

MEDICAL BOARD STAFF REPORT

DATE REPORT ISSUED: October 14, 2015
ATTENTION: Members, Medical Board of California
SUBJECT: Consideration of Administrative Petition from Consumers Union
Safe Patient Project
FROM: Kerrie Webb, Senior Staff Counsel

REQUESTED ACTION:

After review and consideration of the petition filed by the Consumers Union Safe Patient Project (CUSPP) pursuant to Government (Gov.) Code section 11340.6, grant or deny the petition.

If the Members vote to deny the petition, instruct staff to work with the Board President to draft a letter indicating why the Medical Board of California (Board) has reached its decision on the merits of the petition, and to transmit the letter to the Office of Administrative Law pursuant to Gov. Code section 11340.7. If the Members vote to grant the petition, instruct staff to proceed with the regular rulemaking process to make the requested amendments to the Board's Manual of Model Disciplinary Orders and Disciplinary Guidelines (Disciplinary Guidelines).

BACKGROUND:

Under Gov. Code section 11340.6, interested parties may petition state agencies to promulgate regulations. CUSPP has petitioned the Board for regulations to require that physicians on probation disclose their probationary status to their patients (See Attachment A). Specifically, CUSPP petitions the Board to amend its Disciplinary Guidelines to require as a standard condition of probation:

1. that physicians who continue to see patients be required to inform their patients of their probationary status;
2. that patients be notified of the physician's probationary status when the patient contacts the physician's office to make an appointment;
3. that this disclosure be required to be in writing and signed at the time of the patient's appointment by each patient the physician sees while on probation to acknowledge the notice;
4. that this disclosure be posted in the physician's office in a place readily apparent to patients;
5. that the written disclosures described in 3 and 4 above include at least a one-paragraph description of the offenses that led the Board to place the physician on probation;
6. that the written disclosures include a description of any practice restrictions placed on the physician;
7. that the patient be referred for more details to Board online documents related to the physician's probation;
8. that the physician maintain a log of all patients to whom the required oral notification was made. The log should contain the following: 1) patient's name, address and phone number; patient's medical record number, if available; 3) the full name of the person making the notification; 4) the date notification was made; 5) a copy of the notification given; and 6) a signed attestation by the patient that notification was received. Respondent shall keep this log

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in a separate file or ledger, in chronological order, shall make the log available for immediate inspection and copying on the premises at all times during business hours by the Board or its designee, and shall retain the log for the entire term of probation.

If the Board grants the petition, then the matter will proceed through the regular rulemaking process in accordance with Gov. Code section 11346, et seq.

If the Board denies the petition, then the Board is required to notify CUSSP in writing within 30 days of receipt of the petition indicating why the agency has reached its decision on the merits of the petition. Pursuant to discussions, CUSSP understands that the Board may require additional time to respond.

CURRENT LAW

Standard Condition number 27 in the Board's Disciplinary Guidelines requires the licensee to provide a copy of his or her disciplinary decision and accusation to the Chief of Staff or Chief Executive Officer at every hospital where privileges or membership are extended to the licensee. A copy must also be provided at any facility where the licensee engages in the practice of medicine, including all physicians and locum tenens registries, and to the Chief Executive Officer at every malpractice insurance carrier which extends malpractice insurance coverage to the licensee.

Additionally, under Optional Condition number 25, the Board currently may require a licensee to provide written notification to patients in circumstances where the licensee is required to have a third-party chaperone present during the consultation, examination, or treatment by the licensee. Notification to patients may also be required if Optional Condition number 26, regarding Prohibited Practice, is included in the licensee's probationary order.

Pursuant to reports by Executive Officers in California, no other health care Board or Bureau mandates all of its licensees on probation to report their probationary status to patients. Moreover, no medical board in the country, that responded to staff's inquiry on the subject, mandates all of its licensees on probation to report their probationary status to patients.

PREVIOUS BOARD ACTION

At its October 2012 Board Meeting, the Members considered adding Notification to Patients of Physician's Discipline as an issue to present to the Legislature as part of the Sunset Review process. The Board rejected this proposal, and instead wanted the focus to be on educating the public to obtain information about physicians from the Board and its website.

