

MEDICAL BOARD STAFF REPORT

DATE REPORT ISSUED: January 11, 2011
 ATTENTION: Board Members
 SUBJECT: Disciplinary Guidelines – Modified Text
 STAFF CONTACT: Susan Cady, Enforcement Manager

REQUESTED ACTION: Adopt modified text and request the Executive Director to complete the rulemaking file to be submitted to the Office of Administrative Law for review and approval.

STAFF RECOMMENDATION:

Staff recommends that the Board consider the proposed revisions, discussed at the Board's January 6, 2011, Interested Parties Meeting, which relates to the Manual of Disciplinary Guidelines and Model Disciplinary Orders.

EXECUTIVE SUMMARY:

At the November 5, 2010, Board meeting, a hearing was held to discuss a rulemaking that proposed amendments to the Manual of Disciplinary Guidelines and Model Disciplinary Orders. The proposed amendments are being made to reflect changes in law, clarify existing language, and make technical changes to reflect the current probationary environment.

The Board received written comments before the meeting and public comments were given regarding the proposed regulations.

At the end of the hearing, it was suggested that any action on the rulemaking be tabled until the January 28, 2011, meeting so that staff could further review the comments provided and the Uniform Standards being developed for all healing arts boards by the Substance Abuse Coordination Committee (convened by the Department of Consumer Affairs in 2009 as directed by SB 1441). Further, it was suggested that a meeting of interested parties be held.

A meeting of interested parties was held on January 6, 2011, in Sacramento. Several written comments were received and discussed at that meeting.

Attached, please see:

- Letter from California Medical Association, dated October 18, 2010
- Letter from California Society of Addiction Medicine, dated January 6, 2011
- E-mail from Julie D'Angelo Fellmuth, CPIL, dated January 6, 2011

Based on these written comments, which also were discussed at the January 6, 2011 Interested Parties meeting, the following modifications were made to the proposed text:

Conditions 9 and 10 -- Controlled Substances/Alcohol-- Abstain from Use

In response to the comments and testimony received during the 45-day comment period, the regulation hearing and interested parties meeting, the board modified the text to eliminate the 3-day advance notice before the cease practice order is issued following a positive test result. This modification makes the board's guidelines consistent with the DCA uniform standard and the provisions of Business and Professions Code Section 315.2 requiring an immediate "cease practice"

order based on a positive test. In addition, Business and Professions Code Section 315.2 became effective January 1, 2011, which provides specific authority to impose the immediate cease practice order and addresses CMA's concerns regarding the board's authority to impose this requirement.

No modification was made to address the testimony from CSAM to combine the conditions requiring that the licensee "abstain from use" for controlled substance and/or alcohol. Under the current "recommended range of penalties", violations related to excessive use of either alcohol or controlled substances suggest including both Condition 9 and 10, which is consistent with the testimony provided. Therefore, no modification of text was necessary.

The board did modify the text to add that the biological fluid test must be "confirmed" before pursuing a "cease practice" order in response to CSAM's testimony regarding this issue. The text was also modified in response to the issue identified by a representative from the Office of Attorney General to address the failure by a licensee to promptly report a new prescription to the Board, which triggered a positive test result.

Condition 11 – Biological Fluid Testing

The board modified the text to eliminate the 3-day advance notice before the cease practice order is issued for failing to cooperate with biological fluid testing. This modification makes the board's guidelines consistent with the DCA uniform standard. In response to comments received, the proposed text "Within 30 calendar days of the decision" has been removed and the condition will require that an acceptable lab contract must be in place "prior to practicing medicine".

Staff did not propose a modification to the proposed language regarding the testing frequency. The testing frequency standard proposed by the DCA SB 1441 Substance Abuse Coordination Committee is not finalized. The subcommittee meeting scheduled on September 27, 2010 to further discuss this standard was cancelled and has not been rescheduled. The condition as proposed requires the licensee to submit to random, unannounced testing. The Board believes that by not identifying a specific testing frequency in this condition, the frequency can be determined by board policy and modified when a standard is finalized.

Other technical, non-substantive changes were made to the proposed language.

The modified text is attached. It was mailed out to all interested parties on January 7, 2011. The close of the public comment period will be January 24, 2011. This meets the 15-day notice requirement allowing the Board to adopt the modified text at the Board meeting on January 28, 2011.

If any written comments are received during the public comment period, copies will be brought to the Board meeting. As always, public comment also may be received during the meeting. In the mean time, if you have any questions, please contact me at (916) 263-2644 or at susan.cady@mbc.ca.gov



October 18, 2010

Susan Cady
Enforcement Manager
Medical Board of California
2005 Evergreen St, Suite 1200
Sacramento, CA 95815

Subject: Comments on
“Manual of Model Disciplinary Orders and Disciplinary Guidelines (11th Edition/2010)”

Dear Ms. Cady:

The California Medical Association (CMA) respectfully submits the following comments for consideration related to the proposed amendments to the “Manual of Model Disciplinary Orders and Disciplinary Guidelines (11th Edition/2010)”. The comments are in response to the solicitation for comments in a notice of proposed rulemaking posted on September 13, 2010 for Division 13 of Title 16 of the California Code of Regulations.

