MEDICAL BOARD OF CALIFORNIA
Executive
Office

Executive Committee

Medical Board of California
Hearing Room
2005 Evergreen Street
Sacramento, CA 95815

June 18, 2009

MINUTES

Open Session:

Agenda Item 1 Call to Order/Roll Call

The Executive Committee of the Medical Board of California was called to order by the Chair, Barbara Yaroslavsky at 1:35 p.m. Notice had been sent to interested parties.

Members Present:
Barbara Yaroslavsky
Hedy Chang
Janet Salomonson, M.D.
Frank Zerunyan, J.D.

Members Absent:
Gary Gitnick, M.D.

Staff Present:
Barb Johnston, Executive Director
Kimberly Kirchmeyer, Deputy Director
Kathi Bums, Discipline Coordination Unit Manager
Susan Cady, Enforcement Manager
Candis Cohen, Public Information Officer
Janie Cordray, Research Specialist
Abbie French, Telemedicine Manager
Kurt Heppler, Department of Consumer Affairs Staff Counsel
Ross Locke, Business Services Office
Kelly Nelson, Legislative Analyst
Paulette Romero, Associate Analyst
Anita Scuri, Department of Consumer Affairs Senior Staff Counsel
Cheryl Thompson, Executive Assistant
Renee Threadgill, Chief of Enforcement
Linda Whitney, Chief of Legislation

Members of the Audience:
Zennie Coughlin, Kaiser Permanente
Frank Cuny, California Citizens for Health Freedom
Julie D'Angelo Fellmeth, Center for Public Interest Law
Brett Michelin, California Medical Association
Curtis Notsinneh, Consultant, Assemblyman Hill
Roz Pulmano, Consultant, Senate Business & Professions Committee
Jim Rathlesberger, California Board of Podiatric Medicine
John Toth, M.D., California Citizens for Health Freedom

Agenda Item 2 Approval of Minutes from the March 25, 2009 Meeting

Ms. Chang made a motion to approve the minutes from the March 25, 2009 Executive Committee meeting; s/Zerunyan; motion carried.

Agenda Item 3 Update on 2009 Legislation
Linda Whitney, Chief of Legislation, provided a review of the bills the Board is tracking.

AB 501 (Emmerson) Licensing: Limited, Use of M.D., Fee/Fund
Ms. Whitney indicated this Board-sponsored bill has been amended and support has been obtained from all of the medical schools in California. This bill will be heard in Senate Business and Professions on June 29, 2009.

AB 1070 (Hill) Enforcement Enhancements: reporting, public reprimand
Ms. Whitney reported this bill carries the Board's enforcement enhancement provisions and will be amended to address physicians being notified by a self-insured entity if the entity plans to report the physician to the Board for a malpractice award. The bill is also the vehicle for decisions made on the Vertical Enforcement and Prosecution (VE/P) process.

Ms. Whitney reported the following bills have become two-year bills and will not move forward during this legislative session:

AB 832 (Jones) Clinic Licensing: Workgroup
AB 977 (Skinner) Pharmacists: Protocols with Physicians
AB 1458 (Davis) Drugs: adverse events: reporting
SB 58 (Aanestad) Physicians and Surgeons: peer review
SB 700 (Negrete McLeod) Healing Arts: peer review

With regard to SB58 and SB700, Ms. Whitney noted any of the suggested enhancements to the peer review process suggested by the Lumetra Report or during the hearings are no longer in 2009 session bills and will only relate to the peer review hearing process or Business and Professions Code Section 809 in AB 120 (Hayashi) Peer Review.

SB 638 (Negrete McLeod) Regulatory Boards: joint committee on operations
This bill was to be the vehicle to revise the sunset review process and to extend the Medical Board as well as other boards. This bill is now a two-year bill.

SB 389 (Negrete McLeod) Fingerprinting
This bill requires all licensees to be fingerprinted. Ms. Whitney reported the Board supported having all physicians fingerprinted. She stated information from archive files verified that the Board has required fingerprinting of physicians back to 1945. Based upon this research and the estimated age of physicians licensed at that time, staff has concluded all practicing physicians have been fingerprinted, thus no action will need to be taken related to this requirement.

SB 674 (Negrete McLeod) Outpatient settings / Advertising
This bill, which enhances requirements for outpatient settings, was amended to delete the provision regarding assisted reproductive technology settings, and now refers only to in vitro clinics to be included in the outpatient settings.

AB 245 (Ma) Disclosure Verification
Ms. Whitney stated this bill carried provisions the Board opposed. The bill has been amended to solely require the Board to remove expunged convictions from its website within 90 days of notification. Staff recommends a neutral if amended position, with the amendment requiring that notice to the Board include appropriate court documentation to substantiate the expungement. Ms. Chang made a motion to take a neutral if amended position on AB 245; s/Salomonson; motion carried.

