

MEDICAL BOARD OF CALIFORNIA**ENFORCEMENT COMMITTEE MEETING**

Courtyard Marriot – Cal Expo
1782 Tribute Road
Sacramento, CA 95815
Golden State Rooms A and B

Thursday, January 26, 2017

MINUTES**Members Present:**

Felix Yip, M.D., Chair
Michelle Bholat, M.D.
Judge Katherine Feinstein (ret.)
Sharon Levine, M.D.
Ronald Lewis, M.D.
Jamie Wright, J.D.

Other Board Members Present:

Dev GnanaDev, M.D.
Randy Hawkins, M.D.
Kristina Lawson, J.D.
David Warmoth

Staff Present:

April Alameda, Staff Services Manager II
Liz Amaral, Deputy Director
Mike Briscoe, Staff Service Analyst
Ramona Carrasco, Staff Services Manager I
Christina Delp, Chief of Enforcement
Dianne Dobbs, Legal Counsel, Department of Consumer Affairs
Cassandra Hockenson, Public Affairs Manager
Susan Houston, Staff Services Manager II
Jacoby Jorgensen, Associate Government Program Analyst
Kimberly Kirchmeyer, Executive Director
Nicole Kramer, Business Services Manager
Regina Rao, Associate Government Program Analyst
Elizabeth Rojas, Staff Service Analyst
Paulette Romero, Staff Services Manager II
Reylina Ruiz, Administrative Services Manager
David Ruswinkle, Associate Government Program Analyst
Jennifer Saucedo, Staff Service Analyst
Jennifer Simoes, Chief of Legislation
Lisa Toof, Administrative Assistant II
Kerrie Webb, Staff Counsel

Members of the Audience:

Theresa Anderson, California Academy of Physician Assistants
Doug Becker, Investigator, Health Quality Investigation Unit
Gloria Castro, Senior Assistant Attorney General, Department of Justice
Yvonne Choong, California Medical Association
Zennie Coughlin, Kaiser Permanente
Julie D'Angelo Fellmeth, Center for Public Interest Law
Evelynne Drinker
Karen Fisher, Executive Officer, Dental Board of California
Louis Galiano, Department of Consumer Affairs
Fred Gardner
Tessa Huenis, Department of Justice, Deputy Attorney General
Andrew Hegelein, Supervising Investigator, Health Quality Investigation Unit
Marian Hollingsworth, Consumers Union Safe Patient Project
Christine Lally, Deputy Director, Department of Consumer Affairs
Mark Loomis, Supervising Investigator, Health Quality Investigation Unit

Agenda Item 1 Call to Order/Roll Call/Establishment of Quorum

The Enforcement Committee (Committee) of the Medical Board of California (Board) was called to order by Dr. Yip, Chair of Enforcement on January 26, 2017 at 2:20 p.m. A quorum was present and due notice was provided to all interested parties.

Agenda Item 2 Public Comments on Items not on the Agenda

No public comments were provided.

Agenda Item 3 Approval of Minutes from July 28, 2016 Meeting

Dr. Yip noted an error on page 37 in the 3rd paragraph. Dr. Lewis made a motion to approve the July 28, 2016 Enforcement Committee Meeting minutes with the error being corrected; s/Ms. Wright. Motion carried unanimously (6-0).

Agenda Item 4 Enforcement Program Update

Ms. Delp stated that at the conclusion of 2016, the Board had provided six training sessions to the Office of Administrative Hearings (OAH), which fulfilled a strategic objective to provide crucial training to the administrative law judges (ALJ). She stated according to Government Code section 11371, ALJs shall have medical training as recommended by the Board and approved by the director of the OAH. She noted that she and Ms. Kirchmeyer would be meeting with leadership at OAH on February 8, 2017 to discuss new training topics and other enforcement related matters including discussions about the Board's new disciplinary guidelines, which were adopted by the Office of Administrative Law (OAL) and took effect on January 5, 2017. Ms. Delp added that Board staff would be conducting a video conference with Health Quality Enforcement Section (HQES) staff from the Office of the Attorney General (OAG) to go over the disciplinary guideline revisions.