The California Medical Association is an advocacy organization that represents 35,000 California physicians. Dedicated to the health of Californians, CMA is active in the legal, legislative, reimbursement and regulatory areas on behalf of California physicians and their patients.

I. Background

We understand that the purpose of the proposed amendments to the Manual of Model Disciplinary Orders and Disciplinary Guidelines is to reflect changes in law, clarify existing language, and make technical changes to reflect the current probationary environment. CMA would like to offer additional revisions for your consideration.

II. CMA’s Comments

CMA has several concerns regarding the proposed disciplinary guidelines as follows:

- A. **Section 9. Controlled Substances - Abstain From Use**
- Section 10. Alcohol - Abstain From Use**
- Section 11. Biological Fluid Testing**

These sections essentially provide for an automatic suspension of a license in the event the respondent has a positive biological fluid test for certain substances or fails to cooperate in a random biological fluid testing program. While we acknowledge that such events are a violation of probation, as was the case with the diversion program, we have serious reservations that the Medical Board may lawfully order the cessation of medical practice under these circumstances.

First, the Legislature, in its detailed statutory scheme governing Medical Board disciplinary powers, has not authorized an automatic suspension in these cases, as it has where a licensee has been convicted of a felony. See Business & Professions Code §2236.1. Accordingly, the Medical Board lacks the statutory authority to issue such suspensions. See *Medical Board of California v. Superior Court* (2003) 111 Cal.App.4th 163 (Business & Professions Code provision governing a physician's participation in the diversion program did not permit disciplinary action against a physician solely on his failure to complete the program).

Further, there are serious questions as to the constitutionality of the proposed guidelines purporting to authorize automatic suspension of the license. For example, in *Ralph Williams Ford v. New Car Dealers policy and Appeals Board* (1973) 30 Cal.App.3d 494, at issue was whether the Director of Motor Vehicles could lawfully suspend a license in the event the licensee violated a condition of probation. Recognizing the constitutional infirmity of the activity, the court stated:

The Fourteenth Amendment protects the pursuit of one's profession from abridgment by arbitrary state action, and a state cannot exclude a person from any occupation in a manner or for reasons that contravene due process of law. (*Endler v. Schutzbank*, 68 Cal.2d 162, 169-170, 65 Cal.Rptr. 297, 436 P.2d 297.) Here, the revocation of probation, and therefore the revocation of Williams' dealer's license, is left to the discretion of the Director of Motor Vehicles. But "an individual must be afforded notice and an opportunity for a hearing before he is deprived of any significant property interest, ..." (*Randone v. Appellate Department*, 5 Cal.3d 536, 541, 96 Cal.Rptr. 709, 488 P.2d 13.) Although Williams received notice and a hearing on its past violations, the conditions of probation dispense with notice and hearing on any future violations that may bring about a revocation of its license.

In criminal law "fundamental principles of due process and fair play demand, ... that after a summary revocation of probation and before sentencing a hearing is required at which the defendant is entitled to be represented by counsel, to be advised of the alleged violation and given an opportunity to deny or explain it, and, if necessary, present witnesses on his own behalf." (*People v. Youngs*, 23 Cal.App.3d 180, 188, 99 Cal.Rptr. 101; *People v. Vickers*, 8 Cal.3d 451, 458-461, 105 Cal.Rptr. 305, 503 P.2d 313; see also, *Morrissey v. Brewer*, 408 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593.) Due process requires a comparable opportunity for notice and hearing on the revocation of an occupational license. (Cf. *Goldberg v. Kelly*, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011.)

Accordingly, CMA believes licensees under probation should be accorded a pre-deprivation hearing on the issue to determine whether the licensee in fact imposes a danger to patients. If the Medical Board truly believes the licensee poses a threat to patient care, the Board can certainly take steps to prevent harm by seeking a temporary restraining order or interim suspension.

B. Section 16. Professionalism Program (Ethics Course)

This section requires respondents to enroll in a professionalism program that meets the requirements of Title 16, California Code of Regulations (CCR) section 1358.1. To be consistent with the other sections of the guidelines that require respondents to participate in educational courses and specify that the courses must be “equivalent to the ... Course offered by the Physician Assessment and Clinical Education Program, University of California, San Diego School of Medicine (Program),” we recommend that this section be amended to state that the professionalism program must be “equivalent to the Professionalism Program offered by the Institute for Medical Quality (IMQ).” Providing more information regarding the content of a recognized professionalism program will clarify the type of professionalism program that meets the Medical Board’s standards.

