

MEDICAL BOARD STAFF REPORT

DATE REPORT ISSUED: July 1, 2014
ATTENTION: Members, Medical Board of California
SUBJECT: Proposed Changes to the Manual of Model Disciplinary
Orders and Disciplinary Guidelines
FROM: Susan Cady, Staff Services Manager II

REQUESTED ACTION:

After review and consideration of the attached proposed amendments to the Manual of Model Disciplinary Orders and Disciplinary Guidelines, make a motion to direct staff to notice the amended regulatory language and hold a hearing at the October 2014 Board meeting after the 45-day public comment period.

BACKGROUND:

In December 2011, section 1361 containing the Medical Board of California (Board's) Manual of Model Disciplinary Orders and Disciplinary Guidelines (Disciplinary Guidelines) was amended. Since that time, a number of non-substantive changes were identified and are being addressed in this regulatory proposal. In addition, a number of statutory and program changes have prompted the need to amend the Disciplinary Guidelines to be consistent with current practices.

In January 2014, Senate Bill 304 (Lieu, Chapter 515, Statutes of 2013) amended Government Code Section 11529 extending the timeframe in which an accusation must be filed following the issuance of a suspension order from 15 days to 30 days. The Disciplinary Guidelines related to the abstention from the use of alcohol and controlled substances and biological fluid testing (Conditions 9, 10 and 11) authorize the issuance of a cease practice order, but require that an accusation be filed within 15 days or the cease practice order will be dissolved. An amendment is required in order to be consistent with the timelines for filing an accusation following a suspension currently defined in the Government Code.

The Board has implemented the Uniform Standards for Substance-Abusing Licensees by incorporating terms and conditions under CCR, Title 16, section 1361.5 that must be ordered without deviation when the physician is deemed to be a substance-abusing licensee. However, there are some circumstances when the Board places individuals on probation and requires biological fluid testing or the abstention from drugs or alcohol even when the physician does not meet the definition of a substance-abusing licensee. Some examples would include physicians who are being placed on probation following the reinstatement of their license who may be ordered to submit to biological fluid testing despite the fact that their initial cause for discipline was not related to the use of drugs or alcohol. Physicians may also be placed on probation due to mental health issues and are required as a condition of probation to be monitored through

biological fluid testing to ensure they are compliant with their ordered medication(s). For those situations, the Board believes it is appropriate to retain Conditions 9, 10 and 11 in addition to those conditions that could be ordered for substance-abusing licensees.

For the past year, the University of California - San Diego School of Medicine has been working on redesigning the clinical training program which is required under Condition 18. The redesigned assessment program is ready for implementation but amendments to the language in this condition are required to more accurately describe the components of the comprehensive assessment program.

Condition 19 provides an alternative method of evaluating a physician's medical knowledge when a clinical training program is not considered to be an appropriate condition to order for physicians charged with gross negligence or repeated negligent acts. This condition requires that an oral clinical examination be administered pursuant to the requirements outlined in Business and Professions Code Section 2293. The Board's district medical consultants were instrumental in facilitating and coordinating the administration of an ordered oral clinical examination. On July 1, 2014, pursuant to Senate Bill 304, the Board's sworn staff and their support staff, including the district medical consultants, were transferred to the Department of Consumer Affairs (DCA). The district medical consultants are no longer available to the Probation Unit to provide the coordination of the oral clinical examination should it be ordered as a condition of probation. An amendment to this condition is required to eliminate the oral clinical examination as a condition that could be ordered.

Condition 25 requires a third party chaperone be identified and nominated by the physician within 30 days, however, if the chaperone leaves the licensee's employ, the physician is given 60 days to nominate a new chaperone. An amendment to this condition is necessary to reduce the time allowed to replace a chaperone to 30 days in order to enhance patient protection.

Condition 28 prohibits the licensee from supervising physician assistants during the period of probation. It was identified that advance practice nurses perform a similar function and have a very similar scope of practice to that of a physician assistant. An amendment to Condition 28 is needed to prohibit physicians on probation from supervising advance practice nurses.

Condition 31, which outlines general probation requirements, was found to contain language that conflicted with language in Condition 33, Non-Practice While on Probation. An amendment to this condition is required to eliminate this conflict.

When the disciplinary guidelines were revised in 2011, two conditions that described what was expected from a physician who was not practicing medicine during probation, either in California or out-of-state, were consolidated into one condition, Non-Practice While on Probation. After implementation it was discovered that the new language did not adequately address what terms and conditions a non-practicing physician was expected to comply with during this time. An amendment to this condition is needed to clarify the requirement that a physician residing in California is expected to comply with all conditions of probation. Staff is

also proposing that, in lieu of requiring the physician to enroll in a comprehensive assessment program after 18 months of non-practice, the physician be allowed to complete the Special Purpose Examination (SPEX) instead. An amendment to Condition 33 is needed to allow this substitution.