Ms. Delp stated that in previous updates, she reported that the Central Complaint Unit's (CCU) complaint time frame exceeded the mandated ten days to open a complaint. Ms. Delp was pleased to inform the Committee Members that the average time frame to initiate a new complaint was now six days. She praised intake staff in CCU for decreasing the amount of time it takes to initiate a complaint. Ms. Delp further noted that during a discussion of the Sunset Review Report during the October meeting Board Members commented that CCU's response letters were impersonal and too technical in nature. Board Members instructed Board staff to evaluate the content of those letters. Ms. Delp explained that on January 4, 2017, Dr. Yip met with Board staff to go over the response letters. She noted that the meeting with Dr. Yip was very productive and many letters had been modified. Ms. Delp stated that recently the Board of Registered Nursing (BRN) was audited by the Bureau of State Audits, and noted the audit findings recommended several processing improvements to the way complaints were handled. She noted that Enforcement Program managers were provided a copy of this audit and were asked to determine if there were any changes that needed to be made or developed to improve how business was being conducted in the Board's Enforcement Program. Ms. Delp added that she would be meeting with managers to receive their input to develop any plans of action to implement new ideas or modify current processing methods that would improve the Enforcement Program and consumer satisfaction. Lastly, Ms. Delp commented that at the July 2016 meeting Executive Director Kirchmeyer gave an update on the strategies to expedite cases. She noted that Ms. Kirchmeyer had stated that several of the recommended improvement policy changes had been implemented and staff was in the process of completing the additional changes. Ms. Delp anticipated that at the next Committee meeting, the remaining changes will be completed and/or implemented and a full report of the ISO project would be provided to the members.

Agenda Item 5 Update on the Expert Reviewers Program's Training and Recruitment Plan

Ms. Delp stated that at the July 2016 Board meeting, she presented an Expert Reviewer Program plan that consisted of three phases. Phase 1 included enhancement to the Board's website, Newsletter, development of a recruitment letter, and the creation of an expert reviewer brochure. Except for a couple of website improvements, all other tasks had been completed. Ms. Delp noted that the website improvements would be completed by mid-February.

Ms. Delp referred the committee members to agenda item five in their Board packets, which exhibits the expert reviewer brochure. She explained that this new brochure included entertaining graphics and was informative. She further noted that it provided the key requirements to become an expert, the qualities that make a good expert, and identified the responsibilities the Board expects from the experts. She stated that this brochure would be distributed at recruitment events. Ms. Delp thanked staff from the Expert Reviewer Program, the Board's Public Affairs Office, the Department's Office of Publications, and the physicians who provided quotes on their experiences as expert reviewers. Ms. Delp further noted that statistics were added to the Summer Newsletter to document how many individuals were directed to the Board's website expert reviewer page. She added, from July 1, 2016, to January 24, 2017, the Board's home page had been reviewed a total of 764 times. Ms. Delp stated that the Summer Newsletter would continue to have analytics embedded on the website so the Board could monitor the number of individuals who visit the expert reviewer page. Ms. Delp added that from July to December of 2016, a total of 47 new experts had joined the program. She stated that each

quarter Board staff sent out an announcement to the Health Quality Investigation Unit (HQIU) informing them of new experts, including the expert's specialty and whether they had attended the Board's expert reviewer training. Ms. Delp noted that the purpose of the notice was to broadcast the new expert to those who utilize them. Ms. Delp stated that Phase 2 of the recruitment plan included advertisements in newsletters, magazines, CME activities, special conferences, and medical staff meetings. She noted that on January 13, 2017, she and staff from the CCU attended the Essentials of Primary Care Psychiatry CME conference in Sacramento. She stated that they spoke with physicians about the Expert Reviewer and Medical Consultant Programs. She anticipated several physicians joining the program.