The IMQ Professionalism Program was developed to comply with the requirements established by the Medical Board of California. The program centers on both the legal and ethical dimensions of the practice of medicine in California, and it introduces participants to a range of resources to address present or future problems. Full participation and completion of all assignments are required for completion of the program. The Program is divided into three components.

The pre-course component consists of a background assessment application, a baseline knowledge test and pre course reading. The purpose of this component is to determine the participant’s knowledge/awareness of ethical/legal issues related to the practice of medicine in California, as well as information about the participant’s knowledge of the legal and ethical issues related to the specific case(s) for which the participant has been referred to the program. Participants prepare an assessment of their expectations of the program, recognition of need for change and commitment to change.

The second component is the two-day ethics course. It includes a series of components that move from demonstration to practice and application. Issues covered include: what are ethical issues and when they arise, clarification of legal issues, resources to analyze situations and a decision making model. The course is very interactive, and it is designed to provide participants with a full understanding of the ethical and legal aspects of their own violations and knowledge about how to access resources to deal with future issues.

The third component is required assessments over a one-year period following the course. It consists of the post-course test on California law and ethics given at the end of the two-day course, and 6 month and 12 month follow-up assessments. At 6 months, participants submit information regarding their practice during the period since the course and complete a skills review exercise. At 12 months they provide a final report on changes in their practice profile and

a self-assessment status report. On completion of the course, a report is sent to the Medical Board.

III. Conclusion

In conclusion, the CMA believes that the recommended changes will improve the disciplinary guidelines making it a more useful document for those involved in the physician disciplinary process.

Sincerely,

Yvonne Choong
Associate Director, Center for Medical and Regulatory Policy
California Medical Association

Cc: Lisa Folberg, CMA Vice-President, Center for Medical and Regulatory Policy



A specialty society of physicians founded in 1973. Since 1989, a State Chapter of the American Society of Addiction Medicine

January 6, 2011

TO: Medical Board of California
Susan Cady, Enforcement Manager
2005 Evergreen Street, Suite 1200
Sacramento, CA 95815

CC: Linda Whitney, Executive Director
Medical Board of California

FROM: David Pating, MD and Stephanie Shaner, MD
CSAM Committee on the Well-being of Physicians

RE: Changes proposed to the 11th Edition/2010 of the Manual of Model Disciplinary Orders and
Disciplinary Guidelines

California Society of Addiction Medicine is the specialty society of physicians who have clinical experience and expertise in the full spectrum of diagnosis and treatment of alcoholism and other drug dependencies. CSAM has a longstanding interest in the promotion and maintenance of physician health and the relationship of physician health to patient safety. CSAM has always reinforced physician health activities and provided information and education for those in positions of responsibility for maintenance of patient safety. CSAM contributed to the MBC Diversion Program for Physicians during its development in 1978 and 1979 and from the time it began operations on January 1, 1980.

CSAM is interested in these disciplinary guidelines because physicians who would previously have gone into the Diversion Program for Physicians are now going into probation governed by these guidelines.

CSAM offers these statements of concern and suggests these specific changes.

Conditions 9 and 10 – abstain from use of controlled substances and from alcohol

CSAM recommends that these two should be applied together so that a respondent with a substance use or alcohol use disorder is required to abstain from both alcohol and drugs not lawfully prescribed.

REASONS: Our recommendation is in line with the clinical evidence that, for a person with a substance use disorder (alcoholism or drug dependence), alcohol and any other mind-altering substance represent the same risk. Because clinical experience has shown that individuals most often use several substances—both alcohol and other drugs—and use one when another is not available, and because alcohol and other drugs have similar effects on the brain and on behavior, abstinence from both alcohol and illegal or not-legally-prescribed drugs is indicated.

Condition 9 -- "If respondent has a positive biological fluid test for any substance ... , respondent shall receive a notification from the Board ... to cease the practice of medicine within three ... days The respondent will not resume ... until final decision on an accusation and/or a petition to revoke probation."

CSAM recommends that this guideline specify a requirement for confirmation of a positive screening test result before the respondent is required to cease practice and wait for a decision of the Board.

REASON: False positives from initial screening tests are not unusual, due to the simplified techniques

employed in the testing methods used for screening tests. Confirmation of a positive screening test by another, more sophisticated testing method has always been the industry standard.

Further, CSAM recommends that the guideline specify that MRO review shall be available to the respondent if the respondent contests any confirmed positive test.