AB 526 (Fuentes) Public Protection and Physician Health Program Act of 2009
Ms. Whitney indicated the Board previously took a neutral position on the bill as it did not contain requirements for the Board. The bill was amended June 1, 2009 to require the Board to be the pass through funding source for this program. The Board has stated its opposition to collecting fees and being the pass through funding source in its review of a similar bill last year. Staff recommends an oppose position for this reason. Dr. Salomonson made a motion to oppose AB 526; Ms. Chang seconded the motion.

Mr. Zerunyan stated a number of the provisions in the bill conflict with the mandate of the Board. He voiced his concern with having another entity engaged in ensuring patient safety and public protection, since these are the mandates of the Board. Ms. Whitney clarified the entity would be the State and Consumer Services Agency through its committee of 14 members, thus, the responsibility would remain within a state agency who would then contract out with other entities to provide services. Mr. Zerunyan reiterated his concern over potential conflicts in areas such as standards, requirements, procedures, protocols, required reports, and discipline as they relate to physicians. Further, he indicated the confidentiality for physicians within any such program would undermine the Board's mandate of public protection.

Brett Michelin, California Medical Association (CMA), indicated the physicians involved in this program would participate voluntarily. Any physician problems would not have reached the level requiring notification to the Board. The bill requires the program to notify the Board of any physicians who come into the program and fail to comply, even if their error does not yet reach the level of Board notification in other circumstances. Mr. Michelin stated the CMA believes this program will not divert physicians from any discipline and the program does not change any laws on reporting requirements.

Anita Scuri, Senior Staff Counsel, indicated the bill permits the program to accept referrals from the Board to provide monitoring services pursuant to a Board order. Mr. Michelin stated this is correct, but only if the Board chooses to make such referrals.

Mr. Zerunyan stated his opposition is not toward addressing physician wellness, but, rather, to having the government, as opposed to the CMA or any other private organization, involved in this program. Mr. Michelin stated the CMA agrees with this preference to have the program run by a non-government entity, however, the opposition to the transfer of fees to fund the program has prevented this from happening in the past.

Julie D'Angelo Fellmeth, Center for Public Interest Law, stated her organization's concerns with the bill. She indicated the bill conflicts with SB 1441 (Ridley Thomas) which was passed last year and requires the Department of Consumer Affairs to convene a committee to adopt uniform standards that will be used by all health care licensing boards in dealing with impaired licensees. This committee is already working and developing standards. Ms. Fellmeth stated the bill would place the program within the State and Consumer Services Agency, which may potentially be eliminated in the state budget negotiations. Finally, Ms. Fellmeth stated the program's fiscal foundation is unknown; although $22 per renewal period would be taken from the Board's licensing fees, there has been no fiscal analysis to determine if this would provide appropriate funding.

The motion to oppose AB 526 carried.

Agenda Item 4 Discussion and Approval of Final Draft of Vertical Enforcement Report

Ms. Chang made a motion to approve the draft of the Vertical Enforcement and Prosecution (VE/P) Report to the Legislature; Dr. Salomonson seconded the motion.

Ms. Threadgill reported, pursuant to the statute, the Board was required to consult with the Department of Finance, the Department of Personnel Administration, and the Department of Justice on the report. Although the Board was also asked to consult with Department of Consumer Affairs on the report, a response has not yet been received. The Board entered into an agreement with Integrated Business Solutions for Government (IBSG) to complete this report. Kenneth Kobrin, IBSG, was present to address questions about the report and explain his methodology in assimilating the data.

Mr. Kobrin reported, in conducting the study, background information and statistics provided by the Board were reviewed and interviews were conducted with identified staff from the Attorney General's Office and the Medical Board. This information was then analyzed and recommendations from staff were considered in assembling the recommendations made in the report. He stated the project required significantly more input and review than originally anticipated, resulting in IBSG donating in excess of 150 hours of their own time in order to conduct the comprehensive analysis necessary.

Ms. Yaroslavsky indicated she had spent a considerable amount of time reading the report and expressed her frustration with the many abbreviations used throughout the report and asked for a summary of the abbreviations used to be included. She stated it was difficult to determine from the report if the changes in the enforcement and prosecution timelines were due to the implementation of VE/P or whether they were due to

changes in legislation, the furlough of state employees, or the difficulty in retaining investigators due to pay differentials. Ms. Yaroslavsky indicated the vast number of tables and charts made the report difficult to understand.

