MEDICAL BOARD OF CALIFORNIA
Executive Office

MEMBERS OF THE BOARD
Reginald Low, M.D., Chair
Dev GnanaDev, M.D.
Sharon Levine, M.D.
Gerrie Schipske, R.N.P., J.D.

Enforcement Committee

May 3, 2012

Doubletree by Hilton Hotel Torrance- South Bay
Salon A & B
21333 Hawthorne Blvd.
Torrance, CA 90503
310-540-0500 (directions only)

Action may be taken on any item listed on the agenda.

AGENDA

1:00 p.m. - 2:00 p.m.
(or until the conclusion of business)

ALL TIMES ARE APPROXIMATE AND SUBJECT TO CHANGE
If a quorum of the Board is present, members of the Board who are not members of the Committee may attend only as observers.

1. Call to Order / Roll Call
2. Public Comment on Items not on the Agenda
   Note: The Board may not discuss or take action on any matter raised during this public comment section, except to decide whether to place the matter on the agenda of a future meeting. [Government Code Sections 11125 and 11125.7(a)]
3. Approval of Minutes
4. Presentation on Enforcement Core Concepts – Mr. Heppler
5. Update on Expert Reviewer Training – Ms. Sweet
6. Update on Training for Administrative Law Judges – Dr. Low
7. Discussion of the VE/P Evaluation Report – Dr. Low
8. Agenda Items for June 19-20, 2012 Meeting in Sacramento, CA
9. Adjournment

2005 Evergreen Street, Suite 1200, Sacramento, CA 95815 (916) 263-2389 Fax: (916) 263-2387 www.mbc.ca.gov

The mission of the Medical Board of California is to protect healthcare consumers through the proper licensing and regulation of physicians and surgeons and certain allied healthcare professions and through the vigorous, objective enforcement of the Medical Practice Act, and to promote access to quality medical care through the Board's licensing and regulatory functions.

Meetings of the Medical Board of California are open to the public except when specifically noticed otherwise in accordance with the Open Meetings Act. The audience will be given appropriate opportunities to comment on any issue presented in open session before the Board, but the President may apportion available time among those who wish to speak.

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For additional information call (916) 263-2389.

NOTICE: The meeting is accessible to the physically disabled. A person who needs a disability-related accommodation or modification in order to participate in the meeting may make a request by contacting Tim Einer at (916) 263-2389 or tim.einer@mbc.ca.gov or send a written request to Tim Einer. Providing your request at least five (5) business days before the meeting will help ensure availability of the requested accommodation.

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MEDICAL BOARD OF CALIFORNIA
Executive Office

ENFORCEMENT COMMITTEE
Medical Board of California
Embassy Suites
San Francisco Airport
150 Anza Boulevard
Burlingame, CA 94010
February 02, 2012

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 2:00 p.m.

Members Present:
Reginald Low, M.D.
Sharon Levine, M.D.

Members Absent:
Gerrie Schipske, R.N.P., J.D.

Staff Present:
Douglas Becker, Enforcement Investigator
Susan Cady, Enforcement Manager
Tim Einer, Executive Assistant
Kurt Heppler, Legal Counsel
Teri Hunley, Business Services Manager
Kimberly Kirchmeyer, Deputy Director
Natalie Lowe, Enforcement Analyst
Armando Melendez, Business Services Staff
Regina Rao, Business Services Staff
Anthony Salgado, Licensing Manager
Teresa Schaeffer, Enforcement Analyst
Kevin Schunke, Regulations Manager
Anita Scuri, Department of Consumer Affairs, Supervising Legal Counsel
Jennifer Simoes, Chief of Legislation
Laura Sweet, Deputy Chief of Enforcement
Susan Thadani, Enforcement Investigator
Cheryl Thompson, Executive Assistant
Renee Threadgill, Chief of Enforcement
Linda Whitney, Executive Director
Dan Wood, Information Officer
Curt Worden, Chief of Licensing

DRAFT

Members of the Audience:
Julie D'Angelo Fellmeth, Center for Public Interest Law (CPIL)
Jose Guerrero, Office of the Attorney General
Jack French, Member of the Public
Carlos Ramirez, Office of the Attorney General

Agenda Item 2 Public Comments on Items not on the Agenda
There were no public comments.