Condition 20 – psychiatric exam

CSAM recommends these added requirements

- add an additional qualification of the Board-approved psychiatrist: participation in a 4-hour orientation to relevant clinical principles conducted by the recognized specialty societies in the psychiatric disorders and substance abuse disorders, CPA and CSAM, together with the MBC.
- add a requirement that an orientation must be repeated every four years
- add a requirement that the evaluating psychiatrist must complete the evaluation of the respondent and submit the report to the Board within sixty days
- add a requirement that the MBC or the evaluating psychiatrist must provide the respondent with a copy of the report of the evaluation

REASONS: The evaluations of high functioning professionals in safety sensitive situations require specialized experience and skill beyond most psychiatric evaluations. The psychiatrists performing these examinations and preparing the reports for the Medical Board should be required to participate in orientations to clinical issues to assure a baseline competence, and continuing currency and competence, in this specialized area.

The timeliness of the evaluation, and thus the action of the Medical Board to bring the respondent under [therapeutic] terms and conditions, is important to the clinical outcome for the respondent.

Condition 21 – psychotherapy

“Note: this condition is for those cases where the evidence demonstrates that the respondent has had impairment (impairment by mental illness, alcohol abuse and/or drug self-abuse) related to the violations but is not at present a danger to respondent’s patients.”

CSAM recommends these added requirements

- add to the qualifications required of the psychiatrist or psychologist so that they include ... “experience in the diagnosis and treatment of emotional and mental disorders and/or substance use disorders.”
- add a definition of “psychotherapy treatment” to insure that it includes treatment approaches that have been demonstrated effective for substance use disorders.

REASON: Diagnosis and effective treatment of alcohol/substance use disorders require treatment approaches not commonly used within traditional psychotherapy; such experience should be required.

“The psychotherapist ... shall furnish a written evaluation report to the Board...”

CSAM asks for a clarification of how this evaluation is different from the evaluation required in condition in condition 20.

Condition 22 – medical evaluation and treatment

“Note: this condition is for those cases where the evidence demonstrates that medical illness or disability was a contributing cause of the violations.”

CSAM recommends these added requirements

- add a requirement that physicians who are appointed by the Medical Board to conduct medical evaluations must complete an orientation about the use of validated screening instruments for diagnosis of substance use disorders and mood disorders
- add a requirement that the medical report furnished to the Medical Board include documentation of which screening instruments were used and the scores or response of the respondent

REASON: Harmful alcohol use and substance use/abuse have significant medical effects that are

factors in a number of medical illnesses or conditions. Harmful alcohol use and drug use should always be ruled out. There are well-validated screening instruments designed to be used by primary care physicians and others for this purpose, and the Medical Board should insure that those tests are employed and the results are included in the reports of these comprehensive examinations and evaluations.

Simple, short, validated screening instruments are used routinely in history and physical examinations. Examples of the instruments are the single question test for alcohol abuse, the MAST, ASSIST, the AUDIT, the CAGE and the CAGE adapted for drug use. They are available from more than one government website, such as <http://drugabuse.gov/NIDAMED/screening/>
<http://www.dhs.state.il.us/page.aspx?item=38488>

A new section

CSAM recommends the addition of a guideline designed to be followed when the Medical Board becomes aware that a resident applying for a license may be required to enter probation. CSAM recommends adding a requirement that the MBC provide a decision within a specified time, requiring that a Board-approved evaluator conduct the evaluation and submit the evaluation report within a specified time.

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>>> Linda Whitney 1/6/2011 11:29 AM >>>

fyi

>>> Julianne Fellmeth <julied@sandiego.edu> 1/6/2011 11:28 AM >>>

Dear Linda:

I am trying to get to Sac for the meeting today at 1:00, but my plane is delayed due to mechanical problems.

FYI: CPIL has concerns about Conditions 9, 10, and 11 for the same reasons as I stated in November: the 3-day practice period is not consistent with the SB 1441 Committee's Stds #8 and 10, which require immediate removal from practice upon notice of a positive test. This is a PROBATIONER who has been disciplined w/full procedural due process. Additionally, Condit 9-11 are not consistent w/new BPC section 31.2, as added by SB 1172.

Also, CPIL has concerns about the absence of any required drug testing frequency standard. The SB 1441 Committee's std requires 104 tests (2x per week) during the first year.

Finally, CPIL is concerned about Condit #11 -- it allows a substance-abusing probationer to practice medicine for 30 days w/ no testing. This is not acceptable. Drug testing arrangements acceptable to MBC should be a condition precedent to practicing medicine.

If you are not attending the meeting today, could you please forward this to the staff person who is? I'm trying to get there as soon as I can! We are being put on a different plane!

Julie D. F.

Sent from my HTC Touch Pro2 on the Now Network from Sprint®.



California Society of Addiction Medicine

575 Market Street, Ste 2125 — San Francisco, CA 94105 — 415/764-4855 — Fax 415/764-4915 www.csam-asam.org

A specialty society of physicians founded in 1973. Since 1989, a State Chapter of the American Society of Addiction Medicine

January 7, 2011

Ms. Linda Whitney
Medical Board of California
2005 Evergreen Street, Suite 1200
Sacramento, CA 95815

Dear Linda:

We understand that many or most of CSAM's comments made in response to the proposed changes in the Disciplinary Guidelines should be addressed by MBC policy and procedures, and thus we are writing to ask that the Board take them up now as recommendations. They are all included in the letter attached here.