Ms. Delp stated in 2016, the Board conducted three expert reviewer training sessions. She noted that after each session, Board staff made several improvements, such as adding the overall enforcement process and removed redundant information. She explained that at the last training held in November 2016, Dr. Bholat attended and provided opening remarks to the attendees. She noted that these trainings had focused on getting the physicians already enrolled in the program to attend. She added that the total participation was 134 experts with 105 being allopathic doctors and the remaining experts were either podiatrists, osteopathic physicians, or midwives. She noted that Board staff realized that participation was low and that a survey would be sent out to experts in the program asking for their input to increase turnout. She noted that the program's focus would not only be to increase the number of experts in the program, but to make efforts to increase attendance at the training sessions.

Dr. Lewis asked Ms. Delp how long the compensation rates had been in effect and if she believed that the low compensation rates were a deterrent for people entering the program. He also asked if she found that people were dropping out of the program because of that factor.

Ms. Delp commented that she had been with the Board 18 months and those compensation rates had been in effect for quite some time. She added that she did not feel like those compensation rates entice experts to join the program.

Dr. Lewis recommended that Ms. Delp look into the statutes or check with DCA to review the compensation rates because after taxes, reviewers would only be getting paid \$75 dollars an hour. He added that the Board would not be able to find too many physicians who would assist for such a low compensation rate.

Ms. Delp commented that she understood, but added that the Board tried to encourage physicians that joining the program was based more on the principle than the payment.

Ms. Kirchmeyer commented that in order for the Board to move forward with increasing the compensation rates for experts, the Board would have to create a budget change proposal. She added that the Board had obtained an approved budget change proposal that funded overspending cost. She assured committee members that creating another budget change proposal to get higher compensation rates for reviewers was more likely to happen next year. Ms. Kirchmeyer further noted that the Board wanted to increase the rates for physicians who attended the expert review training because it is such a vital training course for the program. Ms. Kirchmeyer stated she would create concept papers for a new budget change proposal to increase compensation rates for reviewers.

Judge Feinstein asked if there were any particular medical specialties that the program lacks sufficient expert reviewers in, and if so, what was being done to recruit those specialties to the expert reviewer program.

Ms. Kirchmeyer asked committee members to turn to page ENF 11B-1 in their packets that showed a list of specialties where physicians were sufficient and areas where there were deficiencies. She added that those deficient specialties are areas that Ms. Delp and her staff were targeting.

Ms. Delp added that the list on ENF 11B-1 showed the number of physicians, their specialty, and the additional specialists needed. She added that at recruitment conferences her staff would be focusing on those specialties that are needed.

Dr. Yip commented that one of the strategies the Board was trying to use to recruit physicians for the program was to make the expert review training a CME activity. He added that this would give the physicians who are participating at least 6 to 8 hours of CME.

Ms. Wright asked if the Board had been advocating for higher rates for the Expert Review Program, and is the program using comparable data that informs physicians that their subspecialty could pay them differently depending on if the case was a civil matter, etc. If so, she asked what had been the reaction to that concept.

Ms. Kirchmeyer commented that it had not moved forward yet. She added that because of the current budget, the concept Ms. Wright mentioned is difficult to pursue at this time. She noted that once a new budget has been agreed upon, the Board can see what happens once they increase the compensation rates for different specialties.

Ms. Kirchmeyer commented that usually a physician who joins the Expert Reviewer Program is a person who wants to do their job to protect the public and serve the community rather than join to make a profit.

Dr. Levine commented that she agrees with Ms. Kirchmeyer's statement about public service. She added, that part of the Hippocratic Oath of physicians is that they commit to the maintenance of the profession and in many ways services on the Expert Review Program can contribute to that maintenance. She further noted that the quality of the physicians joining the program is crucial for public safety and hopefully the Board can make a strong case to increase the pay.

Ms. Kirchmeyer commented that unfortunately the quality of the expert is not seen until the Board receives a report from their first case. She noted that having the physicians attend the expert reviewer training before they join the program would hopefully improve the quality of the expert.

