

**Medical Board of California  
Tracker - Legislative Bill File  
6/4/2007**

<u>BILL</u>	<u>AUTHOR</u>	<u>TITLE</u>	<u>STATUS</u>	<u>POSITION</u>	<u>VER. OF BILL POS. BASED</u>	<u>LAST AMENDED</u>	<u>LETTERS</u>
AB 253	Eng	MBC: Restructuring	Sen. B&P	Sponsor/Support	Amended	3/8/07	3/13/07
AB 329	Nakanishi	Chronic Diseases: Telemedicine	Sen. Health 6/13	Sponsor/Support	Amended	3/29/07	4/17/07
AB 1025	Bass	Professions: Denial of Licensure	Floor	Neutral w/amends	Amended	4/16/07	
AB 1073	Nava	Work Comp: CA lic. Physicians on Utilization Review	Sen. Labor	(Support)	Amended	5/1/07	
AB 1224	Hernandez	Telemedicine: Optometrists	Sen. B&P	Support	Amended	4/10/07	
SB 102	Migden	Blood Transfusions: Brochure	Asm. B&P 6/12	Support	Amended	4/12/07	
SB 472	Corbett	Prescription Drugs: Labeling Requirements & Panel	Floor	Support	Amended	5/21/07	
SB 620	Correa	Anesthesia Permit for Physicians in Dental Offices	Asm. B&P	Support	Introduced		5/30/07
SB 761	Ridley-Thomas	Diversion and Vertical Prosecution	Floor	Sponsor/Support	Amended	3/27/07	3/13/07
SB 764	Migden	MBC Reporting Licensee Information to OSHPD	Asm. Health 6/12	Support w/conditions	Amended	4/25/07	4/9/07
SB 767	Ridley-Thomas	Drug Overdose Treatment: Liability	Floor	Neutral	Amended	5/15/07	
SB 1048	Comm. B,P&ED	Healing Arts: Omnibus	Asm. B&P	Support MBC Provisions	Introduced		



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May 29, 2007

The Honorable Mike Eng  
 California State Assembly  
 State Capitol, Room 6025  
 Sacramento, CA 95814

RE: AB 253 – **SUPPORT IF AMENDED**

Dear Assembly Member Eng:

The Department of Consumer Affairs (Department) has taken a **SUPPORT IF AMENDED** position on your bill, **AB 253** (as amended 3/08/07), which, among other things, would reduce the size of the Medical Board (Board) from 21 members to 19 members.

At 19 members, the Board would remain the largest Board under the Department. A board of this size is costly and has not been demonstrated to be more effective than a smaller board. The Department believes that the Board can function with 15 members, which is consistent with the size of comparable boards that regulate similarly large and complex licensee populations. Consequently, the Department recommends that the Board instead be reduced to 15 members consisting of 8 physicians and 7 public members, which would reduce the size of state government and improve the current ratio of public members.

Should you have any questions regarding our position, please contact me at 574-7800.

Sincerely,

LAURA ZUNIGA  
 Deputy Director  
 Division of Legislative and Regulatory Review

cc: Chris Kahn, Legislative Secretary, Office of the Governor  
 Happy Chastain, Deputy Secretary, Legislation, State and Consumer Services Agency



# Medical Board of California's Physician Diversion Program

While Making Recent Improvements, Inconsistent Monitoring of  
Participants and Inadequate Oversight of Its Service Providers  
Continue to Hamper Its Ability to Protect the Public

June 2007 Report 2006-116R



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June 7, 2007

2006-116

The Governor of California  
President pro Tempore of the Senate  
Speaker of the Assembly  
State Capitol  
Sacramento, California 95814

Dear Governor and Legislative Leaders:

As requested by the Joint Legislative Audit Committee, the Bureau of State Audits presents its audit report concerning the Medical Board of California's Physician Diversion Program (diversion program).

This report concludes that although the diversion program has made many improvements since the release of the November 2005 report of an independent reviewer, known as the enforcement monitor, there are still some areas in which the program must improve in order to adequately protect the public. For instance, although case managers appear to be contacting participants on a regular basis and participants appear to be attending group meetings and completing the required amount of drug tests, the diversion program does not adequately ensure that it receives required monitoring reports from its participants' treatment providers and work-site monitors. In addition, although the diversion program has reduced the amount of time it takes to admit new participants into the program and begin drug testing, it does not always respond to potential relapses in a timely and adequate manner. Specifically, the diversion program has not always required a physician to immediately stop practicing medicine after testing positive for alcohol or a nonprescribed or prohibited drug.

Further, of the drug tests scheduled in June and October 2006, 26 percent were not performed as randomly scheduled. Additionally, the diversion program currently does not have an effective process for reconciling its scheduled drug tests with the actual drug tests performed and does not formally evaluate its collectors, group facilitators, and diversion evaluation committee members to determine whether they are meeting program standards. Finally, the medical board, which is charged with overseeing the diversion program, has not provided consistently effective oversight.

Respectfully submitted,



ELAINE M. HOWLE  
State Auditor

## Contents

Summary	1
Introduction	7
Chapter 1	
Although the Physician Diversion Program Has Shown Improvement in Some Areas, Its Monitoring of Participants Remains Inconsistent	17
Recommendations	36
Chapter 2	
The Physician Diversion Program's Oversight of Random Drug Tests and Its Service Providers Is Inadequate	39
Recommendations	51
Chapter 3	
The Physician Diversion Program Could Be Improved Through Better Oversight by the Medical Board	53
Recommendations	62
Appendix	
The Physician Diversion Program Has Made Improvements Since the Final Enforcement Monitor Report	65
Responses to the Audit	
State and Consumer Services Agency, Department of Consumer Affairs and the Medical Board of California	69
Comments	
California State Auditor's Comments on the Response From the Medical Board of California	81

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## Summary

### Results in Brief

The Medical Board of California (medical board), a consumer protection agency with the goal of protecting the public by ensuring the initial and continued competence of the health care professionals under its jurisdiction, administers a program designed to rehabilitate physicians impaired by substance abuse or by mental health disorders. This program—the Physician Diversion Program (diversion program)—monitors participants’ attendance at group meetings, facilitates random drug testing, and requires reports from work-site monitors and treatment providers. State law authorizes the diversion program and charges the medical board with its oversight and administration.

In addition to state employees who are principally responsible for the administration of the diversion program, other outside service providers, such as urine collection monitors (collectors) and group facilitators, participate in the monitoring and treatment of program participants. The program also uses seven regional diversion evaluation committees (DECs), made up of individuals with experience in the evaluation and management of persons impaired due to alcohol or drug abuse or a physical or mental illness, to determine prospective participants’ appropriateness for and terms of participation in the program, as well as to make decisions on participants’ successful completion of or termination from the program.

In our review of the diversion program, we focused on activities occurring after the November 2005 report was issued by an independent entity known as the enforcement monitor. Legislation passed in 2002 required that such an entity conduct a review of the medical board’s enforcement and diversion programs. A November 2004 interim report issued by the enforcement monitor raised a number of concerns and made recommendations related to the diversion program. The November 2005 final report provided an update on these issues. We found that although the diversion program has made a number of improvements since the enforcement monitor’s final report, it must continue to improve its performance and procedures in some specific areas to adequately protect the public.

The diversion program has established requirements designed to monitor participating physicians as they seek to overcome addictions and ailments that have the potential to impede their

### *Audit Highlights . . .*

*Our review of the Medical Board of California’s (medical board) Physician Diversion Program (diversion program) revealed the following:*

- » *Case managers are contacting participants on a regular basis and participants appear to be attending group meetings and completing drug tests, as required.*
- » *The diversion program does not adequately ensure that it receives required monitoring reports from its participants’ treatment providers and work-site monitors.*
- » *The diversion program has reduced the amount of time it takes to bring new participants into the program and begin drug testing, but the timeliness of testing falls short of its goal.*
- » *The diversion program has not always required a physician to immediately stop practicing medicine after testing positive for alcohol or a nonprescribed or prohibited drug, thus putting the public’s safety at risk.*
- » *Twenty-six percent of drug tests in June and October 2006 were not performed as randomly scheduled.*

*continued on the next page . . .*



- » *The diversion program's current process for reconciling its scheduled drug tests with the actual drug tests performed needs to be improved.*
- » *The diversion program has not been formally evaluating its collectors, group facilitators, and diversion evaluation committee members to determine how well they are meeting program standards.*
- » *The medical board has not provided consistently effective oversight of the diversion program.*

ability to practice medicine. Our review found that although the diversion program is generally complying with some of these requirements, its compliance with other requirements falls short. Specifically, case managers appear to be contacting participants on a regular basis, as required, and participants generally appear to be attending group meetings and completing drug tests. However, the diversion program is not adequately ensuring that it receives required monitoring reports from participants' treatment providers and work-site monitors and receives all required meeting verification cards from participants. For example, for the sample of participants we reviewed, the diversion program should have obtained 51 reports from participants' therapists, but it obtained only 17 (33 percent). This low level of compliance may actually be an improvement over that achieved in the past, as indicated by the statistics obtained during the enforcement monitor's review. However, by not adequately ensuring that it receives required monitoring and treatment reports and meeting verification cards, the diversion program has less assurance that its participants are complying with their treatment plans and program requirements.

In addition to the monitoring requirements it has established, the diversion program has set goals related to the timeliness with which participants will be brought into the program. Of the three goals it has established for this purpose, the diversion program appears to be meeting two, and it has made substantial improvement in all three areas in recent years. Specifically, case managers, on average, are completing intake interviews with prospective participants within the goal of seven days from initial contact with the program, and participants are appearing before a DEC for final approval to join the program within the goal of 90 days from initial contact. Although the length of time from initial contact to first drug test decreased from an average of 35 days in 2003 and 2004 to an average of 18 days in 2005 and 2006 for the sample of participants we reviewed, the diversion program has not yet reached its goal of seven days for this activity.

In reviewing the diversion program's response to positive drug tests and other indications that a physician has relapsed into drug or alcohol abuse, we found that in some instances the program did not always respond in a timely manner and did not demonstrate that its actions were adequate, thus putting the public's safety at risk. Specifically, the diversion program has not always required a physician to immediately stop practicing medicine after testing positive for alcohol or a nonprescribed or prohibited drug, as required by program policy; has determined that positive drug tests were not a relapse without providing any justification for such a determination; and has not followed the advice of its advisory committee to have a trained medical review officer review contested results.

In addition, we found that the diversion program has generally not overseen its drug test system and its service providers in an adequate manner. Specifically, although it has shown improvement in this area in recent years, a large number of drug tests are still not being performed according to the randomly generated schedule. The most frequent reason given for drug tests not being completed as scheduled was that participants had requested vacations on those days. However, a significant portion of these vacation requests never received approval from appropriate program personnel. Other reasons drug tests were not completed as scheduled were that collectors moved the tests to other dates and participants did not show up to take the tests. In these instances, the program did not document the inadequate performance of collectors and did not ensure that collectors submitted an incident report for each missed test, as required by program policy.

Further, the diversion program's current process for reconciling its scheduled drug tests with the actual drug tests performed does not adequately or quickly identify missed drug tests or data inconsistencies between collectors' reports and lab results. We also found that although the diversion program relies heavily on its collectors, group facilitators, and DEC members in the monitoring and treatment of its participants, it has not been formally evaluating these individuals to determine how well they are meeting program standards.

For its part, the medical board has not provided consistently effective oversight of the diversion program. The medical board uses a committee made up of some of its members to oversee the program (diversion committee). However, the diversion committee's ability to oversee the program is hindered by a reporting process that does not give it a complete view of the program's performance and by a policy-making process that does not ensure that adopted policies are incorporated into the program's policy manual. Consequently, rather than discovering deficiencies through the reporting process and correcting them through a policy-making process that maintains some level of continuity, the diversion committee has been notified of program deficiencies in recent years by an outside entity—the enforcement monitor. Although improvements have been made, most of the enforcement monitor's recommendations have not yet been fully implemented, even though almost two years have elapsed since the publishing of the enforcement monitor's final report. Therefore, it does not appear that the diversion committee has made a diligent effort to ensure that the program promptly implements those recommendations with which it agreed.

## Recommendations

To better monitor diversion program participants, program management should create mechanisms to ensure that group facilitators, therapists, and work-site monitors submit required reports, and that the participants submit required meeting verifications.

To ensure a timely and adequate response to positive drug tests or other indications of a relapse, the diversion program should do the following:

- Immediately remove practicing physicians from work when notified of a positive drug test.
- Require DEC members to provide justification when they determine that a positive drug test does not constitute a relapse.
- Have a qualified medical review officer evaluate all disputed drug test results if its new advisory committee determines that this action is needed.

To provide adequate oversight of participants' random drug tests, the diversion program should ensure that both the case manager and group facilitator approve all vacation requests and should establish a more timely and effective reconciliation of scheduled drug tests to actual drug tests performed by comparing the calendar of randomly generated assigned dates to the lab results.

To ensure that it adequately oversees its collectors, group facilitators, and DEC members, the diversion program should formally evaluate the performance of these individuals annually.

To effectively oversee the diversion program, the medical board should require it to create a reporting process that allows the medical board to view each critical component of the program.