If the Board Members support these modifications, the motion identified under Requested Action above should be made.

**California Code of Regulations
Title 16, Division 13, Chapter 2, Article 4.
Section 1361. Disciplinary Guidelines**

The following edits would be made to the Manual of Model Disciplinary Orders and Disciplinary Guidelines and then incorporated by reference into section 1361.

9. Controlled Substances - Abstain From Use

Respondent shall abstain completely from the personal use or possession of controlled substances as defined in the California Uniform Controlled Substances Act, dangerous drugs as defined by Business and Professions Code section 4022, and any drugs requiring a prescription. This prohibition does not apply to medications lawfully prescribed to respondent by another practitioner for a bona fide illness or condition.

Within 15 calendar days of receiving any lawfully prescribed medications, respondent shall notify the Board or its designee of the: issuing practitioner's name, address, and telephone number; medication name, strength, and quantity; and issuing pharmacy name, address, and telephone number.

If respondent has a confirmed positive biological fluid test for any substance (whether or not legally prescribed) and has not reported the use to the Board or its designee, respondent shall receive a notification from the Board or its designee to immediately cease the practice of medicine. The respondent shall not resume the practice of medicine until the final decision on an accusation and/or a petition to revoke probation is effective. An accusation and/or petition to revoke probation shall be filed by the Board within ~~15~~ 30 days of the notification to cease practice. If the respondent requests a hearing on the accusation and/or petition to revoke probation, the Board shall provide the respondent with a hearing within 30 days of the request, unless the respondent stipulates to a later hearing. A decision shall be received from the Administrative Law Judge or the Board within 15 days unless good cause can be shown for the delay. The cessation of practice shall not apply to the reduction of the probationary time period.

If the Board does not file an accusation or petition to revoke probation within ~~15~~ 30 days of the issuance of the notification to cease practice or does not provide respondent with a hearing within 30 days of a such a request, the notification of cease practice shall be dissolved.

10. Alcohol - Abstain From Use

Respondent shall abstain completely from the use of products or beverages containing alcohol.

If respondent has a confirmed positive biological fluid test for alcohol, respondent shall receive a notification from the Board or its designee to immediately cease the practice of medicine. The respondent shall not resume the practice of medicine until the final decision on an accusation and/or a petition to revoke probation is effective. An accusation and/or petition to revoke probation shall be filed by the Board within ~~15~~ 30 days of the notification to cease practice. If the respondent requests a hearing on the accusation and/or petition to revoke probation, the Board shall provide the respondent with a hearing within 30 days of the request, unless the respondent stipulates to a later hearing. A decision shall be received from the Administrative Law Judge or the Board within 15 days unless good cause can be shown for the delay. The cessation of practice shall not apply to the reduction of the probationary time period.

If the Board does not file an accusation or petition to revoke probation within ~~15~~ 30 days of the issuance of the notification to cease practice or does not provide respondent with a hearing within 30 days of a such a request, the notification of cease practice shall be dissolved.

11. Biological Fluid Testing

Respondent shall immediately submit to biological fluid testing, at respondent's expense, upon request of the Board or its designee. "Biological fluid testing" may include, but is not limited to, urine, blood, breathalyzer, hair follicle testing, or similar drug screening approved by the Board or its designee. Prior to practicing medicine, respondent shall contract with a laboratory or service approved in advance by the Board or its designee that will conduct random, unannounced, observed, biological fluid testing. The contract shall require results of the tests to be transmitted by the laboratory or service directly to the Board or its designee within four hours of the results becoming available. Respondent shall maintain this laboratory or service contract during the period of probation.

A certified copy of any laboratory test result may be received in evidence in any proceedings between the Board and respondent.

If respondent fails to cooperate in a random biological fluid testing program within the specified time frame, respondent shall receive a notification from the Board or its designee to immediately cease the practice of medicine. The respondent shall not resume the practice of medicine until the final decision on an accusation and/or a petition to revoke probation is effective. An accusation and/or petition to revoke probation shall be filed by the Board within ~~15~~ 30 days of the notification to cease practice. If the respondent requests a hearing on the accusation and/or petition to revoke probation, the Board shall provide the respondent with a hearing within 30 days of the request, unless the respondent stipulates to a later hearing. A decision shall be received from the Administrative Law Judge or the Board within 15 days unless good cause can be shown for the delay. The cessation of practice shall not apply to the reduction of the probationary time period.

If the Board does not file an accusation or petition to revoke probation within ~~15~~ 30 days of the issuance of the notification to cease practice or does not provide respondent with a hearing within 30 days of a such a request, the notification of cease practice shall be dissolved.