Dr. Bholat commented that she had spent a decade being an expert reviewer and had enjoyed serving the public. Dr. Bholat further noted that her mission when meeting with her Legislators was how to leverage academic institutions. She noted that she enjoyed the recruiting event she attended in November and the Board staff provided outstanding and clear information. She was impressed by the conversations and questions from the wide spectrum of specialists that attended. Dr. Bholat said she agrees with the idea of additional pay for attending the expert reviewer training.

Judge Feinstein asked a follow-up question regarding the list of experts. She stated that she was confused because the list shows the specialties, the number of cases reviewed by experts, and how often experts were utilized. However, she wanted to know where the Board is lacking in regard to experts.

Ms. Kirchmeyer asked Judge Feinstein to look on page ENF 11B-1 in the narrative section. She stated that there is a list of specialties where the Board is deficient.

Ms. Castro stated in regard to Dr. Lewis's question about the repayment method for expert reviewers, that for report writing, it is \$150 dollars compensation, which should not be balked at by the experts who are reviewing and drafting reports. She explained that the Board has been very generous when it comes to approving more hours for experts. She noted that the Expert Reviewer Program was a passive activity that could be taken in a physician's free time outside their practice. Ms. Castro stated that the big challenge is when there was testimony for a case. She noted that the testimony rate of \$200 dollars is a challenge because the Board was asking a physician to take a day out of their busy schedule to come out and testify for a low compensation rate. She added that this was an issue because the Board's expert witnesses would be battling another expert on the defense, who is possibly getting a better compensation rate for their appearance in court. She stressed to the committee members that it was difficult for a physician to recover from the day they sacrificed to appear in court as an expert witness. She noted that there really is nothing the Board could do about issues with experts taking time off from their practice to testify but she emphasized the importance of trying to settle a case rather than wasting public resources. She added that this could create issues for expert contracts, because, if a case is cancelled, they do not get paid for that day even though they took the day off from their practice to testify. She explained that their contract with experts could be refined to explain the cancelation policies.

Dr. Levine asked Ms. Castro if these cases were settled on the courthouse steps then experts do not get paid at all.

Ms. Castro stated that was correct, because they did not testify.

Dr. Yip stated that the Board will take the cancelation policy into consideration.

Ms. Webb wanted to clarify that the experts are getting paid for work that is being done but are not getting paid if the case is canceled even though they have taken a whole day off from their practice to testify that day, which is an issue.

Ms. Kirchmeyer stated that the contract states that experts only get paid for work done. She noted that if the expert was in court to testify, the Board would pay for their travel and the work done, however, if they were not in court to testify, the Board would not pay them for that day.

Dr. Yip suggested creating a survey for existing experts to give their input on the issues with the program. Dr. Yip noted that retention of experts is obviously an issue that needs to be addressed.

Dr. Bholat added that an expert is usually happy when the settlement occurs because they are not required to show up on the witness stand, which can be challenging. She added that she supports looking into what can be done about the cancellation policy for experts.

Agenda Item 6 Presentation on the Central Complaint Unit's Complaint Handling Process – Ms. Romero

Ms. Romero gave the committee members an overview of the Central Complaint Unit (CCU) process. Ms. Romero stated that the most important thing to note about the CCU process was the mandated priorities. She added that there were certain priorities to consider when investigating a case. She noted that these priorities include gross negligence, incompetence or repeated negligent acts involving patient death; drug or alcohol abuse; involving patient harm; excessive prescribing without an appropriate examination; sexual misconduct; and practicing medicine under the influence of alcohol. Ms. Romero noted that with the mandated priorities CCU is divided into two sections. She noted that one section processed quality of care cases and the other section processed physician conduct cases. Ms. Romero stated that CCU gets a plethora of cases from many different sources such as members of the public, other physicians, medical facilities, insurance companies, court clerks, etc. She further explained that once a complaint comes in, it goes to intake staff so they can enter the case into the system and distribute them to an analyst based on the mandated priorities. Ms. Romero explained that once a complaint was received by an analyst in CCU, it gets analyzed to see if it falls within the Board's jurisdiction. She noted that if the complaint falls within the Board's jurisdiction, the analyst contacts the patient for authorization to have their medical records released to the Board, which is crucial in order to proceed with the case. Ms. Romero noted that after obtaining the release for medical records, the Board is required to contact the physician to provide a summary of the complaint allegations and to give the physician an opportunity to respond. She continued to explain that once the analyst gets the medical records, the physician's response, and all other important documents, the case is then reviewed by a medical consultant (MC) if the case is regarding quality of care. All other cases that have to do with a physician's conduct are usually processed by Board staff and do not require an MC review.