**Administrative Petition
from Consumers Union Safe Patient Project and Activists
Calling on the Medical Board of California to
Require that Physicians on Probation Inform their Patients of the Physicians' Probation**

I. Introduction

California state statute requires that protection of the public is the Medical Board of California's (MBC) paramount responsibility and gives the MBC authority to discipline physicians, including placing them on probation. State law gives the MBC broad discretion to impose restrictions on physicians on probation. The MBC Manual of Model Disciplinary Orders and Disciplinary Guidelines already requires that physicians on probation disclose to hospitals and malpractice insurers when they are on probation, but has no such requirement for notifying physicians' patients. A policy passed by the MBC in October 2014 stated it was MBC policy that all California consumers should know the history of disciplinary actions of any healthcare provider they may consider seeing. This petition is brought by the Consumers Union Safe Patient Project California Network (CUSPP) and its activists who believe the MBC should exercise its authority and fulfill its responsibility by requiring that physicians on probation disclose their probation status to their patients. Many California patients unknowingly receive health services from physicians who have been placed on probation for a range of offenses including offenses related to substance abuse, sexual misconduct, violence, patient deaths, incompetence, gross negligence, repeated negligent acts and other miscellaneous violations.

Generally, patients are unaware when their physician is on probation, but the public has concerns about physicians on probation continuing to practice as usual. In a Consumer Reports National Research Center telephone survey of a nationally representative sample, 79% of respondents agreed that when a physician's license is limited, suspended or revoked, the physician should be restricted to work that does not require patient care or treatment until their licenses are in good standing again.

Physicians on probation are much more likely to require further discipline than physicians who were never disciplined. When the MBC allows physicians to continue practicing medicine while on probation, those physicians should notify their patients so they are aware of any probationary limitations and can decide for themselves whether or not they want to entrust their care to a physician on probation. Patients have a right to know when their physician has been sanctioned by the MBC.

II. Parties

A. Petitioners

Consumers Union Safe Patient Project (CUSPP), a nationwide campaign, has organized a California Network of patient safety advocates. CUSPP has been working in California on issues relating to hospital safety (hospital-acquired infections and medical errors) since 2003. Members of the CUSPP monitor agency meetings, testify at legislative hearings and participate as members of various health-related state committees. For several years, CUSPP has been monitoring the work of the Medical Board of California. We share with the MBC a similar mission of protecting health care consumers.

B. Respondent

Kimberly Kirchmeyer is the Executive Director of the Medical Board of California, the mission of which is to protect healthcare consumers through proper licensing and regulation of physicians and surgeons.

III. Statement of Facts

California physicians on probation

Physicians are routinely placed on probation by the MBC for multiple years. Generally, while on probation these physicians are allowed to continue practicing medicine, often with limitations and requirements, but most commonly they are not required to provide any information to their patients regarding their MBC discipline. As of September 29, 2015, nearly 500 California physicians – among 102,000 California physicians in active practice – were on probation. (Spreadsheet obtained upon request from the MBC Executive Director, October 5, 2015)

According to the MBC, during fiscal years 2011-2012 and 2012-2013, 444 of 561 physicians on probation were *actively practicing* in California. (Probation Monitoring, MBC documents distributed at the October 23, 2013, Enforcement Committee Meeting, agenda item # 9.)

Physicians are placed on probation following the Attorney General making an accusation for a variety of reasons, for example, gross negligence/incompetence (the most common reason for probation), substance abuse, inappropriate prescribing, sexual misconduct, conviction of a felony and other miscellaneous violations. Typically, the MBC does not take action on a finding of guilt; instead, the Attorney General provides the accusation to the MBC and the MBC takes action based on the physician agreeing to the action without a finding of guilt.

Significant rates of recidivism

The California Research Bureau (CRB) in its November 2008 report, *Physician Misconduct and Public Disclosure Practices at the Medical Board of California*, reported that physicians who have received serious sanctions are far more likely to receive additional sanctions in the future. According to the CRB report, *"These findings strongly imply that disciplinary histories provide patients with important information about the likely qualities of different physicians."*

The CRB cited research that examined physician discipline data from the Federation of State Medical Boards. The researchers split their sample into two periods, Period A 1994 – 98 and Period B 1999 – 2002. They classified physicians by whether they had no sanctions in the period, or had been assessed with one or more mild, medium or severe sanctions. Severe sanctions encompassed disciplinary actions that resulted in the revocation, suspension, surrender, or mandatory retirement of a license or the loss of privileges afforded by that license. The medium sanctions included actions that resulted in *probation*, limitation, or conditions on the medical license or a restriction of license privileges.