We look forward to discussing them with you and members of the Board's committees and staff.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kerry Parker'. The signature is fluid and cursive, with the first name 'Kerry' being more prominent than the last name 'Parker'.

Kerry Parker, CAE
Executive Director

cc : Ms. Barbara Yaroslavsky
Ms. Gail Jara
Stephanie Shaner, MD
David Pating, MD

Rehan Sheikh
PO Box 869 French Camp CA 95231
Phone (209) 982 9039; Facsimile (209) 468 6392
Email: rehansheikh@yahoo.com

Date: Jul 24, 2009

Respectable Board Members
Medical Board of California
2005 Evergreen Street, Suite 1200
Sacramento California 95815

Subject: A few Considerations on Disciplinary Actions against Physician(s)

Reference: Quarterly Board Meeting – May 2009

Respectable Board Member(s),

If I had the opportunity to speak at the Quarterly Board Meeting, I would have suggested that the Members of the Board must not ignore a suggestion by a very respectable member Ms. Gerrie Schipske, Esq. Ms. Schipske had suggested that the Medical Board demand 'truthfulness'.

As I recall, her suggestion was for the experts and the institutions that provide certain information to the Medical Board. Intent or Bad Intent for the peer review was another relevant issue. I am writing to second her suggestion.

The Executive Director of this Board acts as a Judge with Unequivocal Authority

The Respectable members of the Medical Board must understand that the Executive Director of the Medical Board serves as a 'Judge' in such a unique and powerful way that there is no appeal available after the decision. There is an Administrative Review of the decisions; however, generally the Courts have relied on the Medical Board to determine credibility and truthfulness of a witness. The Executive Director, acting as a Judge, **must** assure truthfulness of facts.

A humble Suggestion for Oversight of the Decision making

A key oversight on the actions of 'the Executive Director of the Medical Board acting as a Judge', are the members of this Medical Board. This is requested that the Members of the Medical Board consider a process that monitors the quality of decision making for the accusations brought by the Medical Board **before** the accusations are brought. The Board can bring accusations only if the accusations are supported by the evidence such as verified information and appropriate expert reports.

The 'well known meeting of Board Members' where a proposed decision by an ALJ is adopted or otherwise, appears to be too little too late in the disciplinary process. Further, there is no reliable information available in the public domain whether that meeting considers the truthfulness of the evidence or **only** the severity of the punishment.

Incompetence of a Physician (Accusation of)

This is requested that the Medical Board reconsider if this is appropriate (whether legal or ethical) for this Board to bring accusations of incompetence against a physician who has successfully

completed his/her residency training. This is also requested that the Medical Board reconsider the definition of incompetency if this Board has a legal authority and qualification to bring accusations of incompetence against physician(s).

Severity of Disciplinary 'Punishment'

Clearly a section of the B&P Code states that the Board can discipline a physician by taking actions such as to suspend/revoke a license, place on probation and issuing a letter of reprimand etc. While this may or may not be a legally obligation, the respectable members of this Board can make it obligatory for the Board to propose **only appropriate and proportionate** 'punishment' in consistent with the intent of this Board and the final report of the Enforcement Monitor.

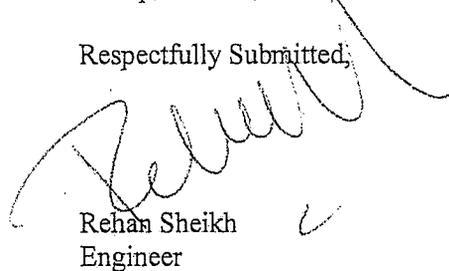
Enforcement Monitor Report

The final report of the Enforcement Monitor submitted to California State Legislature states:

*In this era of managed care, the impact of MBC investigative and disciplinary activity can have momentous ramifications for a physician's ability to practice medicine. Thus, the **fairness, consistency, and quality** of MBC disciplinary decision making are of significant importance to California's physician population.*

While taking disciplinary actions against physician(s), the respectable members of this Board are hereby requested to kindly consider a process that is not adverse to physicians.

Respectfully Submitted,



Rehan Sheikh
Engineer

The Office of Rehan Sheikh
PO Box 869 French Camp CA 95231
Phone (209) 982 9039
Email: rehansheikh@yahoo.com

Date: January 17, 2011

Ms. Barbara Yaroslavsky
President, Medical Board of California
2005 Evergreen Street, Suite 1200
Sacramento California 95815

Subject: Rehan's Suggestion on Disciplinary Guidelines
Ref: MBC Meeting on Disciplinary Guidelines (Sacramento, Jan 6, 2011)

Dear Madam President,

I attended the above referenced meeting and I have some reservations on the Disciplinary Guidelines primarily because;

- 1) The Disciplinary guidelines are not binding on the Board
- 2) The Board has unlimited discretion to propose any punishment to a physician

As I understand, our legal system generally demands that punishment be appropriate to the offense (or negligence). For example; punishment of individuals who is guilty of a minor infraction such as a traffic violation may not be the same as punishment of someone who is guilty of an act of felony.