18. Clinical Competence Assessment Training Program

Within 60 calendar days of the effective date of this Decision, respondent shall enroll in a clinical competence assessment training or educational program equivalent to the Physician Assessment and Clinical Education Program (PACE) offered at the University of California - San Diego School of Medicine ("Program"). Respondent shall successfully complete the Program not later than six (6) months after respondent's initial enrollment unless the Board or its designee agrees in writing to an extension of that time.

The Program shall consist of a Comprehensive Assessment ~~program comprised of an two-day assessment~~ of respondent's physical and mental health; ~~basic clinical and communication skills common to all clinicians; and medical knowledge, skill and judgment and the six general domains of clinical competence as defined by the Accreditation Council on Graduate Medical Education and American Board of Medical Specialties~~ pertaining to respondent's current or intended area of practice ~~in which respondent was alleged to be deficient, and at minimum, a 40-hour program of clinical education in the respondent's~~

~~area of practice in which respondent was alleged to be deficient and.~~ The Program shall ~~which~~-takes into account data obtained from the ~~pre-~~assessment, ~~self-report forms and interview, and the~~ Decision(s), Accusation(s), and any other information that the Board or its designee deems relevant. The program shall require respondent's on-site participation for a minimum of 3 to 5 days as determined by the Program for the assessment and clinical education evaluation.

~~At the end of the evaluation, the Program will submit a report to~~ Based on respondent's performance and test results in the assessment and clinical education, the Program will advise the Board or its designee ~~which unequivocally states whether the respondent has demonstrated the ability to practice safely and independently.~~ Based on respondent's performance on the Clinical Competence Assessment, the Program will advise the Board or its designee of its recommendation(s) for the scope and length of any additional educational or clinical training, evaluation or treatment for any medical condition, ~~treatment for any or~~ psychological condition, or anything else affecting respondent's practice of medicine. Respondent shall comply with the Program's recommendations.

~~At the completion of any additional educational or clinical training, respondent shall submit to and pass an examination.~~ Determination as to whether respondent successfully completed ~~the examination or successfully completed~~ the clinical competence assessment program is solely within the ~~p~~Program's jurisdiction.

[Note: The following language shall be included in this condition unless Option #1 is included: If respondent fails to enroll, participate in, or successfully complete the clinical competence assessment training program within the designated time period, respondent shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. The respondent shall not resume the practice of medicine until enrollment or participation in the outstanding portions of the clinical competence assessment training program have been completed. If the respondent did not successfully complete the clinical competence assessment training program, the respondent shall not resume the practice of medicine until a final decision has been rendered on the accusation and/or a petition to revoke probation. The cessation of practice shall not apply to the reduction of the probationary time period.]

(Option #1: Condition Precedent)

Respondent shall not practice medicine until respondent has successfully completed the Program and has been so notified by the Board or its designee in writing. ~~,except that respondent may practice in a clinical training program approved by the Board or its designee. Respondent's practice of medicine shall be restricted only to that which is required by the approved training program.~~

(Option #2)

Within 60 days after respondent has successfully completed the clinical competence assessment training program, respondent shall participate in a professional enhancement program equivalent to the one offered by the Physician Assessment and Clinical Education Program at the University of California, San Diego School of Medicine, which shall include quarterly chart review, semi-annual practice assessment, and semi-annual review of professional growth and education. Respondent shall participate in the professional enhancement program at respondent's expense during the term of probation, or until the Board or its designee determines that further participation is no longer necessary.

19. ~~Oral and/or~~ Written Examination

[NOTE: This condition should **only** be used where a clinical training program is not appropriate.]

Within 60 calendar days of the effective date of this Decision, respondent shall take and pass ~~an oral and/or a written examination, administered by the Board or its designee. The Board or its designee shall designate a subject matter and administer the oral and/or written.~~

~~If the examination is an oral examination, it shall be conducted in accordance with section 2293(a) and (b) of the Code.~~

~~If respondent is required to take and pass a written exam, that examination shall be either~~ the Special Purpose Examination (SPEX) or an equivalent examination as determined by the Board or its designee.

~~If respondent fails the first examination, respondent shall be allowed to take and pass a second examination.~~

Failure to pass the required ~~oral and/or~~ written examination within 180 calendar days after the effective date of this Decision is a violation of probation. Respondent shall pay the costs of all examinations.

[Note: The following language shall be included in this condition unless Option #1 is included: If respondent fails to pass the ~~first~~ written examination, respondent shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. Respondent shall not practice medicine until respondent successfully passes the examination, as evidenced by written notice to respondent from the Board or its designee.]

