MEDICAL BOARD OF CALIFORNIA
Executive Office

ENFORCEMENT COMMITTEE
Medical Board of California
Embassy Suites Hotel – San Francisco Airport
Mendocino/Burlingame Room
150 Anza Boulevard
Burlingame, CA 94010
January 27, 2011

MINUTES

Agenda Item 1 Call to Order/Roll Call
The Enforcement Committee of the Medical Board of California was called to order by Reginald Low, M.D. With due notice having been mailed to all interested parties, the meeting was called to order at 9:05 a.m.

Members Present:
Reginald Low, M.D., Chair
Sharon Levine, M.D.
Gerrie Schipske, R.N.P., J.D.
Frank Zerunyan, J.D.

Members Absent:
John Chin, M.D.
Mary Lynn Moran, M.D.

Staff Present:
Susan Cady, Enforcement Manager
Jorge Carreon, M.D., Board Member
Hedy Chang, Board Member
Silvia Diego, M.D., Board Member
Eric Esrailian, M.D., Board Member
Catherine Hayes, Probation Manager
Kurt Heppler, Legal Counsel
Breanne Humphreys, Licensing Manager
Teri Hunley, Business Services Manager
Diane Ingram, Information Systems Branch Manager
Rachel LaSota, Supervising Inspector
Craig Leader, Enforcement Investigator
Sheronnia Little, Information Systems Branch
Ross Locke, Business Services Office
Natalie Lowe, Enforcement Analyst
Armando Melendez, Business Services Office
Regina Rao, Business Services Office
Letitia Robinson, Licensing Manager
Janet Salomonson, M.D., Board Member

Victor Sandoval, Enforcement Investigator
Kevin Schunke, Regulations Manager
Anita Scuri, Department of Consumer Affairs, Supervising Legal Counsel
Jennifer Simoes, Chief of Legislation
Laura Sweet, Deputy Chief of Enforcement
Cheryl Thompson, Executive Assistant
Renee Threadgill, Chief of Enforcement
Linda Whitney, Executive Director
Curt Worden, Chief of Licensing
Barbara Yaroslavsky, Board Member

Members of the Audience:
Zennie Coughlin, Kaiser Permanente
Julie D'Angelo Fellmeth, Center for Public Interest Law (CPIL)
Stan Furmanski, Member of the Public
Dean Grafilo, California Medical Association
Rehan Sheikh, Member of the Public

Agenda Item 2 Approval of Minutes

A. Dr. Levine moved to approve the minutes from the July 29, 2010 meeting; seconded; motion carried.
B. Dr. Levine moved to approve the minutes from the November 04, 2010 meeting; seconded; motion carried.

Agenda Item 3 Public Comment on Items not on the Agenda
There were no public comments.

Agenda Item 4 Review of Probation Practice Monitor Requirement
Dr. Low requested that Ms. Hayes and Ms. LaSota of the Probation Unit update the presentation that was provided at the November 2010 meeting; including updates based on feedback provided by committee members at that meeting.

Ms. Hayes provided a brief overview of the Probation Unit and the practice monitor requirement, including a Power Point presentation.

Currently there are 186 probationers who are required to have a practice monitor. This condition requires that the probationer identify and propose a practice monitor within 30 calendar days from the effective date of their Decision. The practice monitor must be someone who has no prior or current, business or personal relationship with the probationer. This requirement was designed to ensure that the monitor could provide fair and unbiased reports to the Board. The practice monitors are "reimbursed" by the probationer for any costs associated with acting as a monitor and typically range from $100 to $600 per hour.

Once the probationer has identified a potential practice monitor, the Probation Unit Inspector reviews the physician's background, including any complaint or disciplinary history with the Board and his/her qualifications. If approved, the Inspector will provide the monitor with copies of the accusation and decision, a brief overview of the Board's expectations and a monitoring plan.

The monitor is expected to visit the probationer's practice location at least once a month. During the visit, the monitor randomly selects 10% of the probationer's charts to review. The objective of the chart review is to

allow the monitor to make an assessment as to whether the probationer is practicing "within the standard of care." A quarterly report is prepared by the monitor to confirm that the reviews have taken place and identify any deficiencies noted during the chart review. The practice monitor does not provide any on-site or direct supervision of the probationer.

A concern identified with the current system is that it is often difficult to find a practice monitor with no prior relationship with the probationer.