To ensure that it adequately oversees the diversion program, the medical board should have its diversion committee review and approve the program's policy manual. Thereafter, the diversion committee should ensure that any policy change it approves is added to the manual.

The medical board should ensure that areas of program improvement recommended by the enforcement monitor are completed within the next six months.

### Agency Comments

The State and Consumer Services Agency agrees with our audit recommendations and has directed the Department of Consumer Affairs (department) to follow through with the medical board to ensure their implementation. The department also concurs with the recommendations and describes specific actions it would take to assist and encourage the medical board to ensure timely completion. The medical board agrees with each recommendation and describes a number of programmatic changes it has already implemented in response to the audit.

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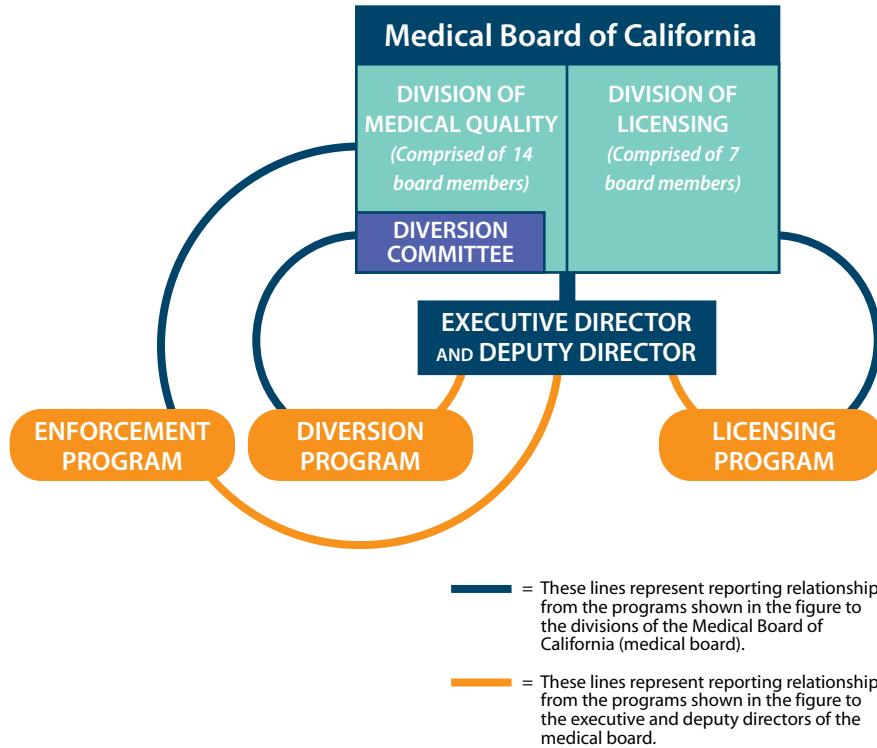
## Introduction

### Background

The Medical Board of California (medical board) is a consumer protection agency with the goal of protecting the public by ensuring the initial and continued competence of the health care professionals under its jurisdiction. The medical board licenses physicians, surgeons, and other health professionals; investigates complaints against its licensees; and disciplines those found guilty of violating the law or regulations. In addition, the medical board administers a program designed to rehabilitate physicians impaired by substance abuse or by mental health disorders. This program—the Physician Diversion Program (diversion program)—monitors participants’ attendance at group meetings, facilitates random drug testing, and requires reports from work-site monitors and treatment providers.

### Medical Board

The medical board, which has 21 appointed members and is within the Department of Consumer Affairs, comprises two divisions—the Division of Licensing and the Division of Medical Quality—and employs an executive director and a deputy director to oversee the day-to-day operations of its programs, as indicated in Figure 1 on the following page. The Division of Licensing is responsible for approving medical education programs, administering physician and surgeon examinations, issuing licenses and certificates, and administering the medical board’s continuing education and student loan programs. The Division of Medical Quality, through its enforcement program (enforcement), is responsible for investigating complaints against licensees of the medical board and disciplining those found guilty of violating the Medical Practice Act. The type of discipline the medical board administers depends on the nature of the violation and includes restrictions of medical duties, license suspension, license revocation, probation, and participation in the diversion program. As Figure 1 illustrates, the Division of Medical Quality has established a committee made up of some of its members (diversion committee) to directly oversee the diversion program.

**Figure 1****The Structure of the Medical Board of California as It Relates to the Diversion Program**

Source: The medical board's organizational chart for fiscal year 2006–07.

### Diversion Program

Current state law authorizes the diversion program and charges the Division of Medical Quality with its oversight and administration. The intent of the legislation was that the medical board seek ways to identify and rehabilitate physicians and surgeons whose competency is impaired due to abuse of dangerous drugs or alcohol, or due to mental or physical illness, so that they may be treated and returned to the practice of medicine in a manner that will not endanger public health and safety. The medical board explained that the diversion program was started as a cost-effective alternative to the discipline process, which often takes years to complete, and that it better protects the public because it encourages physicians to seek assistance on their own, prior to the violation of any laws or professional codes and prior to the filing of any complaints. The medical board stated that this means a self-referring physician is being monitored and is seeking treatment one to two years earlier than if he or she had waited until disciplinary action was initiated. According to statistics provided in the medical board's annual

reports from the last seven fiscal years, the average number of participants in the program at the end of each fiscal year was just over 250, with a high of 273 in fiscal year 2000–01 and a low of 215 in fiscal year 2005–06.

When an individual enters the diversion program, he or she signs an agreement containing the specific provisions that must be followed while in the program.<sup>1</sup> The agreements vary by individual but generally include entrance into an inpatient treatment program for some length of time and, thereafter, attendance at two diversion group meetings and a minimum of three support group meetings, such as Alcoholics Anonymous or Narcotics Anonymous, each week; submission to at least four random drug tests each month; submission to work-site monitoring by a colleague; and an agreement to not practice medicine if requested and to remain in the program for five years. These requirements can be reduced after a period of time.

The requirements for physicians who enter the diversion program because of mental illness can vary somewhat, but generally follow the same pattern as those for participants who are dealing with substance abuse. For instance, participants with a mental illness receive drug tests and attend diversion group meetings alongside participants who have addictions to drugs and alcohol. The program administrator explained that, more often than not, participants with a mental illness have also had some form of drug or alcohol abuse in their past. For those who have not, the program does not want drug or alcohol use to interfere with their treatment and therefore prohibits the use of drugs or alcohol and conducts monitoring accordingly. Since fiscal year 2002–03 four participants per year, on average, have entered the diversion program primarily as the result of a mental illness.<sup>2</sup>

According to state law, successful completion of the program is to be determined by the program administrator and shall include, at a minimum, three years of sobriety and adoption of a lifestyle designed to maintain a state of mental health stability. According to statistics provided in the medical board's annual reports from the last seven fiscal years, the average number of participants leaving the program each year was 56. Of those, an average of 43 (77 percent) did so successfully.

<sup>1</sup> While an individual is being evaluated for entrance into the program, monitoring begins based on a standard interim agreement signed by the candidate, which is subsequently replaced by a formal diversion agreement after acceptance into the program.

<sup>2</sup> In 2002 state law was amended to permit enforcement to refer physicians diagnosed with mental illness into the diversion program. Although the state law included references to physicians with physical illnesses, the program administrator explained that the diversion program is not currently set up to assist physicians whose primary impairment is a physical illness.



### *Entry Into the Diversion Program*

Physicians enter the diversion program in one of three ways. First, they may choose on their own to enter the program (self-referred).

According to the medical board, these physicians often request entry at the urging of a hospital, colleague, or family member. Second, state law allows a physician to participate in the diversion program in lieu of potential discipline stemming from an investigation by enforcement, if the investigation is based primarily on mental illness or on the self-administration of alcohol or other drugs, and if there is no evidence of patient harm (board-referred). Participants diverted from the discipline process must sign a statement of understanding in which they agree that a violation would be a basis for discipline and could be prosecuted should the physician be terminated from the diversion program for failure to comply with program requirements. However, if a physician successfully completes the program, state law says that he or she shall not be subject to any disciplinary actions by the medical board for any alleged violation that resulted in the referral to the diversion program. The third way an individual may enter the diversion program is if the medical board directs the physician to participate in the program as part of a disciplinary order (board-ordered).

#### **Pathways Into the Diversion Program**

**Self-referred**—Participants can enter the program of their own volition.

**Board-referred**—Enforcement may refer physicians to the program instead of pursuing disciplinary action.

**Board-ordered**—The medical board may direct physicians to participate in the program as part of a disciplinary order.

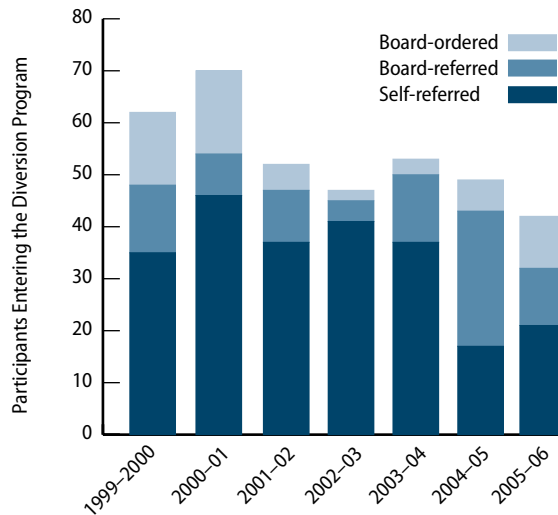
Source: March 2006 Physician Diversion Program informational pamphlet.

One of the key differences between board-ordered participants and those who are either self-referred or board-referred is that information related to self- or board-referred participants must be kept confidential from the public. Conversely, information on participants who have been ordered into the diversion program as part of a disciplinary action is a matter of public record.

According to statistics provided in the medical board's annual reports, the number of participants entering the program<sup>3</sup> in the last seven fiscal years averaged 54 each year, ranging from a high of 70 in fiscal year 2000–01 to a low of 42 in fiscal year 2005–06. As shown in Figure 2, the majority of participants entering the diversion program were self-referred in all the years except fiscal year 2004–05, in which board-referred participants outnumbered the other categories.

<sup>3</sup> The annual reports defined this term as being approved to enter the program and signing a formal diversion agreement.

**Figure 2**  
**Number and Type of Referral for Participants Entering the Physician Diversion Program During Fiscal Years 1999–2000 Through 2005–06**



Source: Statistics provided in the medical board's annual reports.

In reference to the steep drop in self-referred participants in fiscal year 2004–05, the diversion program's administrator explained that, because of excessive caseloads in some regions, the program instituted a policy in fiscal year 2003–04 that delayed prospective participants' entry into the program. He stated that this practice grew in scope and impact until the policy was ended in the beginning of 2005. He indicated that this policy, as well as the fact that legislation had put a sunset date on the program and required a review by an outside entity, gave prospective participants and individuals within the treatment community the impression that the program was either not accepting new participants or would not be around to see participants through the recovery process. The program administrator explained that the program still has not fully recovered from this perception and said that he looks forward to the time when he can perform more extensive program outreach.

As to the sharp increase in board-referred participants in fiscal year 2004–05, the chief of enforcement explained that it was around this time that a statutory and policy change allowed enforcement to refer physicians affected by mental illness to the diversion program while continuing to complete an investigation into any quality-of-care issues. According to the chief, because this was new policy, enforcement may have referred some physicians affected by mental illness who it learned over time were not ideally suited for the diversion program. Thus, it reduced the number of these referrals in subsequent years. The chief also explained that a number of

participants enter the diversion program as self-referred but then become board-referred after enforcement receives a complaint regarding them. She said that the diversion program's delayed entry policy quite possibly caused a number of participants to be classified as board-referred who might, without the delay in entry, have been classified as self-referred. The diversion program administrator agreed that this could be a plausible explanation for the increase in board referrals during fiscal year 2004–05.

### ***Administrative Structure of the Diversion Program***

In addition to state employees who are principally responsible for the administration of the diversion program (program staff), other outside service providers, such as urine collection monitors (collectors) and group facilitators, participate in the monitoring and treatment of program participants. However, although these service providers are paid directly by participants, program staff are responsible for screening the providers for competence. The program also uses seven regional diversion evaluation committees (DECs) to determine prospective participants' appropriateness for and terms of participation in the program, as well as to make decisions on participants' successful completion of or termination from the program. According to state law, each DEC is composed of five members who are appointed by the Division of Medical Quality and who have experience in the evaluation and management of persons impaired due to alcohol or drug abuse or a physical or mental illness.

As shown in Figure 3, the diversion program, which reported expenditures of approximately \$1.1 million for fiscal year 2005–06, is staffed by 15 employees: a program administrator, two case manager supervisors, six case managers, a DEC coordinator, a collection system manager, and four administrative staff. Although the program administrator is ultimately responsible for carrying out program priorities, the day-to-day monitoring of participants' progress falls to the case managers. The diversion program has six case managers located in different regions of the State. A case manager is assigned to each participant based on his or her geographic location, and is responsible for monitoring the participant's compliance with his or her diversion agreement and coordinating information from all monitoring and treatment sources. The case manager is required to have one-on-one contact with each participant on a regular basis.

**Figure 3**  
**The Organizational Chart of the Diversion Program**



Source: The medical board's organizational chart.