Dr. Salomonson asked whether the average or the median was the more meaningful number in drawing conclusions from the data. Mr. Kobrin responded the median was the more important number. He stated the reader was cautioned in two parts of the report that in determining the significance of the statistics it is critical to look at the raw data to determine the number of records being referred to, since the number in some cases was so small. In addition, Dr. Salomonson noted the average length of time from the date the case is assigned to an investigator to the date the case is closed does not consider the complexity of the cases; highly complex cases are likely to produce outliers and negatively affect the averages; hence, the median would be the more significant statistic.

Ms. Chang asked for a simplified chart or graph in the Executive Summary that would clearly indicate whether VE/P was working. Mr. Kobrin stated that, overall, from the date a case was assigned to an investigator to disciplinary outcome, there has been a .51% decrease in the average days aged and a 1.85% decrease in the median days aged. Hence, overall in disciplinary cases, there has been a *slight* reduction in the time frame.

Mr. Kobrin stated, in looking at the total process, there has been an increase in the investigation time (from the time a case is assigned to investigator to referral to the Attorney General's Office) and a reduction in the prosecution time (from the time an accusation is filed to total outcome). The number of days aged from the time a case was assigned to an investigator to the time the investigation was completed and referred to the AG's office showed a 42% increase in the average and a 56% increase in the median. Mr. Kobrin indicated a variety of factors contributed to this increase in the investigation end, making it difficult to pinpoint a cause.

Mr. Zerunyan expressed his doubt that members of the Legislature would be willing to take the time to wade through the countless charts and graphs to extract relevant data. He requested the addition of a cogent flow chart in the Executive Summary in the report showing the actual number of days in the various components of the enforcement process (pre-VE/P and post-VE/P), rather than showing the % increase or % decrease in average and median.

With regard to the recommendations made in the report, Mr. Kobrin reported many of the recommendations were based on the comments received during interviews with Medical Board and the Attorney General's staff.

Carlos Ramirez, Senior Assistant Attorney General, indicated a response to the report was provided by the AG's Office. He stated some of the comments in the AG's response are mirrored by the Board's concerns in today's meeting. Mr. Ramirez reported the decrease in prosecution time frames is partly attributed to the increase in the quality of the investigations. At the same time, Mr. Ramirez reported the difficulty of prosecuting these cases has increased. He reiterated Mr. Zerunyan's request for a breakdown of each step in the process in order to identify problem areas and craft solutions. He offered the assistance of the AG's Office in compiling a final report to the Legislature.

Ms. Chang asked Mr. Ramirez to elaborate on the AG's response to the VE/P Report. Mr. Ramirez stated it is no secret the Board has had difficulty retaining investigators for long periods of time. Unfortunately, vacancies continue, even though the Chief of Enforcement has done everything in her power to recruit qualified

individuals. This turnover results in the reassignment of investigations and in the movement of some of the more senior investigators to training positions. The limited availability of consultants also negatively impacts the length of the investigation; the consultants are indispensible in interviews and their reports to the AG's Office are vital. Further, Mr. Ramirez indicated the problems caused by the Executive Order have also negatively impacted timelines.

Ms. Threadgill noted there has been a recent increase in the number of investigators and the average caseload per investigator has remained fairly consistent over the years. However, she stated recent indications lead her to expect a loss of investigation staff due to retirement and to frustration with the VE!P process (as identified in exit interviews).

Mr. Kobrin stated the consistency in the average caseload per investigator over the years makes it difficult to identify the vacancy rate as having a major impact in any delays. Certainly additional staff would have decreased timelines; however, he stated this alone could not account for the increase. During interviews with the Medical Board and AG's staff, the frustration and animosity expressed served as the basis for the recommendation for state wide training to provide a common knowledge base and build teamwork between the two offices.

Ms. Yaroslavsky stated, in her opinion, the problem was the lack of clear roles, responsibilities, and expectations of the staff between the two offices. She indicated staff in the Board's and AG's offices are not working together and investigators will continue to leave and timelines will not improve until this problem is addressed.

Ms. Threadgill suggested that staff work with IBSG to make the requested changes to the report and then submit the changes to two members of the Committee for approval before delivering the report to the Legislature. Ms. Yaroslavsky appointed Mr. Zerunyan and herself to form a subcommittee to review the changes to the report.

Ms. Whitney reiterated the Board has a vehicle, AB 1070, available for the extension or sunset of the VE/P Program. Direction is needed quickly since the bill will be heard June 29, 2009 and the deadline to amend the bill is June 19, 2009. Based upon the findings of the report and the input of other individuals, the Committee needs to decide whether it seeks extension of the VE/P Program or prefers to let it sunset and also must decide whether they wish to incorporate anything from the report's findings or recommendations into legislative language. Copies of the proposed legislative language based on the report's findings were provided to the Committee members. Ms. Yaroslavsky directed Ms. Whitney to make sure there was the option in the bill for an extension of the evaluation of the program.