At the November 2010 meeting, concern raised by practice monitors regarding the liability they might be assuming by agreeing to serve as a practice monitor, was discussed. The committee members felt that additional options should be explored to provide immunity to the practice monitors. Staff discussed the possibility of pursuing legislation to establish in statute immunity or protection similar to what is currently provided to the Board's medical experts. However, after discussion with staff counsel, the Probation Unit is looking into developing a "waiver" which would be an agreement between the parties and would be signed by the probationer and considered to be a part of the monitoring plan. Staff have reviewed materials from the UC San Diego Physician Enhancement Program (PEP) and found that it utilized a Consent and Release of Information form that contains the following language "By my signature, I agree to hold harmless the Regents of the University of California, its officers, agents and employees from any liability resulting from or arising in connection with this agreement." This same type of language could be executed into a monitoring agreement and plan.

Another concern staff is reviewing is whether a random review of approximately 10% of a probationer's charts is sufficient to determine if the probationer is providing appropriate care.

A practice monitor performing chart review may not be appropriate in cases involving substance abuse or sexual misconduct. Staff is considering whether the use of a "worksite monitor" would be more appropriate than a practice monitor. The "worksite monitor" is a concept that was used by the Diversion Program and is another physician or health care professional would have face-to-face contact with the probationer in the work environment. The Department of Consumer Affairs has developed criteria for the monitoring, reporting, and the qualifications needed for a worksite monitor in its Senate Bill 1441 uniform standards. Should this be considered a viable option, minor changes would need to be made to the Board's Disciplinary Guidelines.

Staff reviewed background information on the Petitions to Revoke Probation filed over the past two years and found that 43 actions had been filed. Ten accusations and/or petitions to revoke probation were filed charging gross negligence; in 7 of the 10 cases, the probationer was required to have a practice monitor. In reviewing the reports from the practice monitors, all indicated that the care being provided by the probationer was "within the standard" based on their chart review. Staff is concerned that consumers may not be adequately protected by this condition in its current form.

Ms. LaSota presented the modifications being considered by the Probation Unit to enhance and improve the practice monitor condition.

Currently, the only approved option is the Physician Enhancement Program also known as PEP through UC San Diego. The program focuses on developing a mentoring relationship with the probationer by using faculty members as practice monitors. PEP staff chooses the monitor from a pool of university faculty. The PEP monitor is provided with formal training, an extensive training manual, and a structured checklist of items to review during the site visit with the probationer. The reports are returned to staff at PEP for review prior to

being forwarded to the Board. If any deficiencies are noted in the probationer's practice, improvement plans are formulated and provided to the probationer and the Board.

Several options were presented at the November 2010 meeting that staff believed might strengthen the performance of the practice monitors. These options were to exclusively use the Physician Enhancement Program (PEP), which omits the allowance of a physician selecting their monitor; have the Board develop a pool of practice monitors, who have been approved and trained by the Board; use the current system, but require mandatory training; or use the current system and develop more structured requirements. At that meeting, staff was asked to outline staff resources and cost projections which may be needed to implement the options that were proposed.

The PEP program is currently approved by the Board as an alternative to identifying and nominating a practice monitor. This alternative can be expensive for the probationer; however, the program is well developed and provides the best example of a mentoring program.

Other options were provided for Committee review:

Rather than relying on the probationer to find a physician willing to act as a practice monitor, staff has considered the option of developing and maintaining a pool of physicians to provide this service, which the probationer would select from. Staff envisions developing a training program and material similar to the program that is currently in place with the Expert Reviewer Program. While this option incorporates the best practices from the available options, this model will also be the most labor intensive to develop and implement, as it will require a large investment of staff resources and time.

Resources will be needed to develop training material and determine the method of training (such as: classroom instruction; web-based training; and, self-paced review of materials); develop selection criteria for practice monitors and develop recruitment strategies to attract physicians willing to serve in this capacity; advertise and attempt to identify physicians in a variety of practice specialties located throughout the state; provide training and make trained physician listings available to probationers with a practice monitor requirement; and, to assess practice monitor's performance and provide feedback.

Another option is to retain the Board's current system, but add a requirement that practice monitors are trained before they can be used. This would require the use of current staff resources to develop a training program for the practice monitors and determine the method of training. Training material would need to be produced and distributed to approximately 186 existing practice monitors. Staff would need to track the proposed practice monitors to ensure they complete the training. A system would need to be developed to follow-up on those who have not completed the training and possibly terminating the monitor for failing to complete the training. Lastly, an assessment of the practice monitor's performance following the training along with feedback would need to be provided to staff.