The study found that less than 1% of physicians who were unsanctioned during Period A were assessed a disciplinary action during Period B. However, physicians sanctioned during the earlier period were *much more likely* to be assessed additional sanctions in the second period, for example:

- 15.7% of those who received a medium sanction in Period A went on to receive either a medium or a severe sanction in Period B;
- physicians who received a medium sanction in Period A were 28% more likely to receive a *severe* sanction in Period B than someone who received no sanction in period A; and,
- physicians who received a medium sanction in Period A were 32% more likely to receive *another medium* sanction in Period B than someone who received no sanction in Period A.

(An Evaluation of Physician Discipline by State Medical Boards." By Darren Grant, and Kelly C Alfred, Journal of Health Politics, Policy and Law, Vol.32, No. 5, October 2007, Duke University Press)

MBC's own data tells a similar story. In FY 2011-2012 and FY 2012-2013, 17% of 444 actively-practicing California physicians on probation (77 doctors total) either required subsequent discipline or surrendered their licenses while on probation. (Probation Monitoring, MBC documents distributed at the October 23, 2013, Enforcement Committee Meeting, agenda item # 9.)

Patients uninformed of their physician's probation

When the MBC places physicians on probation, generally they continue to practice medicine and see patients. The MBC posts information regarding probation on its website and distributes the information to its email list which includes media and interested persons who have signed up to receive it. Sometimes local media outlets cover stories about local physicians being disciplined

by the MBC. While the MBC makes some effort to disclose the actions they take, it is unreasonable to rely on emails, postings on the MBC website and occasional media articles to inform patients when their physician has been disciplined. We suspect that most patients do not even know that the MBC exists, let alone check the MBC website regularly for information about their physicians. A related 2011 Consumer Reports National Research Center telephone survey of a nationally representative sample revealed that only one-quarter of respondents (26%) said they would know where to file a complaint about a medical error they experienced at a hospital. This lack of awareness may also extend to where to file complaints against physicians. *Most patients are unaware of the regulatory agencies entrusted with the mission of protecting patient safety.*

According to a recent Pew Research Center U.S. analysis, seniors, i.e., those most likely to seek healthcare, are also the group most likely to say they never go online. About four-in-ten adults ages 65 and older (39%) do not use the internet, compared with only 3% of 18- to 29-year-olds. One-in-five African Americans, 18% of Hispanics and 5% of English-speaking Asian-Americans do not use the internet, compared with 14% of whites.

Even in cases where a patient is aware of the Medical Board, it is unlikely that it would occur to a patient, who has been in a particular physician's care for many years, to check whether the physician has recently been disciplined. Under its current guidelines, it is the MBC's general practice to keep patients in the dark regarding physician discipline. In some cases this leaves patients vulnerable to dangerous care.

Occasionally, the MBC includes a requirement that a disciplined physician notify patients regarding the discipline. For example, the following requirement to notify patients was placed on Dr. J.V.G. when he was placed on seven-years probation by the MBC in 2015.

"During probation, respondent is prohibited from performing any of the following procedures on any patient: diaphragmatic herniorrhaphies, gastrectomy, small and large bowel incision and resection, common duct incisions, diverting biliary procedures, splenectomy, adrenalectomy, radical lymphadenectomy, thyroid resection, parathyroid resection, salivary gland resection, thyroglossal duct cyst resection, bronchoscopy, upper extremity-minor, laparoscopic (lysis of adhesions, vagotomy, herniorrhaphy), lymphadenectomy, cystoscopy, pancreas incision and resection, hepatic surgery, liver resection and esophageal diverticula resection. In addition, during probation, respondent is also prohibited from providing emergency room (ER) on call coverage. This prohibited practice condition shall remain in full force and effect until and unless respondent provides satisfactory proof of his successful completion of the Clinical Training Program (PACE)... all patients being treated by the respondent shall be notified in writing that he is subject to the aforementioned prohibited practice condition which shall list each of the prohibited procedures and activities listed above. All new patients must also be provided with this written notification at the time of their appointment... Respondent shall maintain a log of all patients to whom the required written notification was made." (emphasis added) (May 11, 2015 Stipulated Settlement and Disciplinary Order in the

case of Dr. J.V.G., page 8;
<http://www2.mbc.ca.gov/BreezePDL/default.aspx?lastName=&firstName=&licenseType=C&licenseNumber=42883>)