Agenda Item 3 Approval of Minutes
Dr. Low moved to approve the minutes from the May 06, 2011 meeting; seconded; motion carried.

Agenda Item 4 Enforcement Subcommittee Update
Dr. Low indicated that several meetings have taken place between members of the Medical Board's Enforcement Subcommittee and the Attorney General's Health Quality Enforcement section. Meetings were held to discuss ways in which the enforcement data collection process could be improved and to determine a standard process for reporting statistics. It was agreed that Medical Board and Department of Justice Health Quality Enforcement section supervisory staff will provide standard reporting on a monthly basis to the relative agency for data reconciliation. Upon exchange of the documents, the reports will be reviewed for any discrepancies and reconciled between the two agencies. It was requested that data reported include the average and medium. This will pinpoint outliers that can then be independently reviewed to understand the cause of inaction and allow for remedy of the situation in a more timely manner. Following reconciliation, one report will be provided for Board member review.

Agenda Item 5 Update on Expert Reviewer Training
Ms. Sweet provided an update on the progress of the Expert Reviewer Training project including a brief power point presentation. Ms. Sweet stated that the project is nearing completion and the first training session is planned for April 2012.

Technical challenges were faced when it was found that UC Davis changed its interactive power point program which required students to use their laptops or smart phones as transmitters. Because all Experts may not have the necessary equipment, equipment was acquired by the Medical Board. The acquisition of the equipment will allow the training session to be performed in multiple settings, which will be ideal for training Experts throughout the state.

An outline of the proposed lesson plan was displayed via power point, to provide an idea of the topics that will be covered during the seven hour training. Ms. Sweet indicated that the training will be interactive and audience members will be asked to participate in various ways throughout the training.

Medical Board staff are in the process of selecting the specific date to hold the training; are coordinating the schedules of presenters; and, are preparing invitations to be sent out.

Dr. Levine was concerned that the timeframes listed in the outline may not be sufficient due to the extensive amount of topics that will be covered.

Dr. Low reiterated that the purpose of the training program is to allow for higher quality and improved efficiency within the Expert Training Program.

Dr. Levine inquired as to how often the training will be provided per year. Dr. Low responded that currently there are one Northern California and two Southern California sessions planned and in the future additional training will be scheduled on an as needed basis.

Agenda Item 6 Agenda Items for May 3-4, 2012 Meeting in Los Angeles, CA

- Update on Expert Reviewer Training
- Update on Medical Board and Attorney General's Office data collection/reconciliation project

Agenda Item 7 Adjournment

There being no further business, the meeting was adjourned at 2:24 p.m.

DRAFT

Enforcement Core Concepts

Kurt Heppler
Senior Staff Counsel

Important Concepts

- Due Process
- Consumer Protection
- Statutes and Regulations

Due Process

- What is Due Process?
  - Something a lawyer says has been violated or argues for more of for his or her client
  - An Imaginary Concept
  - I don't know. Can I phone a friend?

Due Process is a Limitation on Governmental Action

Due Process Defined

- At its core, due process is two things:
  - Notice
  - Opportunity to Be Heard

Due Process requirements are triggered when the Government intends to impair life, liberty or property rights.

More Due Process

The United States Supreme Court opined that 'due process' is the opportunity to be heard at a meaningful time and in a meaningful manner.

(*Matthews v. Eldridge* (1976) 424 U.S. 319.)

Still More Due Process

- Two Types of Due Process
  - Procedural
  - Substantive
    - Involves Policy Enactments
    - Not Processes

Return to Basics

- What the Board does:
  - Licenses qualified applicants
  - Carries out disciplinary actions
  - Promulgates regulations
- What we do NOT do:
  - Determine civil liability
  - Award monetary damages

Definition of a License

- Generally speaking, a license is a grant of permission to do a particular thing, carry on a particular business, or pursue a given occupation.
- License also means a certificate or registration.