(Option 1: Condition Precedent)

Respondent shall not practice medicine until respondent has passed the required examination and has been so notified by the Board or its designee in writing. This prohibition shall not bar respondent from practicing in a clinical training program approved by the Board or its designee. Respondent's practice of medicine shall be restricted only to that which is required by the approved training program.

Note: The condition precedent option is particularly recommended in cases where respondent has been found to be incompetent, repeatedly negligent, or grossly negligent.

25. Third Party Chaperone

During probation, respondent shall have a third party chaperone present while consulting, examining or treating _____ [insert: male, female, or minor] patients. Respondent shall, within 30 calendar days of the effective date of the Decision, submit to the Board or its designee for prior approval name(s) of persons who will act as the third party chaperone.

If respondent fails to obtain approval of a third party chaperone within 60 calendar days of the effective date of this Decision, respondent shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. Respondent shall cease the practice of medicine until a chaperone is approved to provide monitoring responsibility.

Each third party chaperone shall sign (in ink or electronically) and date each patient medical record at the time the chaperone's services are provided. Each third party chaperone shall read the Decision(s) and the Accusation(s), and fully understand the role of the third party chaperone.

Respondent shall maintain a log of all patients seen for whom a third party chaperone is required. The log shall contain the: 1) patient initials, address and telephone number; 2) medical record number; and 3) date of service. 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.

Respondent is prohibited from terminating employment of a Board-approved third party chaperone solely because that person provided information as required to the Board or its designee.

If the third party chaperone resigns or is no longer available, respondent shall, within 5 calendar days of such resignation or unavailability, submit to the Board or its designee, for prior approval, the name of the person(s) who will act as the third party chaperone. If respondent fails to obtain approval of a replacement chaperone within ~~30~~ 60-calendar days of the resignation or unavailability of the chaperone, respondent shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. Respondent shall cease the practice of medicine until a replacement chaperone is approved and assumes monitoring responsibility.

(Option)

Respondent shall provide written notification to respondent's patients that a third party chaperone shall be present during all consultations, examination, or treatment with [**insert:** male, female or minor] patients. Respondent shall maintain in the patient's file a copy of the written notification, shall make the notification 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 notification for the entire term of probation.

28. Supervision of Physician Assistants

During probation, respondent is prohibited from supervising physician assistants and advanced practice nurses.

31. General Probation Requirements

Compliance with Probation Unit

Respondent shall comply with the Board's probation unit. ~~and all terms and conditions of this Decision.~~

Address Changes

Respondent shall, at all times, keep the Board informed of respondent's business and residence addresses, email address (if available), and telephone number. Changes of such addresses shall be immediately communicated in writing to the Board or its designee. Under no circumstances shall a post office box serve as an address of record, except as allowed by Business and Professions Code section 2021(b).

Place of Practice

Respondent shall not engage in the practice of medicine in respondent's or patient's place of residence, unless the patient resides in a skilled nursing facility or other similar licensed facility.

License Renewal

Respondent shall maintain a current and renewed California physician's and surgeon's license.

Travel or Residence Outside California

Respondent shall immediately inform the Board or its designee, in writing, of travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last, more than thirty (30) calendar days.

In the event respondent should leave the State of California to reside or to practice respondent shall notify the Board or its designee in writing 30 calendar days prior to the dates of departure and return.

33. Non-practice While on Probation

Respondent shall notify the Board or its designee in writing within 15 calendar days of any periods of non-practice lasting more than 30 calendar days and within 15 calendar days of respondent's return to practice. Non-practice is defined as any period of time respondent is not practicing medicine ~~in California~~ as defined in Business and Professions Code sections 2051 and 2052 for at least 40 hours in a calendar month in direct patient care, clinical activity or teaching, or other activity as approved by the Board. If respondent resides in California and is considered to be in non-practice, respondent shall comply with all terms and conditions of probation. All time spent in an intensive training program which has been approved by the Board or its designee shall not be considered non-practice and does not relieve respondent from complying with all the terms and conditions of probation.

In the event respondent's period of non-practice while on probation exceeds 18 calendar months, respondent shall successfully complete the Federation of State Medical Board's Special Purpose Examination ~~a clinical training program that meets the criteria of Condition 18 of the current version of the Board's "Manual of Model Disciplinary Orders and Disciplinary Guidelines"~~ prior to resuming the practice of medicine. Respondent's period of non-practice while on probation shall not exceed two (2) years.

Periods of non-practice, outside of California, will relieve respondent of the responsibility to comply with the probationary terms and conditions with the exception of this condition and the following terms and conditions of probation: Obey All Laws; ~~and~~ General Probation Requirements, Quarterly Declarations, Abstain from the Use of alcohol and/or controlled substances and Biological Fluid Testing.