And in another example, the following requirement to notify certain patients, i.e. family members, was required of Dr. C.C.A. when she was placed on probation by the MBC in in 2012 and in 2015:

"During the probationary term, Respondent shall continue to be prohibited from prescribing, furnishing, and/or providing samples of narcotics, dangerous drugs, and/or controlled substances to any family member. Respondent shall further be prohibited from treating, diagnosing, or counseling any family member during probation. After the effective date of this Decision, the first time that a family member seeking the prohibited services contacts Respondent, Respondent shall orally notify the family member that Respondent is prohibited from prescribing, furnishing, and/or providing samples of narcotics, dangerous drugs, and/or controlled substances to any family member and is further prohibited from treating, diagnosing, or counseling any family member during the probationary period." (emphasis added) (January 20, 2015 Stipulated Settlement and Disciplinary Order in the case of Dr. C.C.A., page 5;
<http://www2.mbc.ca.gov/BreezePDL/default.aspx?lastName=&firstName=&licenseType=A&licenseNumber=105195>)

At a March 2015 Joint Oversight Hearing, legislators expressed dismay that patients are not informed when health practitioners are on probation. Senator Marty Block, member, Senate Business, Professions and Economic Development committee said:

"But my question is 'how do we protect patients, prospective patients, when a dentist is on probation. Is there a sign that tells them the dentist is on probation? If I go into a dentist's office, how do I know my dentist is on probation?' I know, by the way, that there is now a requirement that people are told there's a website they can go to. My guess is that virtually no people go to that website. My guess is that if we took a survey of a hundred people coming out of Ralph's 98 would say they have never gone to that website but they all go to the dentist... If a dentist is a known meth user, if a dentist has burned, disfigured, and killed a patient, why not have them put up a sign that says that in their office?... it's not just dentists...there are probably the same problems with many other health practitioners..."

Jerry Hill, chair, Senate Business, Professions and Economic Development Committee:

"...when you go into a restaurant in many counties... there's a sign that says you didn't get an A, you got a C. It lets people know that there's a difference in that restaurant. Is there any other notification provision for dentists who are on suspension or have particular problems other than going to a website?"

(March 23, 2015. Joint Oversight Hearing, Senate Business, Professions and Economic Development Committee and Assembly Business and Professions Committee

7:31:21 to 7:38:10: http://calchannel.granicus.com/MediaPlayer.php?view_id=7&clip_id=2664)

MBC staff proposal for an effective consumer notification

In October, 2012 MBC staff made a proposal to the MBC to require physicians to inform their patients when the physician is on probation and required to have a monitor. In its recommendation staff said, *"This would insure the public has the ability to make informed decisions regarding their healthcare provider."* (Draft MBC Sunset Review Report presented at the MBC Quarterly Board Meeting in October 2012). During the board meeting discussion, then-MBC-board member, Sylvia Diego, M.D. said:

"I think the big governing bodies have no trouble finding out. It's the patient who, at the end of the day, is the consumer protection who we're after. They're the ones who are going to have the hardest time finding out. Because the hospitals and everyone else, they are all going to find out."

Unfortunately, the Board rejected the proposal. (MBC Quarterly Board meeting webcast October 12, 2013, 4:40 to 4:51)

IV. Right to Petition

This petition is filed pursuant to the California Constitution, which guarantees the public the right to petition the government for redress of grievances. Cal. Const. Art. 1 Section 3. Additionally, this petition is filed pursuant to the Government Code. Cal. Gov. Code section 11340.6. This provision mandates a speedy response or a public hearing. (Cal. Gov. Code Section 11340.7)

V. Legal Claim

The MBC's paramount responsibility is patient safety and the MBC has the authority and responsibility to require disclosure to patients when their physician is on probation.

MBC-related statutes and policies – patient safety and right to know

Business and professions code 2229 requires that "Protection of the public shall be the highest priority" for the MBC.