In my letter dated July 24, 2009, I had requested the Board to adopt a guideline to propose "appropriate" disciplinary punishment. I have not received any response. For your convenience I am resending a copy of my previous letter for your kind consideration. After the Board approves a guideline to propose "appropriate" disciplinary punishment, only then, the disciplinary guidelines can begin to gain acceptance.

I propose that, in order to standardize the discipline of physicians with other professionals, your office consider adding an additional paragraph at end of disciplinary guidelines. The new paragraph may state;

"In lieu of any or all of the disciplinary terms, a physician who is found guilty of unprofessional conduct may settle all disciplinary punishment by paying \$400 fine".

Respectfully Submitted,

/s/

Rehan Sheikh
Representative for Dr. Sheikh

Via Email:

- Executive Staff, Medical Board of California
- Members, Medical Board of California
- Immediate Past President (IMPP) of Medical Board of California
- MBC Advisory Committee on Physicians Responsibility
- U. C. Davis Family Medicine Residency Program(s)

Lodi-area senators [name Redacted], Lois Wolk admit to gifts;

By The Associated Press and News-Sentinel Staff

Wednesday, February 3, 2010 6:08 AM PST

Here is the list of California lawmakers who have acknowledged they failed to report gifts, all in 2008. Seven other lawmakers, listed at the end, have outstanding cases with the commission:

A state senator Sen. Lois Wolk, D-Davis, who represents parts of Stockton and the Delta.

Wolk failed to list two \$151.51 hotel stays paid for by the Consumer Attorneys of California and the Northern California Regional Council SCC at Wine & Roses in Lodi for a Democratic retreat. She agreed to pay a \$400 penalty.

=====

Political Gravy Train Rolls in Sacramento: Free Gifts go unreported by 35 California lawmakers,

— Sen. Lois Wolk, D-Davis, failed to list a \$151.51 stay at the Wine and Roses hotel in Lodi from the Consumer Attorneys of California.

<http://economy4abc.blogspot.com/2010/01/political-gravy-train-rolls-in.html>



STATE AND CONSUMER SERVICES AGENCY • ARNOLD SCHWARZENEGGER, GOVERNOR
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MEMORANDUM

DATE: October 7, 2010

TO: Executive Officers
 Board Presidents/Chairs

FROM: *Doreatha Johnson*
 DOREATHEA JOHNSON
 Deputy Director
 Legal Affairs

SUBJECT: Board Meeting Protocols

Three Duties for Board Meetings

1. Give adequate notice of meetings that will be held and agenda items.
2. Conduct meetings in open session.
3. Provide the public an opportunity to comment.

First Duty

Adequate Notice of Meetings and Agenda Items

1. Timely – Law requires 10 days notice to those on a mailing list and posting notice and agenda on your website.
2. Specific Notice – Detailed, itemized agenda, identifying all items of business to be conducted at the meeting.
 - Items not on agenda cannot be discussed nor can they be acted on.
 - Can't discuss items under the heading of "New or Old Business" unless they are specifically identified.
 - Test for Specific Notice --Is an item specific enough for a member of the public to reasonably ascertain the nature of the business to occur at the meeting?

Second Duty Conduct Meetings

Open Session

General rule: Meetings must be conducted in Open Session and all discussion and actions must take place in the public, unless specifically authorized by law to go into closed session, with regard to that item of business.

Vote in public – Votes must be publically taken. Secret votes or votes by proxy are not permitted.

Closed Session

Business statutorily authorized to be conducted in closed session:

- Disciplinary matters;
- Preparing, approving or grading examinations;
- Pending litigation;
- Matters affecting personal privacy;
- Executive officer appointment, employment or dismissal.

Once in closed session, you can only discuss those matters that were identified as closed session on your agenda.

Third Duty Public Comment At The Meeting

General Rule

Must allow public comment on each open session agenda item.

Suggested script to be read at the beginning of the meeting:

The Board Chair will allow public comment on agenda items, as those items are taken up by the Board, during the meeting. Under the Open Meetings Act, the Board may not take any action on items raised by public comment that are not on the Agenda, other than to decide whether to schedule that item for a future meeting.

If any person desires to address the Board, it will be appreciated if he or she will stand or come forward and give his or her name, and if he or she represents an organization, the name of such organization, so that we will have a record of all those who appear. Please note that a person wishing to provide comment is not

required to identify him or herself when making public comment, but it is appreciated.