For each participant, the case manager leads a local case management team that includes the following key members:

- **An assigned DEC case consultant**—The DEC as a whole functions as an expert consultant for cases within its region. However, each participant is assigned one member of the DEC to act as a case consultant.
- **Group facilitator**—Each participant attends meetings conducted twice a week by a group facilitator who provides support for recovery and monitors program participants by observing them for any unusual behavior, tracking their attendance, and notifying the case manager of any issues or concerns. These individuals are selected and assigned by the program but are paid directly by the participants for their services.
- **Collectors**—Each participant is assigned a collector who is responsible for conducting observed urine collections and following the chain of custody protocol in submitting collections to the laboratory. The diversion program selects and assigns collectors. Participants pay collection costs and laboratory fees to their collector at the time of collection.
- **Work-site and hospital monitors**—Participants who are practicing must find, and obtain program approval for, a work-site monitor whose license with the medical board is valid and in good standing. Participants with hospital privileges must also have a hospital monitor. These individuals are responsible for observing the participant's condition while he or she practices medicine and submitting quarterly reports to the case manager.

### ***Past Reports Involving the Diversion Program***

In 1982 the Office of the Auditor General released the first in a series of audit reports on the diversion program titled *Review of the Board of Medical Quality Assurance*, followed by *The State's Diversion Programs Do Not Adequately Protect the Public From Health Professionals Who Suffer From Alcoholism or Drug Abuse* (1985), and *The Board of Medical Quality Assurance Has Made Progress in Improving Its Diversion Program: Some Problems Remain* (1986). In 2002 a bill was passed requiring the director of the Department of Consumer Affairs to appoint an independent “enforcement monitor” to evaluate the medical board’s enforcement and diversion programs for a period not to exceed two years. The enforcement monitor was responsible for evaluating the effectiveness and efficiency of the medical board’s diversion program and making recommendations regarding the continuation of the program and any changes or reforms required to ensure that physicians and surgeons participating in the program are appropriately monitored and the public is protected from physicians and surgeons who are impaired.

In both the auditor’s and the enforcement monitor’s reports, the findings and criticisms were similar, and included the following:

- The diversion program does not adequately monitor its assigned participants.
- Program monitors are not adequately trained and supervised.
- The diversion program does not terminate or notify enforcement regarding participants who have not complied with significant terms and conditions of their treatment plans.
- The medical board does not adequately supervise and review the program.

The enforcement monitor’s initial and final reports, published in November 2004 and November 2005, respectively, raised additional issues and made specific recommendations that the medical board has recently made efforts to implement. We describe these issues and recommendations, and the medical board’s responses, in greater detail in Chapter 3 and the Appendix.

### **Scope and Methodology**

In response to the findings and recommendations from the study conducted by the enforcement monitor, the Joint Legislative Audit Committee requested the Bureau of State Audits to conduct

a review of the diversion program. Specifically, we were asked to review the program's effectiveness and efficiency in achieving its goals by evaluating the following:

- The timeliness of diversion services provided by the program.
- The thoroughness of the program's documentation of treatment services received by participants.
- The notification procedures when participants are terminated from the diversion program.
- The approval process and oversight of individuals providing services for the diversion program and the corrective action taken when these individuals fail to provide effective or timely services.
- The current administrative structure of the program.

To obtain an understanding of the diversion program, we reviewed associated laws and regulations. We also examined the program's policies and procedures and interviewed key personnel from the program and the medical board. To evaluate the timeliness of services provided by the diversion program and evaluate the monitoring of program participants, we reviewed the files of 40 randomly selected physicians who participated in the program between November 2005 and October 2006. We also obtained information on physicians participating in the diversion program during this time period from the program's Diversion Tracking System (DTS) and, in accordance with standards from the U.S. Government Accountability Office, obtained reasonable assurance that the data provided to us were complete. We conducted a preliminary assessment of using the DTS to perform analyses on all diversion program participants but determined that, for the purposes of this audit, reviewing the files of a sample of participants would be sufficient.

As shown in Table 1 on the following page, we randomly selected 10 physicians from the 83 who began their participation during our sample year—20 from the 206 physicians who participated in the program throughout the entire year and 10 from the 77 who ended their participation during the year we reviewed. Selecting our sample in this manner allowed us to review 11 percent of the overall population and at least 10 percent of each of the three categories shown in Table 1.

Our review of participant files included a number of elements, as indicated in the text box. In reviewing these elements, we took note of the thoroughness of the program's documentation—at times requesting additional documents from case managers and group

**Table 1****Selection of a Sample of Physicians Who Participated in the Physician Diversion Program Between November 2005 and October 2006**

	BEGAN PARTICIPATION DURING TIME PERIOD	PARTICIPATED DURING ENTIRE TIME PERIOD	ENDED PARTICIPATION DURING TIME PERIOD	TOTALS
Number of participants	83	206	77	366*
Random sample taken from group	10	20	10	40
Percentage of total	12%	10%	13%	11%

Source: Statistics provided from the Physician Diversion Program's Diversion Tracking System.

\* The total includes all the participants who were in the program for any length of time between November 2005 and October 2006. This number differs from the statistics provided in the Introduction, which reported the total number of participants in the program at a given point in time.

facilitators so that we could complete our analysis. When evidence in the file, such as a positive drug test, indicated that a physician may have relapsed, we determined what steps the diversion program took in response. In some cases, the appropriate program response would have been to notify enforcement. In such instances, we determined whether the program did so.

In addition to our review of the monitoring of participants, we evaluated how the diversion program approves and oversees the collectors, group facilitators, and DEC members who assist with the program. As part of our review of the practices of collectors, we determined whether the randomly scheduled drug tests in June and October 2006 were completed as scheduled. If they were not, we attempted to ascertain the reasons why. We selected these

two months because they were recent enough that information would still be readily available and because the July 2006 hiring of the current collection system manager fell between these two months.

#### Information Obtained in Our Review of a Sample of Diversion Program Participant Files

- From the initial phone contact, the length of time the diversion program took to complete the intake process, perform the first drug test, and have the participant meet with a DEC.
- The number of case manager contacts.
- The number of therapist and work-site monitor reports.
- The average number of diversion and other support group meetings attended.
- The average number of drug tests taken.
- The completion of an annual review by the DEC.
- The existence of any work restrictions.

Finally, we evaluated the current administrative structure of the diversion program by analyzing the cause of any shortcomings discovered during the audit procedures just described and determining whether the problems were caused or exacerbated by structural deficiencies within the program. Further, we evaluated the effectiveness of the reporting mechanisms used by the medical board to oversee the program, the level of oversight it has exercised over program policies, and the efforts the medical board has undertaken to respond to the enforcement monitor's reports.



## Chapter 1

### **ALTHOUGH THE PHYSICIAN DIVERSION PROGRAM HAS SHOWN IMPROVEMENT IN SOME AREAS, ITS MONITORING OF PARTICIPANTS REMAINS INCONSISTENT**

#### **Chapter Summary**

The Physician Diversion Program (diversion program) of the Medical Board of California (medical board) has established a number of requirements designed to monitor participating physicians as they seek to overcome addictions and ailments that have the potential to impede their ability to practice medicine. While the diversion program's compliance with these requirements is good in some areas, it is lacking in others. Specifically, case managers appear to be contacting participants on a regular basis, as required, and participants generally appear to be attending group meetings and completing drug tests. However, the diversion program is not adequately ensuring that it receives required monitoring reports from participants' treatment providers and work-site monitors. Despite this lack of assurance that participants are meeting treatment requirements and not demonstrating signs of relapse at work, the diversion program has in some instances granted physicians reductions in the required number of group meetings or in the work restrictions originally placed on them.

In addition to the monitoring requirements it has established, the diversion program has set goals related to the timeliness with which participants are to be brought into the program. Of the three goals it has established for this purpose, the diversion program appears to be meeting two, and it has made substantial improvement in all three areas in recent years. Specifically, case managers, on average, are completing intake interviews with prospective participants within the goal of seven days from initial contact with the program, and participants are appearing before a diversion evaluation committee (DEC) for final approval to join the program within the goal of 90 days from initial contact. With respect to its goal of conducting the first drug test within seven days of the initial contact, we found that the diversion program has decreased its average time from 35 days in 2003 and 2004 to 18 days in 2005 and 2006 for the sample of participants we reviewed; however, it still is not meeting its goal of seven days.

In reviewing the diversion program's response to positive drug tests and other indications of a relapse, we found that in some instances the program did not respond in a timely manner and did not demonstrate that its actions were adequate, thus putting the public's safety at risk. Specifically, the diversion program has not always required a physician to immediately stop practicing medicine after testing positive for



alcohol or a nonprescribed or prohibited drug, as required by program policy; has determined that positive drug tests were not a relapse without providing any justification for such a determination; and has not followed the advice of its advisory committee to have a trained medical review officer examine contested results.

### **The Quality of the Diversion Program's Monitoring of its Participants Varies**

Overall, diversion program case managers appear to be contacting participants on a regular basis, and participants generally appear to be attending group meetings and completing drug tests as required. In contrast, case managers and program management are not adequately ensuring that the program receives reports for participants that would, among other things, provide evidence that participants are going to group meetings and individual therapy when required, and are not exhibiting signs of substance abuse in the workplace. However, despite not receiving all of their required reports, the diversion program granted some physicians reductions in the required number of diversion group meetings or in the work restrictions originally placed on them.

To determine how well the diversion program monitors its participants and how compliant participants are with program requirements, we reviewed a random sample of 40 physicians who participated in the diversion program for some amount of time between November 2005 and October 2006.<sup>4</sup> In summarizing the data from the various functional areas of compliance, we found that the overall levels of program compliance fell within three distinct groups—good, fair, and poor. As indicated in Table 2, it was in the receipt of required reports that the program and its participants underperformed.

### ***Case Managers Are Generally Contacting Participants on a Regular Basis***

Diversion program policies require case managers to have regular in-person or telephone contact with their assigned program participants. The program administrator explained that the general expectation is that case managers have monthly contact with participants. For the 40 participants we reviewed, we determined that to meet this expectation overall, case managers would have needed to have 334 contacts with these participants during the time period November 2005 to October 2006. In total, they made 342 contacts, slightly more than the expected number.<sup>5</sup>

<sup>4</sup> Three of the 40 randomly selected participants reside outside of California and were thus considered out-of-state participants. We chose to focus most of our review on physicians located in-state.

<sup>5</sup> The length of time each participant was in the program varied. The expected number of case manager contacts is based on the number of full months the participants in our sample were in the program.

**Table 2**  
**The Overall Level of Compliance for a Sample of Diversion Program Participants**

CATEGORY OF COMPLIANCE	LEVEL OF COMPLIANCE*
Case manager contacts	Good
The following reports were received as required:	
Diversion group attendance reports	Fair
Therapist reports	Poor
Work-site monitor reports	Fair
Verification of support group attendance	Poor
The levels of attendance at the following meetings or events:	
Diversion group	Good
Support group	Good
Drug tests	Good

Source: Auditor analysis of information obtained from a sample of participant files at the Physician Diversion Program.

\* Good (above 80 percent), Fair (60 percent to 80 percent), Poor (below 60 percent).

While this overall level of performance is good, some participants received more contacts from their case managers than required, while a relative few received significantly less. In particular, four in-state and the three out-of-state participants received three to nine fewer contacts than the expected number. Focusing our review on the physicians located in-state, we found that there were eight months in which all four were assigned to the only case manager supervisor at the time and a program employee who was not yet trained as a case manager. The employee who was assisting the case manager supervisor explained that they were primarily performing the “paperwork duties” on these participants during that time and that participant contact consisted of handling participants’ problems over the telephone.

The case manager supervisor explained that this practice was used during a time when they did not have enough case managers to oversee the diversion program’s caseload and said that, with the recent hiring of three case managers and a new case manager supervisor, she does not expect this to occur again.

***The Diversion Program Is Not Ensuring That Required Monitoring Reports Are Submitted***

In addition to regular contact from case managers, the diversion program monitors participants by requiring regular reports from group facilitators, therapists, and work-site monitors, and by requiring verification of support group attendance in some instances.

However, based on our review, it appears that the diversion program does not adequately ensure that these reports are received. The reasons provided for missing reports indicate that the program has not created mechanisms to ensure that program staff, and case managers in particular, have performed the duties required of them. In addition, it also appears that the diversion program does not carefully document changes to participants' program requirements by amending diversion agreements to reflect such changes. Consequently, the program has less assurance that its participants are in compliance with their diversion agreements and has less ability to hold participants and program personnel accountable for fulfilling program requirements.

#### ***The Level of Compliance for Diversion Group Attendance Reports Is Fair***

Diversion program participants are required to attend one or two diversion group meetings a week. As we indicated earlier, they appear to substantially comply with this requirement. Without accounting for vacations and other approved absences, the participants we reviewed attended 92 percent of their required diversion group meetings. However, to calculate this percentage we had to contact a number of group facilitators to obtain attendance reports that had not been submitted to the program. In fact, of the 35 physicians for whom this requirement was applicable, the diversion program had a complete set of attendance sheets for only 24 (69 percent) of them.<sup>6</sup>

The diversion program policies require group facilitators to submit monthly attendance reports. However, when we reviewed the files, it became clear that no one was making sure that these reports were submitted. The collection system manager said that although she files the attendance reports, it has never been her responsibility to ensure that all attendance reports are received. The program administrator explained that the case managers are responsible for ensuring the receipt of attendance reports. However, this view neglects the fact that not all case managers are located at program headquarters, where the files are to be stored. In addition, program management has a responsibility to ensure that case managers are performing the duties required of them.