Since the November 2010 meeting, the Probation Unit staff identified several areas within the current process that could be strengthened and improved internally. Staff will be augmenting the instructional material and the orientation given to the practice monitors to provide a better explanation of their role and the Board's expectation of the type of reviews to be performed. Instead of allowing the practice monitor to submit a report that is free-form text, a standardized report format will be given to the practice monitor to use when preparing their quarterly report, to ensure a more thorough review with the probationer.

Staff will augment the orientation with the practice monitor, where the inspector prepares a monitoring plan that is specific for each probationer, and will take into account the areas of concern identified in the disciplinary action. In addition, staff is developing a checklist of items for the practice monitor that must be reviewed with the probationer during each quarterly visit. Staff is anticipating that these changes will provide more structure and better direction for practice monitors.

A letter received from a physician who had recently completed probation was shared with the Committee. The letter was addressed to an Inspector in the Probation Unit and stated:

> "I thought I might share with you my feelings about the process over the past few years. All of the Medical Board's mandated requirements were certainly beneficial to me. And the sessions with "Dr. X" (name removed for confidentiality purposes) in particular were most enlightening, clearly necessary and insightful.
>
> In addition I'd like to add that the practice monitor sessions with "Dr. X" were especially helpful and beneficial. For the past 40 years I have been in solo practice in the inner-city with a large case load of severely mentally ill patients. The practice monitor sessions with "Dr. X" brought my long time isolation to light, and provided for a much needed exchange of ideas in the real-time, day-to-day treatment of severely ill patients. "Dr. X's" insight and recommendations for individual patient care, updated theoretical developments and treatment goals proved extremely helpful.
>
> I can't speak for other practitioners in other medical disciplines who are in solo practice. But if my experience is any example, being isolated and overwhelmed has to be a universal experience. Having the opportunity and benefit of "Dr. X's" expertise and guidance certainly helped relieve the pressure and offered a new and much needed perspective on patient care.
>
> And in that respect, "Dr. X" has kindly consented to be available in the future should I have a further need for the benefit of his advice."

Staff felt that the letter reinforced the necessity of a strong practice monitoring relationship to ensure successful rehabilitation.

Dr. Levine thanked staff for their thorough and organized presentation and asked if the move to electronic health records has created complications, in terms of chart review, for practice monitors. Ms. Hayes and Ms. LaSota responded that this issue has not been communicated by practice monitors. Dr. Levine also inquired how a practitioner can indemnify a practice monitor from liability, based on something the probationer does to a patient. Mr. Heppler responded that the liability was based on the practice monitor reporting information to the Board, not the practice monitor's review of the probationers' charts. Dr. Levine also inquired how often a probationer elects to use the Physician Enhancement Program through UC San Diego. Ms. LaSota responded that approximately one out five probationers will opt to use this program and that the cost is approximately $5,000 to $6,000 per quarter.

Mr. Zerunyan inquired to the extension of liability coverage when a practice monitor fails to recognize an obvious mistake in a probationer's chart during review. Mr. Heppler responded that the core issue currently being addressed was the practice monitors failure to report general concerns to the Board, not the practice monitors review of the probationers' charts.

Dr. Low inquired as to the "shield" that is available for Expert Reviewers. Mr. Heppler responded that expert reviewers have a Civil Liability shielding that is in statute. Ms. Scuri stated that the difference between the expert reviewers and the practice monitors is that the expert reviewers are directly providing services related to the Board's core function of enforcement, and benefit the state; whereas the practice monitor is in a private relationship with the probationer. There are different liability types that would need to be reviewed as there could be issues with extending liability to individuals whom the Board is not selecting.

Ms. Schipske stated that the difference between an expert reviewer and a practice monitor is that expert reviewers are contracted by the Board, where as the practice monitor is in contract with the probationer. Ms. Schipske suggested the Board craft a statute acknowledging the role of the practice monitor which indicates that the practice monitor is not employed by the Board. Ms. Schipske also stated that there could be a conflict of interest as the practice monitor is paid for by the probationer. Ms. Schipske requested that past and present practice monitors be surveyed to obtain information on their concerns with the current system. Ms. Hayes responded that an extensive survey was previously performed and that staff is looking into doing this again.

Dr. Low stated that there is no question that the practice monitor is a very important function for consumer protection, but that there is an inherent possibility for conflicts of interest. Dr. Low felt that the idea of creating a pool of available monitors is the best option as the Board would then be able to have set standards and guidelines. Dr. Low also suggested looking into obtaining a malpractice liability coverage that would protect the monitors, possibly being funded by the probationers. Dr. Low indicated that at the next meeting staff should provide available options and the liabilities of each.

