda Item 22 Written Examination Passing Score

Ms. Scuri reported Business and Professions Code Section 2177 requires the Board to establish the passing score for the licensing examination. The Board has historically accepted the passing score set by the Federation of State Medical Boards (FSMB). Out of an abundance of caution, the Board is asked to reaffirm its past practice of accepting the passing score set by the FSMB as its own passing score. A motion was made to reaffirm the Board's past practice of accepting the passing score set by the FSMB as its own passing score an all steps of the USMLE; the motion was seconded by Ms. Chang and carried.

Agenda Item 23 Consideration of Proposal to Amend Continuing Medical Education Audit Regulations

Ms. Pellegrini referred Members to page 149 of their packets. Staff recommends the Board amend the current CME regulatory language in Section 1338 by (1) striking the word "once" and (2) adding language to state that a physician's failure to respond to the Board's audit inquiry and providing documentation of his or her compliance with the continuing education requirements within 45 days of receipt of the inquiry will constitute unprofessional conduct. Staff is asking to bring this issue back for a public hearing at the May 2009 Board meeting. Ms. Yaroslavsky made a motion to approve staff's recommendations; Dr. Chin seconded the motion.

During public comment, Yvonne Choong, CMA, expressed concerns with the proposal regarding the failure to provide documentation within 45 days constituting unprofessional conduct. She encouraged the Board to consider an intermediary solution due to issues such as address changes, extended leave or travel, or retirement. The CMA felt putting failure to provide this information on the same level as a DUI or providing false testimony was excessive. Further, Ms. Choong stated it was her understanding that the Board already required the submission of proof of CMEs for renewal, giving the Board the opportunity to hold up a physician's license renewal for non-compliance rather than adding another item to unprofessional conduct.

Ms. Kirchmeyer indicated it has been determined the Board does not have the statutory or regulatory authority to issue a citation and fine if the physician does not send in the documentation in response to the audit inquiry; in fact, no enforcement mechanism currently exists. The Board is seeking the capability to label this failure to submit documentation of CME as unprofessional conduct which could be added to Board regulations and would allow the Board to cite and fine for non-compliance. A cite and fine would not be issued the first time the Board sent out a letter requesting documentation; due diligence would be followed in order to gain compliance. The citation and fine would be used for physicians who continue to ignore requests from the Board for CME documentation.

Dr. Low suggested a possible solution might be linking each licensee's on-line profile to a form for CME activity that would be filled out on an on-going basis; failure to complete the required CME documentation would result in an inability to renew their license. Ms. Schipske noted the Board of Registered Nursing automatically fines nurses who are late in returning their CME documentation; further, if an audit is conducted, the nurse may be subject to additional fines. Mr. Heppler noted the Board seems interested in further discussion on this issue and suggested it might be appropriate to separate the two requested actions and consider them individually.

Dr. Gitnick urged caution on this issue, stating many published studies showed CME, as currently constituted, does not effect practice change. He felt until there was a change in the way CME was delivered, the Board should proceed cautiously and avoid appearing punitive. Ms. Yaroslavsky felt the issue was if the Board had a rule, there needed to be a way to enforce it.

Ms. Yaroslavsky amended her earlier motion to approve staff's first recommendation to amend the current CME regulatory language by striking the word "once" from section 1338(a). Ms. Scuri clarified the audit requirement is included in regulations, but, by removing the word

"once", it simply allows staff to spread out the audit, reducing workload on staff. The motion was seconded and carried.

Dr. Fantozzi asked staff to return with additional options for gaining compliance on providing CME documentation that would be less onerous and punitive for licensees.

Agenda Item 24 Action on Recommendations of Application Review Committee

Dr. Gitnick reported the Application Review Committee met and requests that it be authorized to proceed with developing proposed regulatory language to implement section 2113(e) of the California B&P Code by defining the appropriate minimum level of clinical activities the Board may accept as qualifying time to meet the postgraduate training requirement for licensure. Ms. Yaroslavsky made a motion to approve the Application Review Committee's request; the motion was seconded by Ms. Schipske and carried.

Agenda Item 25 California Physician's Corp Program Update

Ms. Yaroslavsky provided an update on the California Physician's Corp Program, reporting $2.5 million dollars from physician licenses and penalties imposed by managed health care will be used to assist in loan repayment for physicians serving in underserved communities throughout California.