***Although group facilitators are required to submit monthly attendance reports, no one at the diversion program is making sure that these reports are received.***

#### ***The Level of Compliance for Therapist Reports Is Poor***

The diversion program also requires some participants to attend individual therapy. In these instances, the participant is to ensure that the case manager receives written quarterly reports from the

<sup>6</sup> Of the five participants to whom this requirement did not apply, three were living out of state and two dropped out of the program prior to attending a diversion meeting.

therapist. If these reports are not received in a timely manner, policy states that case managers should follow up with participants or their therapists to make sure that reports are forwarded to the program. However, based on our review, it appears that case managers are not adequately performing these duties. For the sample of participants we reviewed, 51 therapist reports should have been received but only 17 (33 percent) actually were.

*For the sample of participants we reviewed, 51 therapist reports should have been received but only 17 (33 percent) actually were.*

Some written reports were not received because a new case manager was not following policy at the time and took verbal reports from therapists over the phone. However, a more frequent problem was that participants discontinued therapy without a formal amendment to their diversion agreement being processed and sometimes without even notifying the diversion program. For example, a board-ordered participant submitted a therapist report in August 2005 and discontinued therapy in October 2005 without notifying the program. In December 2005 the program should have noticed that no subsequent quarterly therapist report had been received for this individual. However, the program did not notify the participant until March 2006 that he was out of compliance, and it did not learn until a month later that this participant had stopped attending therapy. This participant and others were allowed to end the therapy required in their diversion agreements without having a formal amendment approved by a DEC. Although the discontinuance of therapy may not have led directly to a relapse, the physician in this example tested positive for alcohol in July 2006 and was terminated from the diversion program by December 2006 after testing positive for cocaine.

### ***The Level of Compliance for Work-Site Monitor Reports Is Fair***

Of the participants we reviewed, 18 were required to have work-site monitors. For these participants, the program had received 59 of the 78 required work-site monitor reports. Although these results are fair, there is room for substantial improvement.

It appears that new case managers do not always understand diversion program policies regarding work-site monitor reports. Specifically, the missing reports were for eight participants, three of whom had the same case manager, who was new to the program at the time. Instead of requiring written reports, the case manager was having conversations with work-site monitors over the phone. Although she documented in the Diversion Tracking System that these conversations had occurred, this documentation is deficient because it neither recorded what was said nor what time period the conversation covered. The case manager indicated that she now requires written reports from work-site monitors. Nevertheless, it should be noted that this new case manager was

not requiring written reports for at least a year, during which time program management was not aware of this issue and therefore never corrected it. This failure to require written reports indicates that program management has not created an adequate process to detect when case managers are not following policy.

In addition, it appears that work-site monitors are not always approved in advance by the diversion program. Prior to acting as a participant's work-site monitor, an individual agreeing to serve in this capacity must be approved by the case manager and must sign an acknowledgment form indicating that he or she will carry out the responsibilities of a monitor. In our review, we found that there was no acknowledgment form in the files of two participants and that files for three other participants had acknowledgment forms that were signed after the work-site monitors had already begun monitoring a physician. When these forms are not present or are filled out after the fact, the program cannot ensure that case managers have approved work-site monitors in advance and informed them of their responsibilities.

Further, the current work-site monitor agreement contains no conflict-of-interest language. According to a policy that took effect in July 2006, a work-site monitor shall have no business or personal relationship with the participant that could reasonably be expected to compromise the ability of the monitor to render fair and unbiased reports to the diversion program. This policy was incorporated into a conflict-of-interest statement included in the program's new acknowledgment forms for work-site monitors. However, according to the Northern California case manager supervisor, these new forms have not yet been approved by the executive director's office of the medical board and remain to be implemented. These new forms, and enforcement of the relatively new policy, need to be implemented because we found that some participants' relationships to their work-site monitors would constitute a conflict of interest. Specifically, we found two work-site monitors who work directly for the physician they are to monitor. Thus, because their livelihood is at stake, fair reporting could be compromised.

***We found two work-site monitors who work directly for the physicians they are to monitor.***

Finally, the work-site monitoring could be improved if the diversion program had work-site monitors report on whether participants are complying with any work restrictions imposed by the program. Currently, the work-site monitoring reports do not convey whether work restrictions, such as a limit on the number of work hours, are being followed, and there is no indication that work-site monitors are even aware of these restrictions. In fact, we found only one instance in which the file of a participant contained any sort of positive assurance that work restrictions were being followed. If the diversion program leveraged the existing work-site monitoring

reporting procedures to gain information on compliance with work restrictions, the program could eliminate what is currently a potential weakness.

### ***The Verification of Support Group Attendance Is Poor***

In addition to weekly diversion group meetings, the diversion program requires participants to attend other support group meetings, such as Alcoholics Anonymous or Narcotics Anonymous. In some instances, the program requires the participant to provide verification of meeting attendance in the form of signed attendance cards. Of the 37 in-state participants whose files we reviewed, 26 were required to provide verification of meeting attendance. Of these 26, three have since successfully completed the program and their files have been purged of treatment records, including attendance cards, as required by state law. Of the remaining 23, we could obtain attendance cards for only 10 participants (43 percent). Rather than finding this information in the participant's files, we had to contact a number of case managers to obtain the attendance cards, and in some instances it was clear that the case managers received these cards only after our request. Despite the poor level of documentation, the overall attendance at support group meetings for the 10 participants we could review was quite good—approximately 90 percent.

Quite often the reason case managers gave for not obtaining attendance cards was that they were not sure that the requirement was still in effect. The program administrator explained that verification of attendance at support group meetings is often an initial stipulation in diversion agreements, but that after a period of time the verification requirement is no longer applicable; however, an amendment is not always made to document this change. This practice explains why case managers were not sure whether the requirement was still in effect. Therefore, it appears that the lack of formality in documenting participants' current program requirements leads to uncertainty among diversion program officials and reduces the accountability to which participants and program personnel can be held.

Moreover, even when it was known that a participant was to provide verification of attendance at group meetings, some case managers simply did not hold participants accountable for this requirement. For example, one participant provided her case manager with attendance cards in which she initialed next to the dates on the cards that she had attended support groups for more than a six-month span. She did not, however, specify which groups she attended and did not obtain the initials of a group secretary as she had done in the past and as required in the instructions on

***The lack of formality in documenting participants' current program requirements leads to uncertainty among diversion program officials and reduces the accountability to which participants and program personnel can be held.***

the card. The case manager acknowledged that the participant should have noted which meetings she attended but said he was confident, based on his contacts with and clinical observations of this participant and his conversations with her group facilitator and diversion group peers, that she was attending her support group meetings.<sup>7</sup> Finally, he added that “to verify any participant’s attendance at [support group meetings] is not always possible. It is . . . essentially an ‘honor system.’”

We disagree with this case manager’s assessment, however. Attendance cards provide verification of support group attendance, and case managers should make sure that they are submitted correctly. Further, it is troubling that a diversion program official whose primary responsibility is to monitor physicians’ compliance with their diversion agreements would not do so in this instance. The approach displayed by this case manager illustrates the reason that program management should ensure that case managers are adequately performing their assigned role.

### ***The Diversion Program Eases Program Requirements for Some Participants Despite Their Noncompliance With Reporting Elements***

Despite statements and policies to the contrary, the diversion program grants some participants reductions in the number of diversion meetings they are required to attend and increases in the number of hours they are allowed to work, even when the participants are not in full compliance with the reporting components of their diversion agreements. In the November 2004 interim report, the enforcement monitor found that the diversion program lifted participants’ work restrictions despite deficiencies in the submission of work-site monitor reports and, in reference to lapses in therapist reports, said that it does not appear that participants are ever sanctioned or penalized in any way for failure to comply with diversion agreements. In the November 2005 final report, the enforcement monitor reported that program management had responded to these deficiencies by instituting a policy that work restrictions would not be lifted and drug testing would not be decreased if a participant is not in compliance with reporting requirements.

During our review, we searched for this policy and found no written record of it. However, we did find the principle behind it embedded within a policy, which stipulates that only participants with continuous compliance with their diversion agreements will

***The enforcement monitor reported that the program instituted a policy that program requirements would not be lifted if a participant is not in compliance with reporting requirements. We searched for this policy and found no written record of it.***

<sup>7</sup> As we have used the term, support group meetings are Alcoholics Anonymous or Narcotics Anonymous meetings that participants are often required to attend in addition to the diversion group meetings that are facilitated by a group facilitator.



be considered for a reduction in diversion meetings after the first few years. Despite this policy and the diversion program's earlier statements to the enforcement monitor, we found five instances in which participants received reductions in program requirements despite being out of compliance with the reporting components of their diversion agreements. In two of these instances, the program increased the number of hours physicians were allowed to work despite the fact that they were out of compliance with work-site monitoring requirements. For example, in October 2006 a diversion program DEC increased the number of hours a physician could work from 20 to 32 hours a week, even though the physician had not had an approved work-site monitor for three months and had not submitted a required work-site monitor report.

For the three other participants, the program granted their requests to attend one group meeting per week instead of two, despite the fact that they had not submitted quarterly reports from their work-site monitor, therapist, or both. In one of these cases, the diversion program allowed the participant to reduce the number of group meetings in July 2006 despite not receiving all work-site monitor reports for the previous nine months. The participant later relapsed in October 2006. Although this reduction in diversion meetings, despite a record of noncompliance, did not necessarily set up the conditions for the relapse, it certainly did not send the appropriate message to this individual. Rather, the message sent to these participants is that program requirements are not always tracked and enforced.

*The diversion program increased the number of hours a physician could work even though the physician had not had an approved work-site monitor for three months and had not submitted a required work-site monitor report.*

### **Overall, Participants Appear to Receive the Required Number of Drug Tests**

The diversion program required the participants in our sample to take between two and six random drug tests each month. Between November 2005 and October 2006, we found that our sample of participants generally received the number of drug tests required by their diversion agreements. Specifically, 1,100 drug tests were required in our sample and 1,084 (99 percent) were actually taken. However, it should be noted that some participants took more than the required number for various reasons, and these additional tests balanced out the number of tests that a few participants did not receive. Further, as we describe in Chapter 2, a number of drug tests were performed on dates other than the ones that were randomly selected. Consequently, although the overall results from our sample indicate that the diversion program is doing well in having required drug tests completed, there is need for a number of improvements that we describe in detail in the next chapter.



**The Diversion Program Has Reduced the Time It Takes to Bring New Participants Into the Program**

Although it is still meeting only two of its three goals in this area, the diversion program has made substantial improvement in the timeliness of its initial evaluation of prospective participants. The diversion program's established goal, when a physician initially contacts the diversion program and a telephone intake interview is completed, is to have the prospective participant meet with a case manager and complete his or her first drug test within seven days. After participants sign a standard interim agreement with the case manager and begin drug tests and group meetings, the diversion program has them finish the evaluation phase of the program by meeting with a DEC so that an individualized diversion agreement can be developed and later signed. The diversion program's goal is to have participants meet with a DEC within 90 days of the telephone intake interview. As will be discussed further in Chapter 3, the diversion program provides ongoing reports to the medical board on the results of its efforts to achieve these goals.

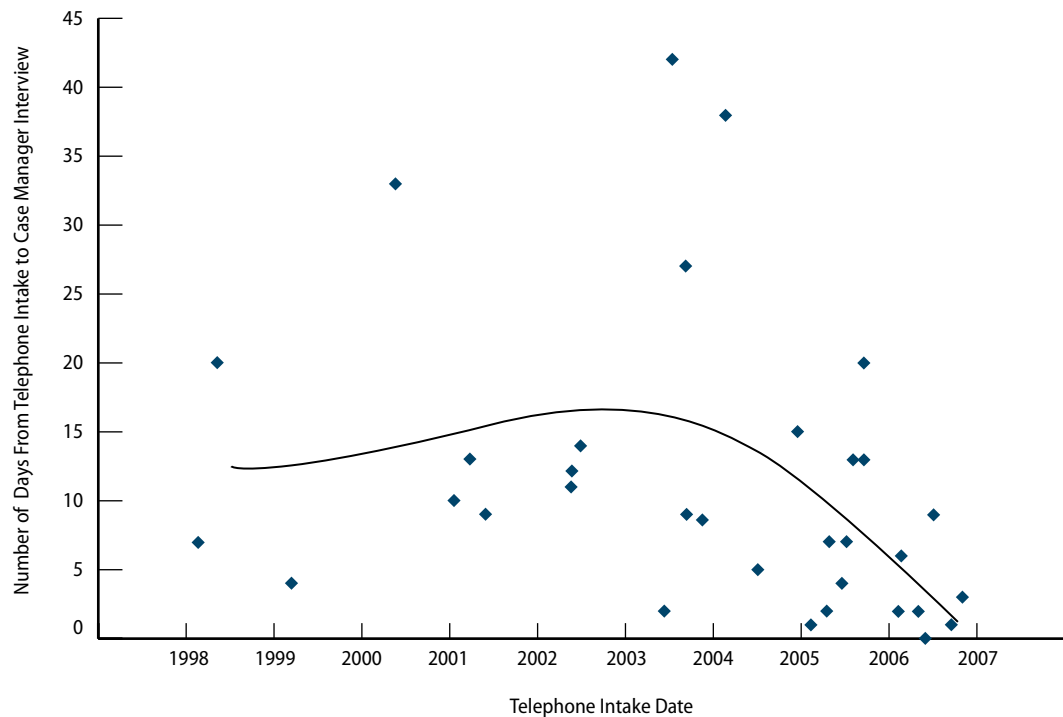
Using our random sample of participants, we determined how well the diversion program was meeting its goals and found that for all three areas—timeliness of case manager intake interviews, first drug tests, and first DEC meeting—the program has reduced the number of days it takes to accomplish these tasks in recent years. In fact, for case manager interviews and first DEC meetings, the diversion program appears to have met its goals, on average, in 2005 and 2006. However, although dramatically improved, the timeliness of first drug tests continues to lag behind the program's stated goal. Nevertheless, the overall improvement the program has made in moving participants through the evaluation phase in a timely manner should be commended. This improvement demonstrates the value of establishing, striving for, and reporting on performance goals—a subject that is further discussed in Chapter 3.