Mr. Zerunyan agreed that the idea of creating a pool of available physicians to act as practice monitors would be an acceptable option; however, as this would create another level of internal administrative service, it could be problematic and expensive.

Ms. Whitney stated that there are many aspects of contracting law, and by directing staff to present additional information at the next meeting, they will be able to provide the pros and cons; the different aspects that would affect state service; the codes that would be necessary; as well as other options that have not been pursued.

Dr. Levine stated that the creating of a pool could be done in one of two ways: the first in which the relationship remains with the probationer; and the second where the relationship remains with the Board. Ms. Whitney responded that staff will be prepared to address these issues at the next meeting.

Julie D'Angelo Fellmeth, Center for Public Interest Law (CPIL), stated that she applauds the Board for reviewing this process, as the Board has not had strict enough standards for patient protection, when it comes to the practice monitoring requirement. Ms. Fellmeth mentioned that the difference between a practice monitor and a worksite monitor (which was used in the diversion program) was that there were no set standards or criteria in place for the worksite monitor, and that diversion participants could designate whomever they chose. Ms. Fellmeth stated that the Department of Consumer Affairs, through its work to implement Senate Bill 1441, has created stringent standards for worksite monitors, and suggested the Board review these standards and bring back to future meetings for discussion. Ms. Fellmeth opined that the practice monitor is suitable for certain kinds of violations such as billing and record keeping issues; however, other types, such as substance abuse and sexual misconduct would not benefit from the practice monitor requirement. Ms. Fellmeth suggested separating the types of violations and insuring that the practice monitor has adequate training in order to evaluate the specific types of violations.

Ms. Schipske inquired as to what type of background investigation is performed when a physician applies to be a practice monitor. Ms. Hayes responded that when a physician submits an application to act as a practice monitor, a review is performed at the Board, including a review of any disciplinary or adverse actions on the physician's record, and an interview with the applicant. A brief synopsis is then provided to the Supervising Inspector to determine if the applicant meets the Board's criteria. Ms. Hayes advised there may be flaws within the system, such as when a relationship is not disclosed.

Agenda Item 5 Update on Expert Reviewer Training Progress

Ms. Sweet provided an update of the Expert Reviewer Training stating that the program was progressing well. Ms. Sweet indicated that one of the major challenges has been to find a sample case that would be suitable for training and was pleased to report that a case had been selected. All training material has been completed is awaiting conversion to an electronic format. Future tasks include setting the training date, and notifying attendees. The training is anticipated to take place in the fall of 2011.

Dr. Low inquired if there will be a requirement for the current expert reviewers to participate in the training. Ms. Sweet indicated that current and future expert reviewers will be required to participate.

Dr. Low provided a brief overview stating that this training program was being created to provide standardized training for all experts throughout the state.

Mr. Zerunyan suggested that the training sessions be recorded and be made available online to allow experts throughout the state to review the training electronically.

There were no public comments.

Agenda Item 6 Review of Training Modules

Ms. Threadgill referenced the "Ideas for Enforcement Program Training Modules in Priority Order" chart that had been created when the Enforcement Committee began, asking committee members if the Enforcement Program was moving in the right direction in presenting the committee with training information during the meetings. Ms. Threadgill asked committee members to review the chart provided which outlined the planned training sessions and to advise if it was still acceptable; if a different approach should be taken; or if they would like the sessions presented in a different order.

Mr. Zerunyan felt that the chart was great and recommended pursuing future training. Mr. Zerunyan would like to see additional enforcement statistics which provide an A-Z type review of the current internal enforcement processes; including timeframes and procedures for each step. Regarding Vertical Enforcement, while some progress has been noted, as a whole there has not been much. Providing additional statistics of the internal processes will allow a more thorough review of the process and identify any outliers. Ms. Threadgill stated that the data can be made available and further discussion will need to take place to determine what information shall be provided.

Regarding the review of training modules, Dr. Low felt that Board members would benefit from a brief executive summary of the Board's enforcement program, verses the breakdown of each module, as this would be too time consuming.

There were no public comments.

Agenda Item 7 Agenda Items for May 5-6, 2011 Meeting in Los Angeles, CA

Dr. Low requested that the following items be included on the May 2011 agenda:

- Presentation of an Overview of Enforcement Programs, Components and Processes
- Progress Report of Expert Reviewer Training

There were no public comments

Agenda Item 8 Adjournment

There being no further business, the meeting was adjourned at 10:01 a.m.