Kurt's Rules of Three

- Administrative Agencies like the Board:
  - Investigate
  - Prosecute
  - Adjudicate – This is the part of the process when Board Members become involved

The Second Rule of Three

- In Real World Terms, Boards:
  - In developing licensing standards, reviewing applications and issuing licenses, determine who gets into the profession
  - In developing regulations and policies, direct the actions of a licensee
  - In pursuing disciplinary actions, may determine how a person leaves the profession or if his or her license is restricted

Reviewing an Agency's Act

- Statutes
- Regulations
- Disciplinary Guidelines
- Business and Professions Code
- Administrative Procedures Act

Statutes

- Title Act
  - Kurt Heppler, M.D.
- Practice Act
  - Can't do this or that without a license. This means that I can't perform open heart surgery
  - Can't repair motor vehicles for compensation
  - Can't dispense spectacle lenses

More Statutes

- Consumer Protection
  - Protection of the public shall be the highest priority for the Medical Board of California in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount. (Bus. & Prof. Code, § 2001.1)

Even More Statutes

- Critically important because they authorize agencies like the Board to discipline licenses and specify the causes to take such actions:

  "The [Agency] shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

More Statutes – Continued

Gross negligence.

Repeated negligent acts.

Incompetence.

The commission of any act involving dishonesty or corruption which is substantially related to the functions of a licensee."

Statutes Yet Again

- Why are statutes so important?

Because administrative agencies only have limited powers:

-Those conferred upon the agency by the law creating it.

-Implied powers necessary to carry out and administer the conferred powers.

Regulations

- Adopted by the Board
- Fill the gaps in statute
- Nuts and Bolts, Forms, and Procedures are found in regulation
- Key concept – a standard of general application

Officially, regulations interpret, implement, make specific or otherwise carry out the provisions of statute. (See Gov. Code, § 11342.2)

Why Are Regulations Important?

State law provides that a board may deny a license on the grounds that the applicant has been convicted of a crime substantially related to the qualifications, functions or duties for business or profession for which application is made.

OK, but what are those crimes?

More Regulations

- Regulations adopted by the agency answer that question, as follows:

  "Such crimes or acts … shall include, but not be limited to, the following:
  (1) Fiscal dishonesty
  (2) Fraud
  (3) Theft
  (4) Violations relating to the misuse of pesticides."

Disciplinary Guidelines

- Model Orders
- Maximum and Minimums
- Standard and Optional Terms of Probation
- Incorporated by Reference into Regulation

MBC/DCA Attorney's Role

- Conflicts
- Communication
- Consumer Protection

Critical to Remember

- Board Counsel Not Attorney General Counsel
  - We Don't Do Investigations or Prosecutions

Back to Due Process

- Another Concept of Due Process
  - Fair Play

This is especially important in administrative proceedings where certain *fair play* rules apply

The Rules of the Game (Administrative Procedure Act)

- The right to Due Process
- The right to Counsel
- The right to offer evidence and call witnesses
- The right to be heard before an impartial decision maker
- The right to no Ex Parte Communications

The Rules of the Game (APA) (cont.)

- The right to a written decision that bridges the analytical gap between the raw evidence and the decision
- The right to a judicial review of the Board's decision

Possible Outcomes of Formal Discipline

- Revocation of a license
- Suspension of a license – not more than a year
- Probation following an actual or stayed (halted) suspension or stayed revocation
- Public Reprimand
- Dismissal of the Accusation

Bus. & Prof. Code, § 2227

Consumer Protection, Not Punishment

The purpose of such a [disciplinary] proceeding is not to punish but to afford protection to the public upon the rationale that respect and confidence of the public is merited by eliminating from the ranks of practitioners those who are dishonest, immoral, disreputable, or incompetent." (Fahmy v. Medical Bd. of California (1995) 38 Cal. App. 4th 810.)