***Case Managers Have Been Contacting Prospective Participants in a Timely Manner in Recent Years***

When a physician contacts the diversion program, an analyst at program headquarters conducts a telephone intake interview and then notifies the appropriate regional case manager. The case manager is to then contact the prospective participant and complete a face-to-face intake interview within seven days. As indicated in Figure 4, the case managers have not always performed this task in a timely manner. For example, for the seven participants in our sample who contacted the program in 2003 or 2004, the average number of days case managers took to complete their interviews was 19. However, as indicated by the trend line in

Figure 4, the diversion program has dramatically decreased the time it takes to conduct a case manager intake interview. In fact, the average number of days for the 16 participants in our sample who contacted the program in 2005 and 2006 was seven. Based on these results, the program appears, on average, to be meeting its stated goal for timeliness of case manager intake interviews.

**Figure 4**  
**Timeliness of Case Manager Intake Interviews for Sample of Physician Diversion Program Participants**



Source: Auditor analysis of information obtained from a sample of participant files of the Physician Diversion Program.

Note: This figure contains 33 data points instead of 40 because our sample included three out-of-state participants who were monitored by parties in other states. In addition, two participants dropped out of the program prior to a case manager intake interview being conducted and two participants had case manager intake interviews prior to the initial telephone intake.

There are various reasons for the length of time it took for case managers to conduct intake interviews in 2003 and 2004. As we discuss in the Introduction, the diversion program delayed some participants' entry into the program during 2003 and 2004 to ease the caseload of case managers in some areas. This delayed entry accounts for the highest data point in Figure 4. Other reasons that case managers did not contact participants in a timely manner included having an insufficient number of case managers in the past and waiting for participants to receive approval from enforcement to participate in the program. To decrease the time it took for case managers to complete their intake interviews, the

*The average length of time before a participant's first drug test was 18 days—well exceeding the program's target time frame of seven days but showing improvement.*

diversion program ended the delayed entry policy, hired additional case managers, and started contacting prospective participants immediately for an intake interview rather than waiting for final approval from enforcement.

***Although the Length of Time Before a Participant's First Drug Test Does Not Appear to Meet Program Goals, Substantial Improvement Has Been Made***

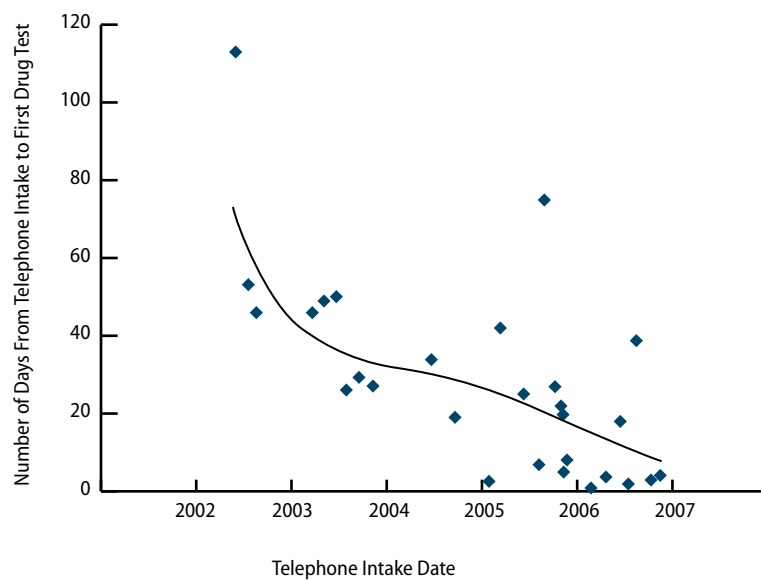
Once a telephone intake interview with a prospective participant is completed, a diversion program analyst notifies the collection system manager to schedule the physician for random drug tests. In 2005 the program established a target time frame of seven days after the telephone intake for completing the first drug test. As indicated by the trend line in Figure 5, the program had difficulty even approaching this goal in the past, but it has dramatically improved in recent years. For our sample of participants who contacted the program in 2005 or 2006, the average length of time before their first drug tests was 18 days—well exceeding the goal but representing a marked improvement over the 2003 and 2004 average of 35 days.

In reviewing the reasons why some initial drug tests were not completed in a timely manner, we found that in the past diversion program personnel would not immediately schedule a participant for drug tests if they knew that the individual would be entering a residential treatment center in the near future. In fact, they would delay drug tests even when the participant was not scheduled to enter treatment for several weeks. The diversion program has since changed this policy and now has the collection system manager schedule drug tests immediately after the initial phone call from the participant. In the past, program personnel would also sometimes not schedule drug tests while the participant was being treated by an outpatient treatment center in California—a circumstance that nevertheless would still allow for drug testing. Finally, another reason first drug tests were not always completed in a timely manner was that program personnel failed to schedule the tests immediately after a participant was released from treatment.

The program administrator explained that it is the policy of the diversion program to perform drug tests when possible, which would include when the participant is in outpatient treatment. He indicated that when testing is not possible because the participant is in residential treatment, the policy calls for resuming drug testing quickly after the participant gets out. He further explained that, although such errors could still exist to a limited extent, the program has made strides in eliminating delays in drug tests due to scheduling errors. He attributed part of this improvement

to changes in policy but stated that he believes setting the goal to complete the first drug test within seven days and reporting on these efforts, starting in April 2005, has been the driving force behind the policy changes and the improvements the program has experienced.

**Figure 5**  
**Timeliness of First Drug Tests for Sample of Physician Diversion**  
**Program Participants**



Source: Auditor analysis of information obtained from a sample of participant files of the Physician Diversion Program.

Note: This figure contains 28 data points instead of 40 because our sample included three out-of-state participants who were monitored by parties in other states. In addition, of the 37 in-state participants in our sample, there were seven participants who entered the program over six years ago and the date of their first drug test could not be determined. There were two others who dropped out of the program prior to a drug test being conducted.

***The Diversion Program Appears to Be Achieving Its Goal of Having Participants Meet With a DEC Within 90 Days***

Until participants can meet with a DEC, they operate under a standardized interim agreement. The diversion program's goal is to have participants meet with a DEC within 90 days so that an individualized program plan can be developed and agreed upon. Adjusting for time during which the diversion program must wait for approval from enforcement for some participants, the program did quite well in achieving this goal for our sample of participants. For the participants who contacted the program in 2003 or 2004,

the average length of time before their first meeting with the DEC was 86 days. The average for the 2005 and 2006 participants in our sample improved to 64 days.

According to state law and medical board policy, physicians who have an open enforcement investigation cannot go before a DEC for formal program acceptance until enforcement has approved their participation in the diversion program. Fourteen of the participants in our sample had to wait for enforcement approval prior to appearing before a DEC. For example, one participant's formal acceptance into the program was delayed for 14 months while waiting for enforcement approval.<sup>8</sup> Because the diversion program has little to no control over the length of time it takes enforcement to approve such physicians' entry into the program, we subtracted wait times of this type from our calculations.

### **The Diversion Program Fails to Ensure a Timely and Adequate Response to Potential Relapses**

State law requires the diversion program to ensure that participants have at least three years of continuous sobriety in order to successfully complete the diversion program. To enable it to monitor their sobriety, the program requires participants to submit randomly scheduled urine samples each month and analyzes these samples to determine whether they contain unauthorized drugs. In some cases, participants try to hide their drug use by increasing their fluid intake, thereby diluting their urine. This is known as a negative dilute. We analyzed drug test results obtained between November 2005 and October 2006 for our sample of participants and found that, of the 1,084 drug tests administered, 31 were reported as positive for drugs and 11 were considered negative dilutes.<sup>9</sup>

Because these test results provide the diversion program with a strong indication that a participant may have relapsed into drug abuse, it is critical for the program to respond quickly and adequately in these instances. However, we found that in some instances the program did not respond in a timely manner and did not demonstrate that its actions were adequate, thus putting the public's safety at risk. Specifically, the diversion program did not always require a physician to immediately stop practicing medicine after testing positive for alcohol or a nonprescribed or prohibited

<sup>8</sup> We did not evaluate why enforcement was not able to provide approval sooner because we considered this to be outside the scope of the audit we were asked to conduct.

<sup>9</sup> When a negative dilute occurs, program policy requires participants to receive another drug test but does not specify how quickly this test should occur. For the 11 negative dilutes in our sample, we determined that this policy was reasonably followed.

drug, as required by program policy, determined that positive drug tests were not a relapse without providing any justification for such a determination, and failed to have a trained medical review officer review contested results.

***The Diversion Program's Actions Following a Participant's Relapse Have Not Always Been Timely or Adequate***

The diversion program failed to follow program policy when it allowed physicians to continue practicing medicine after being notified of positive drug test results. Further, the diversion program has not established written protocols for its communication with enforcement and has consequently not always followed the practice the program administrator says should be employed. According to state law, the diversion program's top priority is to protect the public. In order to fulfill this priority, the diversion program's policies prohibit any participant who tests positive for prohibited drugs or alcohol from practicing medicine until the program can further analyze the positive drug test result and determine whether the physician can return to work. The program administrator stated that if a physician tests positive for a drug, even if the drug is prescribed, the program pulls the physician from work immediately, unless the prescribed medication is authorized. In addition, the program administrator indicated that the physician is not allowed to return to work until he or she receives two consecutive clean drug tests after the work suspension. Although in some cases the diversion program allows participants taking prescribed drugs to practice medicine, the program has determined that they cannot do so when the drug is on a list that it provides to physicians when they enter the program. Of the 31 instances in which participants tested positive for a prohibited drug, 12 involved physicians who were practicing medicine at the time. Although the diversion program should have removed the physicians from work immediately in all 12 instances, it did so in only three. In five instances, physicians were removed within periods ranging from two to 14 days, and in four the program did not remove them from work at all.

Of the four instances in which the diversion program did not remove a practicing physician from work, three related to drugs that were prescribed to the physician that are on the program's list of drugs that participants cannot use while practicing medicine, and one related to a drug that was not prescribed that the participant claimed was taken by accident. In each instance, policy required the program to remove the physician from work until he or she was no longer under the influence of the prohibited drug or until the reasons for the positive drug test result could be determined, but the program did not do so.

***Of the 12 instances in which a practicing physician tested positive for a prohibited drug, the program immediately removed the physician from work in only three instances.***

***Despite the case manager's assertion that the doctor did not return to work until he was off this pain medication, the doctor indicated that he returned to work shortly after testing positive for the drug.***

For example, the diversion program failed to remove a physician from work who tested positive for a particular prohibited drug on two separate occasions, once in December 2005 and again in August 2006. The program did not determine either instance to be a relapse. In the first instance, the physician had more than 10 times the cutoff level needed for a positive result. He notified the program after being tested that he may have unknowingly taken the drug because his wife accidentally placed the drug in a common pain reliever container. The case manager at the time indicated that she used her judgment and did not pull the participant from work or consider the positive result as a relapse based, in part, on the participant's past history of not testing positive. The program administrator agreed that the case manager did not follow program policy and should have consulted with others concerning the positive result. In the second instance, the physician tested positive for the same drug but this time had a prescription. However, despite the case manager's assertion that the physician did not return to work until he was off this pain medication, the physician indicated that he returned to work shortly after testing positive for the drug. This may indicate that he was under the influence of this drug while practicing medicine. The diversion program should have ensured that he was not under the influence by having him complete two drug tests with negative results prior to returning to work, as policy prescribes.

In the instances in which the diversion program removed practicing physicians with positive drug tests from work, it did so immediately, as required, in only three instances. In one example, the program allowed a physician to work for 14 days after the lab reported that the participant had tested positive for alcohol in February 2006. According to information contained in the participant's file, a case manager confronted the physician with the results and the physician denied the use of alcohol, stating that he had consumed barbecue sauce that may have contained alcohol. Although the program administrator stated that it is the program's policy to immediately remove the physician from work until the reasons for the positive result could be determined, the program did not do so until after the physician tested positive for alcohol again and also tested positive for a painkiller for which the physician had a prescription. In part because of concerns over the physician practicing medicine while under the influence of this painkiller, the case manager asked the participant to stop working 14 days after the original test result was received.

