

MEDICAL BOARD STAFF REPORT

DATE REPORT ISSUED: April 6, 2015
 ATTENTION: Members, Medical Board of California
 SUBJECT: Interim Suspension Orders
 STAFF CONTACT: Kimberly Kirchmeyer, Executive Director

REQUESTED ACTION:

After presentations and discussion, pass a resolution that directs the Executive Director of the Medical Board of California (Board) to work with the Attorney General's Office (AGO) and the Department of Consumer Affairs, Health Quality Investigation Unit (HQIU) to identify strategies to expedite cases involving a physician who, if permitted to continue to practice, will endanger the public, and to issue an interim suspension order (ISO) as expeditiously as possible. A report on these strategies should be provided at the October 2015 Board Meeting.

BACKGROUND:

Pursuant to Government Code section 11529 an Administrative Law Judge (ALJ), upon a petition by the Board, may suspend/restrict a physician's license "if the affidavits in support of the petition show that the licensee has engaged in, or is about to engage in, acts or omissions constituting a violation of the Medical Practice Act ..., or is unable to practice safely due to a mental or physical condition, and that permitting the licensee to continue to engage in the profession for which the license was issued will endanger the public health, safety, or welfare." The ALJ may suspend the license or issue some sort of restriction upon the license (e.g. cannot treat female patients, have a practice monitor, undergo biological fluid testing, etc.).

It is important to point out that this ISO process is considered an extraordinary remedy and is reserved for extraordinary circumstances. Government Code Section 11529 goes on to state that an ALJ shall grant the order "if, in the exercise of discretion, the administrative law judge concludes that:

- (1) There is a reasonable probability that the petitioner will prevail in the underlying action.
- (2) The likelihood of injury to the public in not issuing the order outweighs the likelihood of injury to the licensee in issuing the order."

Significantly, Section 11529 of the Government Code also states that within 30 days after the issuance of an ISO, the Board must file an Accusation or the ISO is dissolved. In order to file an Accusation, the AGO must have evidence of a violation of the law that it can prove by clear and convincing evidence. Consequently, one major impediment to filing an ISO expeditiously after receiving the complaint is the fact that the Board cannot petition for an ISO and have the ISO granted, and then begin to investigate the allegations of wrong doing. Because of the timing of the restrictions dictated by statute, the investigation of the allegations must be completed when a petition for an ISO is filed. Some of the documents necessary to petition for an ISO include, but are not limited to, a Memorandum of Points and Authorities summarizing the case and providing the legal argument; a declaration of a medical expert who has opined, based upon a review of documents obtained by the Board, that the physician poses an immediate danger to the public and/or is not safe to practice medicine; any required discovery; a declaration of the investigator who has gathered the information; etc. Based upon the need for this documentation, it is imperative that the investigation be almost completed prior to filing the petition for the ISO.

In addition to the need to file an accusation within 30 days after the issuance of the ISO, there are other timeframe requirements within Section 11529 of the Government Code. If the licensee requests a hearing on the Accusation, a hearing must be held within 30 days after the request for said hearing, unless the licensee stipulates to a later hearing. An ALJ must prepare and submit a proposed decision to the Board within 15 days of the hearing and the Board must issue a decision 15 days after the date the decision is received from the ALJ. If the Board fails to meet any of these timeframes, the ISO will be nullified unless the Board can show good cause for the delay.

In looking at the Board's statistics for the last three fiscal years, the Board issued the following number of ISOs¹: Fiscal Year (FY) 11/12 – 28; FY 12/13 – 27; and FY 13/14 – 21. On average over the last three years, it took approximately 355 days from the date the complaint was received until an ISO was issued. This timeframe does not take into account, however, that some cases (upon receipt) are not cases where the Board believes that the individual poses an immediate threat to the public. Sometimes during the investigation, the Board determines that the individual is a danger to the public and then begins the process to obtain an ISO. The Board does not have the ability to identify the time elapsed prior to discovery that an ISO is warranted in a case.

Based upon the review of the time it takes to issue an ISO after receipt of a complaint, and the understanding that an investigation must be complete in order to petition for an ISO, the Board believes that these cases need to be made the highest priority in their investigation and prosecution. Under the vertical enforcement (VE) model the AGO and the HQIU are both responsible for the investigation of these cases and as such must ensure these cases are processed in a timely manner.

PROPOSED RESOLUTION FOR CONSIDERATION:

The Board resolves that, in the interest of consumer protection, the Executive Director of the Board shall work with the AGO and the HQIU to identify strategies to expedite cases where an ISO is determined to be necessary. Such strategies should include a post-review of every case in which an ISO is granted to determine whether any barriers were found to preclude expediting the case and a review of every case where an ISO is denied to identify the bases for the denial and to identify areas for improvement to reduce such denials. The Board understands that these cases are complex and require time to investigate to meet statutory timelines, however, the Board's mission is consumer protection and therefore, it is important to make these cases the utmost priority.²

A report on the strategies that have been identified and the findings of these discussions should be provided in a full report at the October 2015 Board Meeting.

¹ It is important to note that this is the number of ISOs issued and does not include Penal Code (PC) section 23 orders, automatic suspension orders, out-of-state suspension orders, suspension/cease practice orders, or stipulated agreements to not practice. This information is solely based upon an ISO issued by an ALJ. These other orders are important and also provide consumer protection but are authorized in other sections of law and have other requirements.

² The Board recognizes that some cases may be more suited for PC 23 orders and also understands that in these instances a PC 23 will be sought instead of an ISO.