Formal Licensing Actions

- Denial of a license (Business & Professions Code § 485)
  - When a license is denied, the applicant must receive notification or a Statement of Issues that explains the reason(s) for denial. The applicant has a right to a hearing in order to contest the denial.
- Issuance of a probationary license
  - The applicant may be issued a license with certain provisions (i.e. biological fluid testing, completion of an ethics class, etc.) Generally, issuing a probationary license is not considered discipline.

Other Formal Actions

- Interim Suspension Order
- A Penal Code 23 Action
- Acceptance of the surrender of a license

MEDICAL BOARD OF CALIFORNIA

EXPERT REVIEWER TRAINING - 8 HOURS

COURSE OUTLINE

0830-0900 **WELCOME BY LINDA WHITNEY, EXECUTIVE DIRECTOR OF MEDICAL BOARD, WHO INTRODUCES REGINALD LOW, M.D., MEDICAL BOARD MEMBER AND CHAIR OF ENFORCMENT COMMITTEE**

0900-1000 **SWEET**

I. WHY ARE WE HERE?
- **a. Experts an integral part of our program**
- **b. Consequences of good and bad opinions**
- **c. Medical consumers are protected as a result of our experts**

II. GOALS OF TRAINING
- **a. Legal requirements**
- **b. Immunity**
- **c. Report format and essential components**
- **d. What to expect after opinion is rendered**
- **e. Testifying**

III. MEMBERS OF THE ENFORCEMENT TEAM
- **a. Investigator**
- **b. Medical Consultant**
- **c. Deputy Attorney General**
- **d. Expert**

IV. WHAT HAPPENS BEFORE EXPERT GETS THE CASE
- **a. Components of the investigation**
- **b. What you should expect from us**

1000-1100 **MEDICAL CONSULTANT (TBD)**

V. WHAT KIND OF CASES AN EXPERT REVIEWS
- **a. Quality of care**
- **b. Drugs**
  - **i. Overprescribing**
  - **ii. Prescribing to an addict**
  - **iii. Under-prescribing**

iv. Self-prescribing
v. Intractable pain treatment act

c. Sexual misconduct
d. General unprofessional conduct

VI. DRUG VIOLATIONS
a. Intractable pain

VII. SEXUAL MISCONDUCT
a. Judge is the assessor of credibility

VIII. OTHER EXPERT ROLES
a. Physical exam
b. Mental exam
c. Oral competency panel member

1100-1200 ROBERT MCKIM BELL, DEPUTY ATTORNEY GENERAL

IX. QUALITY OF CARE DEFINITIONS
a. No Departure
b. Simple departure
c. Extreme Departure
d. Lack of Knowledge
e. No other words are allowed … ever!

X. LEGAL DESCRITIONS
a. Extreme departure (gross negligence)
b. Simple departure (negligence)
c. Lack of knowledge (incompetence)
d. Standard of care
e. Scenarios

XI. AESTHETICS
a. Letterhead
b. Typed
c. Signed and Dated
d. Pages numbered
e. No drafts are allowed (WHY)
f. Don't e-mail report (WHY)

1200-1230 LUNCH
1230-1330 MC/SWEET/BELL

XII. SCENARIOS OF NO DEPARTURE, SIMPLE DEPARTURE, EXTREME DEPARTURE

XIII. THINGS THAT DRIVE DEPUTY ATTORNEYS GENERAL TO JOY AND FRUSTRATION

1330-1500 ALJ (TBD) /SWEET

XIV. TESTIFYING

a. **What makes an impression on an Administrative Law Judge**
b. **Video of poor testimony; we lost**
c. **Video of good testimony; we won**

1500-1700 SWEET/MC

XV. EXPERT PACKAGE REVIEW

a. **Participants are provided with an actual expert package for review**

XVI. QUESTIONS ON BOARD REGARDING THE EXPERT PACKAGE

a. **Using the report format, participants will vote on the correct answer as to the appropriate materials listed, summary, medical issues, standard of care, analysis and conclusion.**

Tentative Agenda
Administrative Law Judge Training
June 22, 2012

- Pain Management/Appropriate Medication Standards
  Chronic Pain Issues - Diagnosis/Treatment (Fibromyalgia and Chronic Fatigue Syndrome)

- Impaired Physicians - New Training and Treatment Options
  Current Neuro-Psychological Issues

- Physician Discretion – Where Standard of Care Is Unclear, What Discretion Does MD Have In Deciding Appropriate Treatment Options or Surgical Intervention.