Although in this example, removal from practice occurred 14 days after the date the diversion program received the first positive drug test result from the lab, it should be noted that, because of the time lag between urine collection monitors (collectors) submitting test samples and the lab posting the test results to the program, the first



positive drug test had actually occurred 21 days before the physician was removed from work. Because of the time it takes to ship urine samples and to analyze them, a lag in receiving drug test results is unavoidable to some extent. However, in 10 of the 42 positive or negative-dilute test results we reviewed, the lag exceeded seven days. The diversion program indicated that for the period of January through March 2007, receiving results could still take as long as a week. This lag time makes it even more critical that the diversion program immediately remove physicians from work when they have tested positive for alcohol or a nonprescribed or prohibited drug. When it does not do so, the diversion program endangers those patients a physician sees while potentially under the influence of drugs or alcohol.

In another example, although the enforcement monitor recommended that it do so, the diversion program has not yet developed protocols for its communications with enforcement. According to a prior policy manual, the program must notify enforcement when a board-ordered participant relapses into chemical use. Further, the participants' standard agreements with the diversion program stipulate that the lab results of board-ordered participants will be forwarded to enforcement. The program administrator clarified that only positive results are communicated to enforcement. However, we found that one board-ordered participant had positive drug test results in May and July 2006, and in fact was determined to have relapsed in both instances, yet enforcement was not notified until December 2006 when he relapsed again and was terminated from the program. This example highlights the need for the program to develop written protocols. The program administrator agreed that such protocols need to be developed so that all program staff know what information needs to be shared with enforcement.

*One board-ordered participant had positive drug test results in May and July 2006, and in fact was determined to have relapsed in both instances, yet enforcement was not notified until December 2006.*

***The Diversion Program Does Not Adequately Justify Its Determination That a Positive Drug Test Is Not a Relapse***

When the program determines that a physician has relapsed, diversion program policy requires case managers to document the positive drug result. The documentation provides information concerning the positive test and insight into why it was considered a relapse. However, no such documentation or justification is required when the program determines that positive drug test results or other indications of drug abuse do not constitute a relapse. As a result, the diversion program has less assurance that its decisions regarding whether a physician has relapsed are correct and consistent. These decisions are important because a participant cannot successfully complete the program unless he or she has had no relapses in three years. Additionally, program policy requires the



***By not documenting why it determined that a particular positive drug test result was not a relapse, the program risks allowing participants to graduate without three years of sobriety.***

DECs to consider program termination for any physician who has had three or more relapses. Consequently, by not documenting why it determined that a particular positive drug test result was not a relapse, the program risks allowing participants to graduate without three years of sobriety and also risks not terminating a physician with numerous relapses soon enough.

For example, one participant in our sample, who graduated from the diversion program in December 2005, tested positive for alcohol in March 2004. According to the case file, an anonymous caller notified the program that the participant was drinking alcohol while away on out-of-town trips. As a result, the program immediately ordered a drug test. The test results indicated that the participant had more than three times the cutoff level needed for a positive result for alcohol. Despite this evidence, the program did not determine that this instance constituted a relapse. Further, it did not, and was not required to, justify this decision. The participant graduated from the program 21 months later. We reviewed this instance with a case manager supervisor who, at the time the physician graduated from the program, was acting as the case manager, and she agreed that the program should document the reasons that a positive test result is not considered a relapse. She indicated that she will, in conjunction with the program administrator, consider adding this requirement to diversion program policies.

***The Diversion Program Does Not Have Contested Drug Test Results Evaluated by a Trained Professional as Recommended by a Panel of Experts and Its Own Diversion Committee***

Despite the continued recommendations of a panel of experts the diversion program used to provide it with advice (liaison committee) and the recommendation of its diversion committee, the diversion program does not have a qualified medical review officer (MRO) review drug test results that are contested by participants. Consequently, the diversion program may have less assurance that its decisions regarding whether a positive drug test result constitutes a relapse are valid. According to its February 2005 meeting minutes, the liaison committee asked the diversion program administrator for an update on the hiring of an MRO to review participants' drug test results. In November 2005 the liaison committee reiterated its desire that an MRO be hired, especially in those instances in which a participant contests a positive drug test result. Although we did not obtain the exact date on which the liaison committee first recommended the hiring of an MRO, the current diversion program administrator explained that, prior to his arrival in January 2005, the liaison committee had already recommended that the diversion program have an MRO

review drug test results, and that the diversion committee had recommended the hiring of an MRO. However, as of June 2007, the diversion program has yet to use or hire such a consultant.

Obtaining the opinion of a qualified MRO would help the diversion program determine whether a positive drug test result is a relapse. When physicians in our sample were confronted with a positive drug test result, some admitted to relapsing, but a more common response was to deny taking the prohibited substance that the test identified. Of the eight disputed results in our sample, the diversion program, or the DEC's that assist the program with these decisions, considered half of them not to be relapses. In these instances, the reasons offered by the participants, and apparently accepted by the program, included the following:

- A pharmacy must have incorrectly filled a prescription, dispensing a prohibited drug for which the participant later tested positive.
- The wife of a program participant accidentally placed a powerful prescription drug in a common pain reliever container. The physician later consumed this drug, apparently thinking it was the common pain reliever, and subsequently tested positive for it.
- A participant denied drinking alcohol, stating that she is not inclined to do so in general.

Certainly, an MRO would not have been able to directly ascertain the truthfulness of these explanations, but having a person specifically trained to independently analyze drug test results, and additional information in the participant's file, would allow the diversion program to better ascertain whether the reasons offered were at all consistent with the results. Further, in those cases in which the diversion program determines that a positive drug test represents a relapse, despite the explanation offered by the participant, the program's position would be bolstered by having the documented opinion of a qualified MRO.

Although he generally agreed that an MRO should be hired to review contested results, the program administrator stated that no MRO has yet been hired because the individuals on the list of candidates the liaison committee provided either did not possess desired certificates or did not want to work part time. The liaison committee has since been disbanded, and the program administrator stated that he does not plan to hire an MRO until the replacement for the liaison committee is reconstituted. The program administrator said that, in the meantime, the diversion program would continue to use lab personnel when it has questions concerning a positive drug result. Although the program indicates

*Because many participants deny taking prohibited substances, obtaining the opinion of a qualified medical review officer would help the diversion program determine whether a positive drug test result is a relapse.*

that it utilizes lab personnel for advice on drug test results, the program administrator agrees that an MRO would be advantageous to provide an independent review. In addition, an advisory committee to the program in November 2005 reiterated how important it feels an MRO is to the process of evaluating lab results.

### Recommendations

To better monitor diversion program participants, program management should create mechanisms to ensure that group facilitators, therapists, and work-site monitors submit required reports, and that participants submit required meeting verifications. When such documentation is not received, program management should have case managers make an effort to obtain this information.

The diversion program should institute a formal policy to increase or refuse to reduce the frequency of diversion and support group meetings and drug tests when a participant neglects to provide required documentation. In addition, the program's policy should include a provision to not lift or reduce work restrictions unless a participant is in full compliance with work-site monitoring requirements.

To eliminate uncertainty regarding individual participants' requirements, the program should process a formal amendment to a participant's diversion agreement if the program determines that a requirement should be changed for that physician.

To ensure that work-site monitors provide unbiased and complete reports, the diversion program should do the following:

- Ensure that each participant's work-site monitor is approved in advance and has no relationship with the participant that would impair his or her ability to render fair and unbiased monitoring reports.
- Ensure that the newly developed work-site monitor agreements containing conflict-of-interest language are approved by the medical board's executive office and signed by all work-site monitors.
- Notify work-site monitors of any work restrictions imposed on the participant they are monitoring, and direct them to report on compliance with these requirements.

To ensure that participants receive program services on a timely basis, the diversion program should continue its efforts to achieve the goal of completing participants' first drug tests within seven days of their intake interview.

To ensure a timely and adequate response to positive drug tests or other indications of a relapse, the diversion program should do the following:

- Immediately remove practicing physicians from work upon receiving notice of a positive drug test.
- Provide sufficient justification when it determines that a positive drug test does not constitute a relapse.
- Have the reconstituted liaison committee assess the need to have an MRO evaluate disputed drug test results and hire such an individual if it determines that this action is needed.

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## Chapter 2

### THE PHYSICIAN DIVERSION PROGRAM'S OVERSIGHT OF RANDOM DRUG TESTS AND ITS SERVICE PROVIDERS IS INADEQUATE

#### Chapter Summary

The Physician Diversion Program (diversion program) of the Medical Board of California (medical board) has not adequately overseen its drug-testing system and the service providers it uses to monitor and treat program participants. Specifically, although the diversion program appears to have improved in the drug-testing area in recent years, a large number of tests are still not being performed as randomly scheduled. The most frequent reason drug tests were not completed as scheduled was because of vacations requested by participants. However, a significant portion of these requests never received approval from appropriate program personnel. Other reasons drug tests were not completed as scheduled were that urine collection monitors (collectors) moved the tests to other dates, and that participants did not show up to take the tests. However, the program did not document the instances of inadequate performance by collectors and did not ensure that collectors submitted incident reports for each missed test, as required by program policy.

Further, the diversion program's current process for reconciling its scheduled drug tests with the actual drug tests performed does not adequately or quickly identify missed drug tests or data inconsistencies between collectors' reports and lab results. Finally, although the diversion program relies heavily on its collectors, group facilitators, and diversion evaluation committee (DEC) members in the monitoring and treatment of its participants, it has not been formally evaluating these individuals to determine how well they are meeting program standards.

#### Many of the Participants' Random Drug Tests Were not Completed as Scheduled

Prior to the beginning of each month, the collection system manager uses a random date generator within the Diversion Tracking System (DTS) to create a calendar of all the participants' drug tests for the upcoming month. A copy of the calendar is then sent to each collector, case manager, and diversion group meeting facilitator. The purpose of randomly selecting drug test dates is so that participants cannot anticipate when a test will be given and have an opportunity to affect the outcome of the test.

***For the two months tested,  
74 percent of the drug tests  
scheduled were completed on their  
randomly chosen dates.***

Although there are indications that the diversion program is improving in this area, many drug tests are still not being performed on the dates selected by the program's random date generator. In November 2004, which was prior to the implementation of the current version of the DTS and also prior to the hiring of the current full-time collection system manager, the enforcement monitor reported that only 40 percent of the 378 scheduled drug tests she reviewed were completed as scheduled. We found that for the months of June and October 2006, 74 percent of the 1,692 drug tests scheduled were completed on their randomly chosen dates. This indicates that the diversion program has made some progress in having drug tests completed as randomly scheduled. However, as we describe later, the current system still has a number of deficiencies that need to be corrected. As a result of these deficiencies, some participants may be able to determine patterns in their drug testing and engage in substance abuse such that the opportunity to detect their abuse expires prior to their drug tests. Further, because the diversion program grants vacation requests that have not been planned and approved in advance, some participants could relapse and then request an unplanned vacation to avoid detection. In fact, these deficiencies caused one participant to comment in a program-conducted survey regarding drug tests, "Mine wasn't very random—I was able to 'game' it for several years and almost 'graduated' while still using."

Of the 1,692 total drug tests scheduled in June and October 2006, 439 were not completed on their scheduled date. As shown in Table 3, vacation requests were the most common reason for a participant not having a drug test on the randomly selected date, representing about 46 percent of all drug tests not completed as scheduled. As we will discuss later, a significant number of these requests were granted without appropriate approvals from program officials. Other reasons drug tests were not completed as scheduled were that collectors performed the drug test on a different date (27 percent), participants were in residential treatment (14 percent), the participant missed or refused to take the test on that date (5 percent), and the collector failed to complete the ethyl glucuronide portion of the scheduled test, which specifically tests for alcohol consumption (3 percent).

#### ***The Diversion Program Rescheduled Drug Tests Based on Unapproved Vacation Requests From Participants***

The diversion program's current policy states that participants must submit a vacation request to their case manager, or to their group facilitator if they will miss any group meetings, at least two weeks in advance in order to have their random drug tests

**Table 3**  
**Number of Drug Tests Not Completed as Scheduled in June and October 2006**

MONTH	NUMBER OF DRUG TESTS NOT COMPLETED AS SCHEDULED	PARTICIPANT IN TREATMENT	NUMBER OF DRUG TESTS NOT COMPLETED AS SCHEDULED DUE TO:			
			PARTICIPANTS		COLLECTOR <sup>†</sup>	OTHER <sup>‡</sup>
			VACATION (WITH PROPER APPROVAL)*	VACATION (WITHOUT PROPER APPROVAL)		
June 2006	244	29	82	20	79	34
October 2006	195	34	74	22	39	26
Totals	439	63	156	42	118	60
Percentage of drug tests not completed as scheduled		14%	36%	10%	27%	14%

Sources: Auditor analysis of the June and October 2006 drug test calendars, lab results, and collectors' reports.