Ms. Romero stated that the medical consultant program (MCP) is a program used by the Board for quality of care cases that must be reviewed by an MC to determine if the physician practiced within the standard of care. She noted that the MC must be in the same specialty as the subject being investigated. She noted that CCU could bypass sending the case to an MC and send it straight to investigation if that physician already had an accusation filed against them. Ms. Romero added that the MCP was different than the Expert Review Program. She noted that the criteria to be an MC included having a current valid license, active practice or retired within the last three years, possess specialty certification, no record of complaints on file with the Board, and peer evaluation experience was desired. She further noted that these consultants were not like the expert reviewers. These physicians are reviewing the complaints and determining if the evidence presented warrants further investigation. Ms. Romero noted that there were three possible CCU outcomes for a case. She noted that a case could be closed because there was insufficient evidence to warrant administrative action against a physician's license, referred for an investigation to pursue administrative action, or referred for a citation and fine. Ms. Romero noted that a citation and fine could be issued to a physician if they did not provide medical records in a timely matter, did not maintain medical records properly, or had

failed to sign a death certificate on more than one occasion. She added that these were just some examples that could warrant a citation and fine.

Ms. Romero gave a brief summary of the complaint statistics for CCU for fiscal year 2015-2016. She noted that there were approximately 8,679 complaints received, and closed 9,001 complaints, which was more than received but they were closing some cases from the prior year. She added that CCU referred 1,654 cases to investigation and issued 55 citations and fines. Ms. Romero further noted that the average number of days to review a complaint in CCU was 146 days, however, as of January 6, 2017, CCU was down to 138 days.

Dr. Lewis asked out of those 1,654 cases referred to investigation, what percentage of those would come before the Board for review in a year.

Ms. Romero stated it is a small number but approximately about 400 would result in disciplinary action.

Dr. Bholat stated that she would be interested to know whether there was also a lack of specialist within the MCP.

Ms. Romero stated that she had checked with her MC analyst and was informed that there were 230 active MCs working for CCU, however, the program was in need of neurosurgeons, gastroenterologists, and nephrologists. She added that CCU was trying to recruit for these three areas of deficiency.

Dr. Bholat asked what MCs get paid hourly.

Ms. Romero stated they get paid \$75 dollars an hour.

Dr. Bholat asked why they are getting paid less.

Ms. Romero stated MCs are not required to testify at hearings and are writing memos, not reports.

Dr. Bholat stated she would be interested to see, geographically, where the professional shortage areas are, and hospital versus nonhospital and what the physician specialties are.

Ms. Romero stated that CCU could obtain data on the source of complaints, and the geographical area where the complaints are occurring; however, she did not think she could gather data on the specific individuals who are filing complaints. She noted that a lot of the complainants are anonymous or duplicative, but she would work with the Board's Information Services Branch to obtain the data. She added that staff could identify the sources of the complaints but was unsure if more specific data could be collected.

Dr. Yip asked how many MCs are full-time and part-time.

Ms. Romero stated that all MCs are contracted by the Board and are only contacted when needed, as they are not in-house MCs.

Ms. D'Angelo Fellmeth asked Ms. Romero if there was a fourth CCU outcome which was to refer a case to the non-sworn Complaint Investigation Office.

Ms. Romero stated that it is still considered referring the case to investigation because they are still investigators, however, they are just non-sworn.