- Orthopedics – New Robotics vs. Old Style Surgery
  Anatomy of the Back

- Medical Record Keeping – Electronic Medical Records

- Cardiology – Including Basic Medical Education of Anatomy of System.

- New Development In Medicine/Integrated Medicine – Distinguishing Generally Accepted Treatments/Procedures From New Developments In Medicine.

- Robotic Surgery – Prostrate, Ortho, Cadio, Bariatric.

- Basic Medical Exam – What Should the Exam Consist of Within 10-15 Minutes With Patient.

2012

Medical Board of California

Report to the Legislature Vertical Enforcement and Prosecution Model

Edmund G. Brown Jr., ***Governor***

Barbara Yaroslavsky, President, Medical Board of California

Linda K. Whitney, Executive Director, Medical Board of California

March 2012

Executive Summary

The Medical Board of California (Board) is required to submit a report to the Legislature by March 1, 2012, offering recommendations to the Governor and the Legislature on the "vertical enforcement and prosecution model" (VE/P). The purpose of the VE/P model is to increase public protection by improving coordination, teamwork, increasing efficiency, and reducing investigative completion delays. The VE/P model was implemented by the Board and the Health Quality Enforcement Section (HQES) of the Department of Justice (DOJ) on January 1, 2006.

The Board submitted a report, prepared by Integrated Solutions for Business & Government, Inc., to the Legislature on the VE/P model in June 2009. The 2009 report provided extensive statistical Board data showing select data markers for the period January 2005 to December 2008. It also recommended continuing the VE/P model with modifications.

An August 2010 report, by Benjamin Frank LLC Management Consultants, evaluated the Board's programs. This Frank report suggested implementing 14 recommendations to improve the VE/P model.

This 2012 report will focus on a total of 21 recommendations proposed in the 2009 and 2010 evaluation reports and the Board's actions in implementing them.

The Board and HQES continue to jointly work on strengthening the VE/P model. The revised VE/P manual (Third Edition, July 2011) provides clarification on responsibilities of Board and HQES staff. Further, it states the expected time-frames to complete milestone events during the investigation and prosecution processes. A joint statewide training for all Deputy Attorneys General (DAGs) and Board investigators was held in April 2011. The training included discussions on consistency in administering the VE/P model, processing subpoenas, and techniques for promptly acquiring medical records. Many other enhancements to the VE/P model have been realized by the joint efforts of the Board and HQES staff. The Expert Reviewer Program has been reinforced with an interactive 8-hour training course for experts set to roll out in May 2012. The Board and HQES have been energetically working toward reconciling their different methods of reporting certain data markers.

Ten of the 21 recommendations from the two reports have been implemented. The July 2011 VE/P manual has been updated to incorporate suggestions in the recommendations regarding communication, clarity of roles, and statewide consistent/unified administration of the VE/P process. A joint, Board and HQES, training was held and the Expert Reviewer Program has been strengthened. Phase one of the BreEZe integrated computer system is due to be implemented by the Board in Fall 2012. An interface for DCA Boards/Bureaus and DOJ is not scheduled to be

implemented in the first phase. Discussions are continuing for the Board/DOJ interface to be released in the third quarter of 2013.

Progress has been made in filling staff vacancies, developing new positions, reviewing factors for turnover, and developing plans to minimize attrition. Attention is now being focused on ways to fill vacancies in hard to recruit areas of the State and establish incentives to retain current staff. The Board is seeking approval for six non-sworn, Special Investigator I positions. A re-alignment of the investigator classification will aid in the retention of staff.

A detailed report, fully analyzing the VE/P model, data and its effectiveness, will be provided to the Legislature during the Board's upcoming sunset review period. The impending report will provide Board and HQES integrated data needed to determine the effectiveness of the VE/P model.