MBC Policy Compendium, Policy and Principles 3) states that "The Board holds that *all California Consumers should know* the background, training, education, certification and *history of disciplinary actions of any healthcare provider they may consider seeing.*" (emphasis added) (approved by the MBC October 24, 2014)

MBC-related statutes – MBC authority to require disclosure

The MBC is empowered to discipline physicians in ways it deems proper. Business and Professions code section 2227 (a) sets forth what the MBC may do in disciplining a physician

(e.g., revoke or suspend a license, place a physician on probation, etc); Business and Professions code section 2227 (a) (5) further states that a licensee can "Have any other action taken in relation to discipline as part of an order as the board or administrative law judge may deem proper."

MBC Manual of Model Disciplinary Orders and Disciplinary Guidelines

The MBC Manual of Model Disciplinary Orders and Disciplinary Guidelines (MBC Manual) states that, "Consistent with the mandates of section 2229, these guidelines set forth discipline the Board finds appropriate and necessary for the identified violations." The MBC Manual includes standard conditions that generally appear in all probation orders as well as optional conditions the use of which depends on the nature and circumstances of the particular case. The MBC Manual states that any proposed decision or settlement that departs from the disciplinary guidelines is required to identify the departure, and the facts supporting the departure. (MBC Manual of Model Disciplinary Orders and Disciplinary Guidelines, 11th edition, 2011, page 6)

Currently, Standard Condition 27 in the (MBC) Manual of Model Disciplinary Orders and Disciplinary Guidelines requires that physicians disclose their probationary status:

- at every hospital where the physician has privileges;
- at any facility where the physician engages in the practice of medicine;
- to every malpractice insurance carrier that provides coverage to the physician.

(MBC Manual of Model Disciplinary Orders and Disciplinary Guidelines, 11th edition, 2011, page 2)

Currently, Optional Condition 26 allows for direct notification of patients of physicians who are on probation and have restrictions on their practice. However, this is *optional*, not standard and is not routinely used. Optional Condition 26 describes a process for notifying patients. (MBC Manual of Model Disciplinary Orders and Disciplinary Guidelines, 11th edition, 2011, page 21)

VI. Relief

Physicians' probationary status is already public information, posted on the MBC website, disclosed in agency newsletters and sent in emails by the MBC to interested parties who have signed up to receive them. Physicians on probation are already required by standard MBC guidelines to report their probationary status to hospitals, malpractice insurers and others. However, patients of physicians on probation, i.e., those with the most at stake, are, for all practical purposes, kept in the dark.

Published research and practical California experience tell us that physicians on probation are much more likely to harm their patients than physicians who have not been disciplined. Petitioners believe that, in the interest of fostering patient safety, and in the interest of government transparency, the MBC should timely exercise its authority and fulfill its responsibility by amending its guidelines to require that physicians on probation disclose their probationary status to their patients.

WHEREFORE, Petitioners pray:

That MBC amend its Manual of Model Disciplinary Orders and Disciplinary Guidelines to require as a standard condition of probation:

1. that physicians who continue to see patients be required to inform their patients of their probationary status;
2. that patients be notified of the physician's probationary status when the patient contacts the physician's office to make an appointment;
3. that this disclosure be required to be in writing and signed at the time of the patient's appointment by each patient the physician sees while on probation to acknowledge the notice;
4. that this disclosure be posted in the physician's office in a place readily apparent to patients;
5. that the written disclosures described in #3 and #4 above include at least a one-paragraph description of the offenses that led the MBC to place the physician on probation;
6. that the written disclosures include a description of any practice restrictions placed on the physician;
7. that the patient be referred for more details to MBC online documents related to the physician's probation;
8. that the physician maintain a log of all patients to whom the required oral notification was made. The log should contain the following: 1) patient's name, address and phone number; patient's medical record number, if available; 3) the full name of the person making the notification; 4) the date notification was made; 5) a copy of the notification given; and 6) a signed attestation by the patient that notification was received. Respondent shall keep this log in a separate file or ledger, in chronological order, shall make the log available for immediate inspection and copying on the premises at all times during business hours by the board or its designee, and shall retain the log for the entire term of probation.

Please address follow-up to Maryann O'Sullivan, project consultant,
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Dated: October 8, 2015

Respectfully submitted by the following co-petitioners:

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