\* This column includes 48 drug tests that did not have corresponding approved vacation request forms but rather had entries by the case managers in the program's diversion tracking system.

† This column includes seven tests that were rescheduled by the collection systems manager to make sure that a test was performed each week and to ease the weekend work of collectors.

‡ This column includes 24 drug tests that were not completed as scheduled because the participant missed or refused to take a drug test (5.5 percent), 12 drug tests not completed as scheduled because the collector failed to administer the ethyl glucuronide portion of the test to detect alcohol consumption (3 percent), and 24 drug tests not completed as scheduled for reasons that could not be determined (5.5 percent).

rescheduled. Despite this policy, we found that of the 198 drug tests that were rescheduled because of vacation requests in June and October 2006, 42 (21 percent) were related to requests that never received approval. In some instances, participants sent vacation requests directly to the collection system manager, who then rescheduled the test dates. Thus, these requests did not receive the scrutiny of appropriate program officials.

In addition, although we counted them as approved in Table 3, another 48 vacation requests did not have signed and approved vacation request forms but rather had corresponding entries in the DTS in which the case manager acknowledged receipt of the vacation request. The program administrator said it is understood by the case managers that entering vacation dates into the DTS is equivalent to approval. Although this may be true, the current collection system manager stated that it is not part of her regular process to check the DTS to see if a case manager has approved a vacation request and that she does not have the time to verify with case managers that all vacation requests have been approved. Consequently, although it appears that the case managers were aware of these 48 vacation requests, the randomly selected drug tests were being rescheduled without assurance that case managers had in fact approved the rescheduling. Therefore, although 42 vacation requests in our sample had no approval, there was an



***We also found that 14 of the 42 vacation requests without approvals were faxed directly from the participants to the collection system manager.***

even higher number of vacation requests for which the collection system manager had no indication that the request had been approved—yet the scheduled drug tests were moved anyway.

For example, in June 2006, the collection system manager rescheduled a participant's test due to a vacation request. However, the group facilitator and case manager never approved the vacation request, as the form is blank where their signatures should have been. Despite the fact that the approval portion of the form was blank and there was no entry in the DTS indicating that the case manager was aware of the request, the collection system manager considered the request approved and moved the participant's test date.

Although we could not determine the transmittal of every vacation request, we also found that 14 of the 42 vacation requests without approvals were faxed directly from the participants to the collection system manager. For example, in June 2006, one participant faxed a vacation request directly to the collection system manager, who then moved the scheduled test to another date. Although there was no signature of either the group facilitator or case manager on the form, the participant had checked the box stating that the request was approved. On the form, it appears that the participant hand-wrote the names of the group facilitator and case manager (instead of obtaining their signatures). There was no sign of any correspondence between the case manager and participant about this vacation request in the DTS. Because participants can, if they are so inclined, make the request appear to have been signed and approved, the collection system manager should not be receiving vacation requests directly from participants.

We also found that 13 of the 156 approved vacation requests had signatures only from the group facilitators. Although this is deemed to be sufficient approval under current policy, we believe that participants should also receive approval from their case managers, because case managers are the program officials charged with monitoring the participants assigned to them. In addition, group facilitators are not employed by the State and therefore cannot be held to the same standard of accountability as case managers.

### ***Collectors Did Not Always Complete Tests on the Scheduled Dates***

According to diversion program policy, collectors are to complete drug tests on the dates randomly scheduled and are to give the program 14 days advance notice if they will not be available to perform testing. If this notice is provided soon enough, the dates that collectors are not available are taken into account prior to the drug test calendar being prepared. Of the 439 drug tests not completed as scheduled in June and October 2006, 118 (27 percent)

were completed on a different date chosen by the collector. In 86 of these instances, the collectors notified the program prior to testing on a different date.<sup>10</sup> Even so, when collectors are allowed to move drug tests to dates that are more convenient for them, the diversion program runs the risk that a participant will gain an understanding of his or her collector's pattern and potentially allow the participant to time substance abuse so as not to be detected. For example, a collector was scheduled to test two participants on a Saturday in October 2006 but instead completed the tests on the Tuesday prior to the weekend date. In that same month, another collector also had two drug tests scheduled for a Saturday. This collector moved both tests to a Monday, nine days later. A third collector moved the two randomly selected Saturday test dates for one participant to the following Tuesdays. Although not all test dates moved by a collector were from a weekend to a weekday, these three examples illustrate a pattern that could develop if collectors are allowed to move randomly selected dates.

Of further concern is that collectors did not notify the diversion program in advance for 32 of the 118 drug tests rescheduled by the collector. In addition to potentially creating a pattern that participants can detect, these instances indicate a loss of control by the program that is further exacerbated by the fact that the program does not make note of these failures to follow program policy and does not formally evaluate its collectors (as we discuss later). To address this deficiency, in February 2007, the collection system manager sent a memo to all collectors stating that the diversion program will not tolerate changes in scheduled test dates without prior approval. The memo also stated that the new policy, effective February 2007, requires all collectors to submit a written request for any changes to scheduled collection dates at least two weeks in advance and that telephone calls alone will not be accepted.

*The collectors did not always notify the diversion program in advance as required when rescheduling test dates.*

#### ***Participants in the Diversion Program Missed Scheduled Test Dates for Other Reasons***

As noted in Table 3 on page 41, we found that 60 drug tests scheduled during June and October 2006 were not completed as scheduled for a combination of other reasons. Specifically, 24 drug tests were not completed as scheduled due to a participant not returning a collector's phone call or refusing to take a drug test when contacted, 12 were not completed as scheduled because the

<sup>10</sup>Although available information did not allow us to determine whether collectors gave a 14-day advance notice in most of these instances, we were able to determine that advance notice was not given in 11 instances.

*If the collectors do not send in incident reports, the collection system manager has no way of knowing that a participant has missed a drug test until she reconciles the scheduled drug tests with the drug tests actually performed, which she does after the end of each month.*

collector failed to administer the ethyl glucuronide portion of the test to detect the presence of alcohol, and 24 were not completed as scheduled for unknown reasons.

When a participant does not return a collector's phone call or refuses to take a drug test when contacted, the program's policy manual states that the collector is to notify the collection system manager immediately and submit an incident report explaining what happened to the case manager, collection system manager, and group facilitator within 24 hours. This alerts the collection system manager that a participant missed a test, which may need to be rescheduled. However, we found that there were incident reports for only 11 of the 24 drug tests (46 percent) that were missed, and not all of these reports were submitted in a timely manner. Of the 11 incident reports, five were submitted between two and three days after the participant missed the test, with remaining reports being submitted either the day of or the day after the missed test. For the remaining 13 missed drug tests, no incident reports were submitted.

The collection system manager stated that if the collectors do not send in incident reports, she has no way of knowing that a participant has missed a drug test until she reconciles the scheduled drug tests with the drug tests actually performed after the end of each month. The collection system manager said that if she notices a missed test, she may contact the collector or case manager to find out why or check the DTS for any case manager entries regarding this issue. She indicated that after determining the reason for the missed test, she does not then require the collector to submit an incident report describing the event. We question this decision, because requiring collectors to submit these reports, even well after the event, would reinforce the program's policy by sending a message to collectors that it is important for them to send in their incident reports as required. Of further concern is that in the 11 instances in which the program received an incident report, the program's only response was to reschedule another drug test, even though the program's policy manual lists other steps that could be taken, such as removing a physician from work or increasing the number of drug tests the participant must complete each month.

In addition to the tests that participants missed, we could not determine why another 24 drug tests were not completed as scheduled. In these cases, the collector did not submit a monthly report or the monthly report did not explain why a test was missed. For these drug tests, we confirmed that the collection system manager did not have any vacation requests or incident reports on file for the participant.

In June 2006 one participant had four out of five of his tests rescheduled for unknown reasons. Because the participant did not submit a vacation request and the collector did not submit the June monthly report or any incident reports, we could not determine the reason for these changed dates. Also, because the collection system manager reconciles lab results only with collectors' reports, and not to the monthly calendar, she was not aware that the drug tests were not completed as scheduled and consequently did not have an explanation for these missed tests.

### ***Some Tests Not Completed as Scheduled Were Never Made Up***

Of the drug tests that were not completed as scheduled during the months of June and October 2006, the vast majority were made up on a different date; however, we found eight missed drug tests that were never made up. In these instances, the participants were not required to complete the requisite number of drug tests specified in their agreements.

For example, one participant took a drug test in June 2006; however, it was not reflected in the lab results because the collector sent the sample to the lab without the chain of custody form or payment for the test. Because the diversion program's reconciliations of scheduled drug tests with actual drug tests are not completed promptly, this error was not discovered until August 2006. To make up for this invalid test, the collection system manager intended to add an additional drug test for this participant in August 2006. We checked the August 2006 calendar and saw that the collection system manager had included a note on the bottom of the page stating that a makeup collection should be taken for this participant; however, the test was not added to the calendar itself. We also checked the August 2006 lab results and found that no additional test was taken. Further, there was no indication that this test would be rescheduled to another date. As a result, this missed collection was never made up.

*Because the diversion program's reconciliations of scheduled drug tests with actual drug tests are not completed promptly, a June 2006 error by a collector was not discovered until August 2006.*

### **The Diversion Program's Process for Reconciling Scheduled Drug Tests With Actual Results Needs to Be Improved**

The diversion program's current process for reconciling its scheduled drug tests with the actual drug tests performed does not promptly identify missed drug tests or data inconsistencies between collectors' reports and lab results. In particular, the current process can be slowed by late collector reports and does not allow the program to confirm that drug tests added to the master schedule after its original distribution to the collectors have been completed. Further, program management has not been reviewing

the reconciliations to ensure that they are performed accurately and that there is adequate follow-up on discrepancies identified during the reconciliation process.

According to the program's policy manual, collectors are required to submit monthly reports to the collection system manager that include the participant's name and case number and a unique identifying number for each completed drug test. The reports should also cite the reason why a participant was not tested on an assigned date, if applicable. To check for consistency, this report is to be reconciled to the monthly lab results report and the calendar of randomly generated test dates. If discrepancies exist, the collector may be contacted for an explanation. Although the program's policy manual states that the monthly collector reports should be reconciled to both the lab results and the calendar, the current collection system manager reconciles the collector reports only to the lab results. As demonstrated below, not using the calendar as part of the reconciliation process causes a number of problems.

*In June 2006 a collector's monthly report indicated that a particular drug test was completed as scheduled; however, the lab report had no record of this drug test.*

For example, in June 2006, a collector's monthly report indicated that a particular drug test was completed as scheduled; however, the lab report had no record of this drug test. After we questioned program staff regarding this issue, they provided documentation indicating a drug test had been completed on the scheduled date but the collector had failed to write the identifying number on the sample submitted to the lab. Although a reconciliation of these reports should have discovered this error, program staff explained that they could not do the reconciliation at the time because the collector's report was not sent to them promptly. However, this view fails to recognize that the lab results could have been reconciled immediately to the calendar prepared by the collection system manager.

In addition to delaying the reconciliation, the practice of using the collectors' reports rather than the calendar introduces unnecessary risk to the process because the collectors' reports may not include all scheduled drug tests. In particular, some drug tests are scheduled after the randomly generated calendar is completed. These drug tests are manually added to the master schedule and the collectors are notified. If collectors fail to perform these tests, the manually added dates will not be shown on their reports. Also, these manually added drug tests are not reflected in the lab report, as it displays dates only from the randomly generated schedule. As a result, the current reconciliation process does not identify these missed collections.

For instance, in June 2006, after the schedule was created, the collection system manager manually added an additional test for one participant. However, the lab results show that this test was

never completed. The collector's report, which is filled out after the month is over, did not include this additional test date in the list of scheduled dates. Because the collection system manager's reconciliation process does not include checking the original calendar, which would include any tests added manually, she did not realize that this drug test was not performed.

The collection system manager stated that program management does not check her reconciliation each month. This could contribute to the inefficiency and ineffectiveness of the diversion program's reconciliation process, as management does not ensure that the collection system manager's reconciliation is complete and accurate or that she follows up on any issues discovered. Having someone check the collection system manager's work would provide stronger accountability in the reconciliation process.

#### **The Diversion Program Does Not Formally Evaluate Its Collectors, Group Facilitators, and DEC Members**

Although the diversion program relies heavily on its collectors, group facilitators, and DEC members in the monitoring and treatment of its participants, it has not been formally evaluating these individuals to determine how well they are meeting program standards. Collectors have not faced any consequences for rescheduling drug test dates and failing to submit required reports, group facilitators have continued to provide treatment services without demonstrating that they have a current license and meet continuing educational requirements, and some DEC members have had poor attendance at required meetings without being removed from their positions. In those cases in which the program did take action in response to noncompliance by its collectors, group facilitators, or DEC members, it often waited months or even a year before doing so.

#### ***The Diversion Program Does Not Evaluate Its Collectors***

A critical component to ensuring that diversion program participants are sober, and to document instances when they are not, is the use of random drug tests. However, as we discussed earlier, collectors do not always follow through on the schedules of drug tests provided to them and sometimes make errors in submitting drug test documentation to labs. Even so, the diversion program does not document instances when collectors do not adequately perform their critical function and has not developed an evaluation mechanism for the 27 collectors it currently uses. In

***The diversion program does not document instances when collectors do not adequately perform their critical function and has not developed an evaluation mechanism for the collectors it currently uses.***



addition, diversion program collectors do not sign any contracts or agreements with the program but are simply sent copies of the collection procedures.