Agenda Item 26 Education Committee Update

Ms. Yaroslavsky reported the Education Committee met on January 29, 2009 and discussed a regulatory proposal to require posting a sign regarding physician regulation by the Board Staff will return with additional language and will meet with impacted stakeholders to discuss the reasoning behind and implementation of the signage requirement.

Agenda Item 27 Wellness Committee Update

Dr. Duruisseau reported the Wellness Committee met on January 29, 2009. At the November 2008 meeting, the Committee decided to take steps to gain a better understanding of Wellness resources currently available to California physicians. Dr. Duruisseau reported the Committee has been working with staff on a survey to be sent out to all hospitals in California. The Committee will be setting up a meeting with the administration in February 2009 to discuss this language of the Wellness legislative proposal and the materials developed on Wellness.

Last year the Committee, with the Board's support, created its own website which includes updated articles on Wellness; Dr. Duruisseau encouraged the Members to visit the site. Dr. Duruisseau will report on the activities of the various Wellness subcommittees at a later date.

Agenda Item 28 Physician Assistant Committee Update

Dr. Low reported the Physician Assistant Committee (PAC) met in November 2008 as part of the DCA Summit in Los Angeles. Important issues raised at the meeting included: (1) Legislation in 2008 authorized the PAC to require a licensee to complete 50 hours of CME every two years.

Interested parties are working together to finalize the regulatory language. (2) An on-line assessment has been developed by the PAC to disseminate knowledge about jurisprudence as it relates to physician assistants; it is in the process of being posted to the PAC website. (3) The PAC is in the midst of a strategic planning process which should be completed by the first half of 2009.

Dr. Low also reported staff has prepared an informational page about the Delegation of Services Agreement which is now posted on the PAC website. Citations are also now posted on the website and staff is moving toward scanning everything for electronic retention. As part of the application process, the PAC will query through the National Practitioner Database for new applicants. Finally, the website is being updated to improve the efficiency for renewals. As of January 2009, there are 7,000 licensed physician assistants.

Agenda Item 29 Access to Care Committee Update

Dr. Gitnick reported the Access to Care Committee met on January 29, 2009 where two significant issues were discussed: (1) The report on Malpractice Insurance for Voluntary Physicians, which was presented to the full Board as Agenda Item 13; (2) A proposed pilot program that would meet the requirements of AB 329 which authorized the Medical Board to establish a pilot program to expand the practice of telemedicine and authorized the Board to implement the program using the telemedicine model of delivering health care to those with chronic diseases and delivering other health information. The law requires the Board to make recommendations regarding its findings to the Legislature within one calendar year of the commencement date of the pilot program. Staff has proposed a program in collaboration with the Chronic Disease Management Program at the University of California Davis Health System. This program is designed to resolve health disparities for diabetics, primarily focused on Hispanic and African Americans, building on disease management resources and utilizing telemedicine technologies to connect patients, providers, and community resources in an effective manner that offers enormous potential for improvement.

Dr. Gitnick made a motion to implement the proposed program recommended by staff; Ms.Yaroslavsky seconded, motion carried.

Agenda Item 30 Agenda Items for May 7-8, 2009 Meeting

Dr. Fantozzi asked staff to revise the Board Member Procedure Manual to be consistent with the earlier vote on interested party communications.

Ms. Chang asked that an agenda item be added to discuss a potential pilot project between the Cultural and Linguistic Competency Work Group and UC Davis regarding the language issues surrounding health care in underserved communities.

Agenda Item 31 Election of New Board President

In light of the pending expiration of his term on June 1, 2009, Dr. Fantozzi called for the election of a new president who would serve upon his retirement. He felt it was in the Board's best interest to elect a new president who he would be able to meet with and who would also have the opportunity to meet with staff, advocacy groups and the Legislature, in order to provide a smooth transition in leadership. Dr. Fantozzi called for nominations for the office of President. Dr. Salomonson nominated Ms. Yaroslavsky; Dr. Duruisseau seconded the nomination. There being no other nominations, Dr. Fantozzi called for a vote. Ms. Yaroslavsky was unanimously elected as President of the Board effective June 1, 2009 or earlier upon Dr. Fantozzi's retirement.

Dr. Gitnick congratulated Ms. Yaroslavsky and thanked Dr. Fantozzi for his leadership as President of the Board.

Action Item 32 Adjournment

There being no further business, the meeting was adjourned at 2:10 p.m.

Richard Fantozzi, M.D., President

Hedy Chang, Secretary

Barb Johnston, Executive Director