Ms. Whitney reviewed the AB 1070 proposed legislation, stating it would extend the Pilot an additional 2 years and would address some of the recommendations made in the VE/P Report. Specifically, the proposed language states that investigations are to be a collaborative effort and the VE/P Program would be limited to complex investigations (exempting allied health investigations that are not complex, criminal investigations or unlicensed activity). Additionally, the proposed legislation calls for the development of a common computer server to increase compatibilities for sharing case information, a plan to co-locate the Board's enforcement staff and the staff of the Health Quality Enforcement Section of the Attorney General's Office, and a plan to assist in team building and the development of a common knowledge base. Based on members' comments on the timing

of the report, Ms. Whitney indicated the proposed language could be modified to require the report to the Governor and the Legislature be due in March 2011, rather in July 2011, in order to allow ample time for review. The proposed language also removes the Department of Finance and the Department of Personnel Administration from the list of departments the Board must consult with in preparing the report and also amends Section 2006 of the Business and Professions Code to more accurately reflect the investigation process.

Mr. Ramirez indicated his office has not had the opportunity to review the proposed legislation, but stated the legislation would remove the presence of deputy attorney generals from the Board's district offices. Rather than having the deputies direct the investigations, Mr. Ramirez felt the substitution of the wording "collaborate with the deputy attorney general" on investigations would make the deputies' presence in the district offices no longer necessary. He indicated this would be a major set-back and would effectively end VE/P as it now exists. Ms. Whitney reported this was not the intention of the legislation. Mr. Ramirez stated his office could work with Ms. Whitney on the legislation, but felt it was not prudent, given the short amount of time available, to write legislation that would impact the way cases are investigated and prosecuted over the next 2 years.

Ms. Whitney indicated, with the Committee's approval, the Board could move forward with the current proposed language. Amendments to the bill could be made in legislative counsel before the hearing on June 29, 2009.

There was lengthy discussion on the use of "direct" versus "collaborate" with regard to the roles of the investigators and the deputy attorney generals.

Ms. Whitney recommended asking Assemblyman Hill's office to act as a neutral party to bring together the Board and the Attorney General's Office to ensure language is developed that is acceptable to both sides in order to move the bill through the hearing. Curtis Notsinneh, consultant for Assembly Member Hill, reported their staff would be happy to bring together the two parties to resolve the issues. He expressed his concern with the deadlines in the Legislature, stating the need to move quickly since the bill is double referred in the Senate. He offered the option of adopting some of the non-controversial components of the bill, such as the extension of the deadline, in order to ensure the program continues under statute. The more controversial program improvement areas could be handled separately, although they would prefer to address both issues at the same time.

Ms. Chang amended her motion to recommend the extension of the VE/P program for two years and to proceed with language revisions presented by Ms. Whitney and any modifications worked out by the author and interested parties and to authorize a two person subcommittee to revise the Executive Summary and add any appropriate flow chart to the VE/P Report to the Legislature. Dr. Salomonson seconded the amended motion.

Ms. Fellmeth, Center for Public Interest Law, commented on the VE/P Report, expressing her opinion the report was a data dump with fairly subjective observations made by staff of both agencies. She indicated important information had been omitted from the report, specifically, the impact of the furloughs (1600 hours of investigative time per month) and the difficulties Ms. Threadgill has experienced with the salaries of the Board investigators. Ms. Fellmeth advised removing recommendation #1 from the Executive Summary; although she agreed there should be zero tolerance of negative communication, she felt this was not an appropriate recommendation, but, rather, a management issue. She stated the deputy attorney general was clearly responsible for directing the investigation, but this does not relegate the investigator or any other team member

to a position of lesser dignity or importance. Ms. Fellmeth suggested adding a recommendation to the report to expand vertical enforcement and prosecution to include probation. With regard to the draft legislation, she agreed with Mr. Ramirez that substituting "collaborate with" for "under the direction but not the supervision of" would be a mistake, and disagreed with adding the wording "complex" to the type of complaints that would go to vertical prosecution since this would be too limiting.

Ms. Yaroslavsky called for a vote and the amended motion carried.

Dr. Salomonson commented that speed is the measure being used to evaluate the success of the VE/P process. Closing cases quickly may make the numbers look good, but we might, in reality, be closing things too quickly in terms of public protection. Although data on the quality or accuracy of outcomes would be much harder to obtain, perhaps this would provide a better measure of success.

Agenda Item 6 Adjournment

At the conclusion of discussion on Agenda Item 4, Ms. Yaroslavsky adjourned the meeting at 4:30 p.m.