In order to allow the Board sufficient time to conduct its scheduled business, public comment will be limited to ___ minutes. Please make your comments focused and relevant to the duties of the Board. It is not necessary to repeat statements or views of a previous speaker, it is sufficient to state that you agree. Written statements should be summarized and submitted to the Board. They should not be read.

If as chairperson/president, I forget to ask for public comment on an agenda item, it is not because I intend to limit comment but just because I forgot. So in that situation, please raise your hand and I will recognize you.

Suggested script to be used for each item on the agenda:

1. Call the Agenda Item
2. Committee Presents the agenda item
3. Ask for a motion
4. Ask for a second, unless the motion is made by the committee (second is not needed)
5. Ask for board discussion.
6. Ask if there is public comment. [You may reverse the order of these 2.]
7. Ask if there is further board discussion.
8. Repeat the Motion
9. Take the vote

Suggested script for public comment on items not on the agenda:

The board values input from the public as part of its consumer protection mission. It invites and welcomes public comment during this section of the agenda. However, board members cannot engage in dialogue with those who testify during this section of the agenda due to constraints imposed on the board and its members by law. The law prohibits the board from substantively discussing or voting on any matter brought up during public comment. A member of the public who would like the board to discuss a general topic not related to a specific case involving one of its licensees can ask the board to consider placing the issue on the board's agenda for a future meeting.

If you have an application or disciplinary charges pending before the board, we ask that you not discuss the details of your case or pending complaint since the board members will be the "judges" and by law are not permitted to receive evidence or information that is not part of the administrative record in the case.

Disruptive persons:

The public has the right to express its disapproval, and may sometimes make emotional presentations. It is the board's duty and obligation to allow that public comment. Since the purpose of the meeting is for the agency to conduct its business, commenters shouldn't be permitted to thwart that purpose and may be

removed from the meeting if disruptive behavior continues after a request that it stop.

Suggested script to use when there is a disruptive person:

Under the Open Meetings Act (Government Code Section 11126.5), if you continue in this manner, I will ask you to leave the meeting and if you do not leave the meeting, you will be removed. Accordingly, I am asking you to discontinue your disruptive conduct so that all participants can be heard in an orderly fashion.

Miscellaneous

Wording of Motions

- Motions must be clearly worded.
- The test: Could a reasonable person reading the motion understand what the board meant to accomplish?
- Chair should restate the motion before the discussion and just before the vote is taken

Improper Disclosure of Information

- Improper for information received during closed session to be publicly disclosed without authorization of the body as a whole.

Role of the Attorney

The attorney's role during board meetings is to advise the agency of its obligations and authority under the law when it appears that the agency may be deviating from it, e.g. Open Meetings Act, quorum requirements, practice acts, regulations. In some cases, it may be necessary for the attorney to assist the agency in identifying an issue, framing a motion that accurately reflects the agency's deliberations and intent or seeking clarification from a speaker or board member.

When a problem is identified, the attorney is expected to assist the board in developing a lawful alternative method of accomplishing the board's goal.

It is not the attorney's responsibility or role to chair the meetings or direct the discussion. And the attorney should refrain from doing so even if requested to take on that role.

AVAILABILITY OF MODIFIED TEXT

NOTICE IS HEREBY GIVEN that the Medical Board of California has proposed modifications to the text of CCR Section 1361 in Article 4 of Chapter 2, Division 13, in Title 16 relating to the *Manual of Disciplinary Guidelines and Model Disciplinary Orders*, that were the subject of a regulatory hearing on November 5, 2010. A copy of only the text being modified is enclosed. Any person who wishes to comment on the proposed modifications may do so by submitting written comments by the close of business on January 24, 2011 to the following:

Name: Susan Cady, Enforcement Manager
Medical Board of California
Address: 2005 Evergreen Street, Suite 1200
Sacramento, CA 95815
Telephone No.: (916) 263-2389
Fax No.: (916) 263-2387
E-Mail Address: regulations@mbc.ca.gov

DATED: January 7, 2011

/ signed by /

Kevin A. Schunke
Regulations Coordinator

Medical Board of California

Modified Text

Changes to the originally proposed language are shown by double underline for the new text and underline with strikeout for the deleted text.
(For ease of locating the modified text, it also has been shaded.)

1. Amend section 1361 in Article 4 of Chapter 2, Division 13, to read as follows:

1361. Disciplinary Guidelines.

In reaching a decision on a disciplinary action under the Administrative Procedure Act (Government Code Section 11400 et seq.), the Medical Board of California shall consider the disciplinary guidelines entitled "Manual of Disciplinary Guidelines and Model Disciplinary Orders" (~~10th Edition/2008~~ 11th Edition/2010 2011) which are hereby incorporated by reference. Deviation from these guidelines and orders, including the standard terms of probation, is appropriate where the Medical Board of California in its sole discretion determines by adoption of a proposed decision or stipulation that the facts of the particular case warrant such a deviation -- for example: the presence of mitigating factors; the age of the case; evidentiary problems.

