

# MEDICAL BOARD OF CALIFORNIA



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## DISCIPLINARY GUIDELINES

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### Board's Priority



- ▶ Protection of the public shall be the highest priority for the Board in exercising its licensing, regulatory and disciplinary functions.
- ▶ Whenever protection of the public is inconsistent with other interests sought to be promoted, the protection of the public SHALL BE PARAMOUNT.

B&P Code § 2001.1

## Board's Priority



- ▶ Protection of the public SHALL be the highest priority for administrative law judges (ALJ) and the Board in exercising their disciplinary authority.
- ▶ In exercising disciplinary authority ALJ/Board shall whenever possible take action calculated to aid in the rehabilitation of the licensee as indicated by the evidence.
- ▶ HOWEVER, where rehabilitation and protection of the public are inconsistent, PROTECTION SHALL BE PARAMOUNT!

B&P Code § 2229

## Goal of Discipline



- ▶ **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)

## Disciplinary Guidelines

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### ▶ Purpose of Disciplinary Guidelines:

- Assist the Board in evaluating cases
- Help foster uniformity, consistency, and fairness
- Act as a deterrence

## Disciplinary Guidelines

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### ▶ Where did the Disciplinary Guidelines Come From?

- They were drafted by Board staff and members with active involvement from stakeholders.
- They went through the customary rulemaking process, which includes public hearings.
- They are incorporated by reference into regulation at Title 16 CCR § 1361.
- They are amended as needed, following the rulemaking process. We are on our 12th edition!

## Disciplinary Guidelines

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- ▶ Contain model orders
- ▶ Organized by code section violated
- ▶ Show maximum and minimum levels of discipline
- ▶ Contain standard and optional conditions of probation

## Disciplinary Guidelines

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- ▶ Applicable to both Proposed Decisions and Stipulations
  - ▶ Proposed Decision – Written by ALJ after administrative hearing.
  - ▶ Stipulation – Agreement reached between the parties after settlement negotiations, prior to a hearing, and often involves input from an ALJ.



## PDs vs. Stipulations

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### ▶ How are Proposed Decisions and Stipulations Different?

- A PD results from a full administrative evidentiary hearing.
- A stipulation is a proposed settlement between the parties designed to avoid the delay and uncertainty of going to hearing.

## PDs vs. Stipulations

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### ▶ How are Proposed Decisions and Stipulations Different?

- Both must consider/use the disciplinary guidelines in determining discipline.
- PD must state the reasons for deviation from the guidelines, while a stipulation does not.

◦ **WHY???**

## PDs vs. Stipulations

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- ▶ The settlement discussions under the law are confidential, & designed to promote a speedy resolution without the need for hearing.
- ▶ Confidential reasons for stipulation and deviation from guidelines are provided to the Board in a deputy attorney general (DAG) memo.
- ▶ If no settlement is reached, or if Board rejects the stipulation, motives for attempting settlement cannot be used against either party at a hearing.

## Reviewing Cases – PDs

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- ▶ **Step 1:** Review the Accusation, noting the allegations.
- ▶ **Step 2:** Read the PD and determine:
  - What if any allegations have been sustained in the legal conclusions;
  - Whether the decision identifies the correct standard of proof (clear and convincing evidence) and cites evidence in support of each conclusion based on information noted in the factual findings.

## Reviewing Cases – PDs



- ▶ **Step 3:** Review the Disciplinary Guidelines to determine the minimum/maximum discipline for each allegation sustained.
- ▶ **Step 4:** Determine whether the discipline ordered follows the guidelines for each violation.
  - If not, does the PD provide adequate justification for the deviation?

## Reviewing Cases – PDs



- ▶ **Step 5:** Determine whether the proposed discipline provides sufficient consumer protection and, where possible, rehabilitation.
  - Note: When considering a PD, the Board shall give great weight to the findings of fact of the ALJ.

B&P § 2335(c)(1)
- ▶ **Step 6:** After review and consideration, vote to adopt or hold the PD for discussion.

## Reviewing Cases – PDs

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## Example

## Reviewing Cases – Stips

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- ▶ **Step 1:** Review the Accusation, noting the allegations.
- ▶ **Step 2:** Review the Disciplinary Guidelines to determine the minimum/maximum discipline for each allegation.
- ▶ **Step 3:** Read the stipulation.
- ▶ **Step 4:** Read the DAG memo.



## Reviewing Cases – Stips



- ▶ **Step 5:** Determine whether the stipulated discipline is within the guidelines for each alleged violation.
  - If not, does the DAG memo provide adequate justification for deviation?
- ▶ **Step 6:** Determine whether the stipulation provides sufficient consumer protection and, where possible, rehabilitation.
- ▶ **Step 7:** After review and consideration, vote to adopt or hold the stipulation for discussion.

## The Burning Question



- ▶ **Question:** How can deviation from the Disciplinary Guidelines ever be consistent with the Board's consumer protection mission?
- ▶ **Answer:** When, under the facts of the case, the stipulation provides sufficient discipline and imposes rehabilitation measures, in a timely manner.

## Deviation from Guidelines

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### ► Factors that may warrant deviation:

- Corrective actions taken (mitigation)
- Witness unavailability
- Witness credibility
- Dueling experts
- Expert credibility
- Age of violation
- Value of more immediate discipline
- Level of certainty that discipline will be obtained at hearing

## Reviewing Cases – Stips

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### Example

## Role of Stipulations

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Through settlement, when the terms provide sufficient consumer protection, the Board is able to get the licensee disciplined, monitored, rehabilitated, etc., sooner without the delay and uncertainty of a hearing.

## Any Questions?

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