Agenda Item 7 Probation Unit's Performance Measures – Ms. Delp

Ms. Delp noted that at the July 2016 Board meeting, she and Enforcement Probation Manager Susan Houston gave a presentation regarding the disciplinary actions taken for violations of probation as well as the time it takes to complete an action. She added that during the presentation, committee members asked what metrics were in place to ensure that the Probation Unit was complying with the time frames to complete an action. She stated that DCA had implemented performance measures in July of 2016, which required boards and bureaus to report to DCA to ensure enforcement goals are being met. She explained that the newly implemented measures were now being used by the Board to determine if the timeframe goals to initiate and complete an action were being met.

Ms. Delp stated that performance measure seven tracks the initial cycle time from the date when a probation inspector is assigned to a case to the date the inspector makes contact with the probationer. Ms. Delp also noted that Board management had set a target metric of 25 days. She explained that after the disciplinary order was adopted, the probation case must be assigned and the probation inspector must make contact with the probationer within 25 days. She noted that the Probation Unit had been meeting this target with an average time of five days. Ms. Delp further explained that performance measure eight tracks the violation cycle time.

She noted that this number is from when an inspector confirms or supports with evidence that a violation of a term and condition of probation may have occurred to when management has provided approval for the appropriate action to be taken for the violation of probation. Ms. Delp noted that the Department again deferred the authority to boards and bureaus to establish the baseline target. She added that Board management set a target of 10 days. She continued to explain that agenda item seven demonstrated the Board's effort to meet performance measure eight.

Ms. Delp stated that during January 2016, through December 31, 2016, the biological fluid testing condition of probation was violated the most by probationers. She noted that the second highest category that probationers violate was non-practice for a period of 2 years, controlled substance log not properly maintained and general probation requirements. These violations were grouped together because they do not occur often enough for the volume to be reported as a separate violation category. She continued to explain that the third category that probationers violate was not complying with either billing, practice, or work site monitor conditions. And finally, she noted that the fourth highest violation was not submitting timely quarterly declarations, violations related to the clinical training program, maintaining a current valid license, and paying probation monitoring costs.

Ms. Delp explained the breakdown of the violations of the biological fluid testing condition of probation. She noted that a probationer is in violation of probation if he or she fails to take a biological fluid test when required, fails to call in daily to see if required to test, has a positive test, or fails to

enroll in the biological fluid testing program. She noted that failing to test when required is the top violation of probation. She continued to explain the three monitoring conditions of probation which are practice, worksite, and billing monitors. She noted that a cease practice order is issued when a probationer violates this condition for not having an approved monitor within 60 days of the effective date of the disciplinary order. She noted that the worksite monitor condition is from the Uniform Standard for Substance-Abusing Licensee's terms and conditions for probation and is considered a minor violation of probation. She noted that a cease practice order is not the only action the Board can take for non-compliance of the worksite monitor condition. She explained that a few, but not all, actions that the Board can take include issuance of a citation and fine, ordering the licensee to undergo a clinical diagnostic evaluation, or increase supervision of the licensee. Ms. Delp continued to explain the clinical training program condition of probation. She noted that failing the clinical training assessment will violate the condition of probation resulting in a cease practice order.

Ms. Delp added that the top five actions the Board has taken for violations of probation were issuance of a non-compliance letter, referral for a petition to revoke probation, issuance of a citation and fine, issuance of a cease practice order, or both a cease practice and a petition to revoke probation. She noted that the average time to take on any of these violations is ten calendar days. She noted that January 5, 2017, performance measures were shared with Enforcement Chair, Dr. Yip. She noted that management and Dr. Yip had productive discussions on how to improve these timeframes. She explained that Board staff takes probation very seriously and is meeting the target metrics. She noted that management and staff are continually finding ways to improve the timeframes.

Agenda Item 8 Future Agenda Items

No future agenda items were provided.

Agenda Item 9 Adjournment

There being no further business, the meeting was adjourned at 3:23 p.m.

The full meeting can be viewed at www.mbc.ca.gov/board/meetings/Index.html