NOTE: Authority cited: Sections 2018, Business and Professions Code; and ~~Sections Section~~ Section 11400.20 ~~and 11400.21~~, Government Code. Reference: Sections 2227, 2228, 2229, and 2234, Business and Professions Code; and Sections 11400.20 and 11425.50(e), Government Code.

Modifications have been made to probationary conditions:

Title Page – non-substantive change to year

- #9
- #10
- #11
- Recommended Range of Penalties for Violations of Probation

State of California
State and Consumer Services Agency
MEDICAL BOARD OF CALIFORNIA
MANUAL OF MODEL DISCIPLINARY ORDERS
AND DISCIPLINARY GUIDELINES
1140th Edition
2008~~2010~~-2011
STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA

~~Richard Fantozzi, M.D.~~
Barbara Yaroslavsky,
President
~~Cesar Aristeiguita, M.D.~~
Frank Zerunyan,
Vice President
Hedy Chang,
Secretary

The Board produced this Manual of Model Disciplinary Orders and Disciplinary Guidelines, 1140th Edition for the intended use of those involved in the physician disciplinary process: Administrative Law Judges, defense attorneys, physicians-respondents, trial attorneys from the Office of the Attorney General, and the Board's disciplinary panel members who review proposed decisions and stipulations and make final decisions. These guidelines are not binding standards.

The Federation of State Medical Boards and other state medical boards have requested and received this manual. All are welcome to use and copy any part of this material for their own work.

For additional copies of this manual, please write to the address below or visit
http://www.medbd.ca.gov/publications/disciplinary_guide.pdf:

Medical Board of California
2005 Evergreen Street, Suite 1200
Sacramento, CA 95815
Phone (916) 263-2466

Revisions to the Manual of Model Disciplinary Orders and Disciplinary Guidelines, are made periodically. Listed below are the most recent changes included in the 1140th edition approved by the Board following open discussion at a public meeting.

Summary of Changes

The former "Disciplinary Guidelines – Index" printed after the last "Standard Conditions" has been moved to the Table of Contents (a formatting change only) and has been renamed the "Recommended Range of Penalties for Violations" for clarity.

Model Condition Number:

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 ~~lawful prescription~~ medications, respondent shall notify the Board or its designee of the: issuing practitioner's name, address, and telephone number; medication name, ~~and 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** ~~within three (3) calendar days after being so notified.~~ The respondent shall not resume the practice of medicine until final decision on an accusation and/or a petition to revoke probation. An accusation and/or petition to revoke probation shall be filed by the Board within 15 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 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 ~~within three (3) calendar days after being so notified.~~ The respondent shall not resume the practice of medicine until final decision on an accusation and/or a petition to revoke probation. An accusation and/or petition to revoke probation shall be

filed by the Board within 15 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 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. ~~Within 30 calendar days of this Decision, Prior to practicing medicine,~~ Prior to practicing medicine, respondent shall, at respondent's expense, contract with a laboratory or service approved in advance by the Board or its designee that will conduct random, unannounced, observed, ~~urine~~ biological fluid testing a minimum of four times each month. The contract shall require results of the ~~urine~~ 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 ~~Failure to~~ maintain this laboratory or service contract during the period of probation is a violation of probation.

A certified copy of any laboratory test result may be received in evidence in any proceedings between the Board and respondent. ~~Failure to submit to or comply with the time frame for submitting to, or failure to complete the required biological fluid testing, is a violation of probation."~~

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 ~~within three (3) calendar days after being so notified~~. The respondent shall not resume the practice of medicine until final decision on an accusation and/or a petition to revoke probation. An accusation and/or petition to revoke probation shall be filed by the Board within 15 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 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.

VIOLETION OF PROBATION

Minimum penalty: 30 day suspension

Maximum penalty: Revocation

The maximum penalty should be given for repeated similar offenses or for probation violations revealing a cavalier or recalcitrant attitude. A violation of any of the following conditions of probation should result in, at minimum, a 60 day suspension:

1. Controlled Substances -Maintain Records and Access to Records and Inventories [8]
2. Biological Fluid Testing [11]
3. Professional Boundaries Program [17]
- ~~4. Clinical Training Program [18]~~
- ~~4~~ ~~5~~ Psychiatric Evaluation [20]
- ~~5~~ ~~6~~ Psychotherapy [21]
- ~~6~~ ~~7~~ Medical Evaluation and Treatment [22]
- ~~7~~ ~~8~~ Third Party Chaperone [25]

It is the expectation of the Medical Board of California that the appropriate penalty for a physician who did not successfully complete a clinical training program ordered as part of his or her probation is revocation.