According to the collection system manager, the diversion program does not conduct any formal evaluations of the collectors' performance but is in the process of developing an agreement for the collectors. She explained that unless she hears complaints from the participants, she assumes that everything is okay. If she does receive a complaint, she first contacts the collector. The collection system manager then talks to the case manager, group facilitator, and program administrator, and together they decide whether the collector should be let go. Although this form of monitoring may identify collectors who mistreat participants, it does not evaluate, for instance, whether the collectors are completing drug tests on the randomly generated dates and submitting necessary paperwork to the labs. As a result, collectors have been able to reschedule drug-test dates and make critical errors without facing any consequences.

We also checked to see whether the collectors had complied with the requirement to submit the monthly collector's report. For the month of October 2006, the collection system manager received 23 of the 25 required reports. One of the collectors who did not submit a report for that month had not submitted a monthly collector report since March 2006. According to the collection system manager, the collector was continually late in submitting reports. Although she followed up with him, he still did not submit the reports. The program, however, did not replace this collector until March 2007, a year after he was noted as being noncompliant with the program's policies.

#### ***The Diversion Program's Group Facilitators Have Not Been Formally Evaluated in More Than 10 Years***

Although the diversion program's policy manual states that each group facilitator should be evaluated annually, no group facilitators have been formally evaluated since 1997. The program administrator indicated that he instead evaluates and monitors the group facilitators through informal conversations throughout the year. For example, the program administrator mentioned that he visited at least two meetings conducted by each of the 13 group facilitators during 2005 (the year he joined the diversion program) but indicated that he did not perform an evaluation or take written notes of these visits. According to the program administrator, evaluating the group facilitators has not been one of the diversion program's top priorities in recent years, since most of them have been facilitating groups for many years.

***According to the program administrator, evaluating the group facilitators has not been one of the diversion program's top priorities in recent years.***

Even though the group facilitators have been in their positions for many years, it would still be valuable to evaluate their performance, especially since it is required in the diversion program's policy manual. Without formal evaluations, the group facilitators would not be made aware of whether they are fully meeting the expectations of the program. In addition, the program administrator mentioned that he has received some complaints about the group facilitators from participants and case managers. However, he attributes many of these complaints to differences in personal opinion. Although this could be the case, performing formal evaluations would create stronger accountability for the group facilitators and better ensure that they are meeting program standards.

***The Diversion Program Does Not Appear to Ensure That Its Group Facilitators Stay Current With Required Licenses, Certifications, and Continuing Education***

The diversion program does not do enough to ensure that its group facilitators hold a current license or certification, or meet their continuing education requirements. According to the current memorandum of understanding (MOU), which most group facilitators have signed, group facilitators must be California-licensed therapists "experienced in, and knowledgeable about substance-related disorders and mental health issues." According to the program administrator, group facilitators who were with the program prior to the enactment of this new MOU, can be certified by the California Association of Alcoholism and Drug Abuse Counselors rather than being a licensed therapist as the new MOU requires.

A review of diversion program files indicated that of the 13 program group facilitators, nine are licensed marriage and family therapists or marriage, family, and child counselors; two are licensed clinical social workers; and two are certified alcohol and drug counselors. However, we observed that many of the copies of licenses and certifications in diversion program files were outdated, and some dated back to the 1970s and 1980s. This indicates that the program does not regularly confirm that group facilitators maintain active licenses or certifications. Consequently, the diversion program has less assurance that its group facilitators continue to be qualified to provide services to program participants.

The diversion program's policy manual states that the group facilitators must participate in at least two continuing education seminars in substance abuse, mental health, or group therapy every two years, and should provide verification of their participation to the diversion program. However, 11 of the 13 group facilitators' files did not contain any verification of continuing education. After we brought this to

***The program does not regularly confirm that group facilitators maintain active licenses or certifications.***



their attention, program management obtained documentation from the group facilitators indicating that each had fulfilled the continuing education requirements. Nevertheless, the deficiency in documentation at the time of our review indicates that the program is not ensuring that facilitators are meeting these requirements.

***The Diversion Program Did Not Evaluate Its DEC Members  
Between 2003 and 2007***

Although diversion program policies require annual written evaluations of DEC members, the program did not perform these evaluations between 2003 and March 2007 (it completed its recent evaluations near the end of our review). Consequently, some members may not have been adequately performing their duties and were not replaced in a timely manner. During a 1999 medical board meeting, concern was expressed about the insufficiency of the evaluation process used at the time, which included tracking the DEC members' attendance and the time it takes them to respond to inquiries. As a result, a new procedure was developed requiring written evaluations of each DEC member that included ratings from other members of the committee on the member's preparedness, cooperation, communication, knowledge, clinical judgment, and interview skills. The evaluations were also to include data from diversion case managers about the timeliness and helpfulness of consultations, attendance records from the DEC coordinator, and comments and a summary from the program administrator.

Although the evaluation procedures were approved by the medical board's Division of Medical Quality in 2001, they were never added to the diversion program's policy manual, and the program stopped using the evaluation procedures after 2003. After that date, no formal evaluations of DEC members occurred until March 2007, during our review. This deficiency weakened the diversion program's ability to assess the performance of DEC members in the key areas previously outlined and potentially allowed individuals to continue to occupy a position on a DEC, even though they were not always performing all of their duties.

For example, in reviewing all of the DEC members' attendance records from November 2005 to October 2006, we found that eight out of 33 members (24 percent) missed two or more of their quarterly meetings. Although the DEC coordinator provided explanations for many of these absences, we found one instance in which the program responded slowly when a member had poor attendance. This member, who became the mayor of his town in November 2006, stopped attending DEC meetings after February 2006. Although the diversion program eventually replaced

***Although the diversion evaluation committee member evaluations were approved in 2001, they were never added to the diversion program's policy manual, and the program stopped using the evaluation procedures after 2003.***

the DEC member, it did not do so until March 2007. Collecting information for the formal evaluation process would have identified the need to replace this DEC member much sooner.

The current program administrator, who came to the diversion program in February 2005, explained that he does not know why evaluations of DEC members did not occur in 2004 but agreed that not having the evaluation requirements in the policy manual contributed to them not being performed in 2005 and 2006. He explained that in addition to immediately implementing the evaluations, he plans to get the requirements into the current policy manual as soon as possible.

### **Recommendations**

To ensure that it adequately oversees participants' random drug tests, the diversion program should do the following:

- Change existing policy to require both the case manager and the group facilitator to approve all participant vacation requests prior to the rescheduling of any drug tests.
- Establish a control over the rescheduling of drug tests that prohibits the collection system manager from rescheduling drug tests without a properly approved vacation request and also prevents participants from submitting vacation requests directly to the collection system manager.
- Clarify the vacation request policy for participants, and incorporate the 14-day notice requirement for vacation requests into the participants' diversion agreements.
- Establish a more timely and effective reconciliation of scheduled drug tests to actual drug tests performed by comparing the calendar of randomly generated assigned dates to the lab results.
- Require a program manager to review the drug test reconciliation to ensure that it is complete and accurate.

To ensure that it adequately oversees its collectors, group facilitators, and DEC members, the diversion program should do the following:

- Document instances in which a collector moves drug test dates without receiving approval two weeks in advance, makes an error in the submission of a urine sample, or fails to file an incident report when required. In these instances, the collection system

manager should contact the collector, determine the cause of the noncompliance, and reiterate the need to follow program policy if necessary.

- Maintain updated files on group facilitators to ensure that they stay current with required licenses, certifications, and continuing education requirements.
- Formally evaluate collectors, group facilitators, and DEC members annually and take timely corrective action when these individuals do not fulfill their responsibilities.

## Chapter 3

### THE PHYSICIAN DIVERSION PROGRAM COULD BE IMPROVED THROUGH BETTER OVERSIGHT BY THE MEDICAL BOARD

#### Chapter Summary

The Physician Diversion Program (diversion program) of the Medical Board of California (medical board) lacks consistently effective oversight by the medical board, and its program structure overburdens its top manager. As indicated in the Introduction, the medical board uses a committee made up of some of its members to oversee the diversion program (diversion committee). However, the diversion committee's ability to oversee the program is hindered by a reporting process that does not give it a complete view of the program's performance and by a policy-making process that does not ensure that adopted policies are always added to the program's policy manual.

Consequently, rather than discovering deficiencies through the reporting process and correcting them through a policy-making process that maintains some level of continuity, the diversion committee has been notified of program deficiencies in recent years by an outside entity—the enforcement monitor (as described in the Introduction). As shown in the Appendix, the diversion program has made improvements as a result of the findings and recommendations issued by the enforcement monitor in her November 2004 interim and November 2005 final reports. However, almost two years after the final report, the diversion program has not fully implemented most of the enforcement monitor's recommendations. In one instance, the medical board implemented the enforcement monitor's recommendation of supporting the program administrator with two other managers but chose to create two case manager supervisor positions, rather than one case manager supervisor position and one manager position to oversee other program staff, as the enforcement monitor had recommended. In this instance, we believe the medical board should reconsider whether this choice best alleviated the problem of an overloaded program administrator.

#### The Current Reporting Process Does Not Provide the Medical Board With a Complete View of the Diversion Program's Performance

One of the primary ways the medical board evaluates the diversion program's performance is through reviewing quarterly reports. However, the current reporting process does not provide the medical board with a complete view of the program's operations,

**The diversion program's quality review report was created to help the Division of Medical Quality answer the following questions:**

- Does the diversion program protect the public?
- Are participants compliant with the diversion program's monitoring methods?
- Is the diversion program following its own procedures and doing so in a timely fashion?
- Is the diversion program effective in rehabilitating participants?

Source: Diversion task force meeting minutes from May 2000.

thus hindering its ability to provide program oversight. As required by state law, the diversion program must provide information to the Division of Medical Quality as it may prescribe to assist it in evaluating the program, directing the program's operation, or proposing changes to the program. In 1998 the Division of Medical Quality created the diversion task force to comprehensively study the diversion program; in 2000 it converted this task force to a standing diversion committee. In addition to a financial status report required by state law, the diversion committee requests that the diversion program submit quality review reports on a quarterly basis to answer the questions shown in the text box.

To answer these questions, the former diversion program administrator developed, in June 2000, a list of components that the program would include in its quality review reports. As shown in Table 4, this list included data on intakes, drug tests, diversion group attendance, case manager contacts, relapses, and successes/outcomes. Although it was not able to report on all of the components at the time, the diversion program expected to provide full reporting by fiscal year 2000–01.

Reporting on all of the components shown in Table 4 would have provided the diversion committee with a more complete view of the diversion program. However, in reviewing all of the quality review reports between June 2000 and January 2007, we found that the diversion program has never reported on four of the six originally envisioned reporting components. Specifically, the diversion program has not reported on drug tests, diversion group attendance, case manager contacts, or outcomes.

As the table indicates, the reports provide some additional information beyond what was originally envisioned. For example, starting in January 2001, the program began reporting information related to participants released from the program, whether through successful completion or termination. However, these data do not fully answer one of the four central questions of whether the program is effective in rehabilitating participants. To answer this question, the program would have needed to develop a way to determine how many graduates remain relapse-free after a certain number of years, as outlined by the former diversion program administrator in June 2000. Furthermore, none of the information added to the quality review reports, except for the length of time before the first urine test, directly measures whether the program promptly follows its own procedures.

**Table 4**  
**The Physician Diversion Program's Quality Review Reporting**

REPORTING COMPONENTS ORIGINALLY ENVISIONED BY THE DIVERSION PROGRAM IN JUNE 2000	WAS THIS COMPONENT IMPLEMENTED?	ADDITIONAL INFORMATION INCLUDED IN REPORTS
<b>Intakes</b> Number of days between initial telephone contact and intake interview, signed interim agreement, and initial diversion evaluation committee meeting.	Yes	In June 2000 the program began reporting on the participant's current status and type of board action. It also added the number of participants not interested or ineligible for the program in December 2001 and the length of time before the participant's first urine test in April 2005.
<b>Drug Testing</b> Presentation and explanation of collection incident reports, action taken by program in response, timeliness of response.	No	In June 2005 the program began to include the total number of positive, negative-dilute, and invalid tests.
<b>Diversion Group Attendance</b> Number of unexcused absences, action taken by program in response, timeliness of response.	No	
<b>Case Manager Contact</b> Frequency and type of contact with participants, number of cases where minimum number of contacts are not achieved.	No	
<b>Relapses</b> Number of participants who relapse, how relapses are detected, action taken by program in response, timeliness of response.	Yes	In June 2000 the program provided information on the participant's current status, drug of abuse, and length of time in program. It also reported on the type of referral/enforcement activity starting in January 2001.
<b>Outcomes</b> Number of participants who have new disciplinary action taken by board, graduated after previously being terminated, and remained relapse free after graduating.	No	In January 2001 the program added the participant's release status, time in program at release, drug of abuse, and type of referral; whether participant relapsed, had a mental disorder, or had treatment prior to/during the program.

Sources: Quality review reports from June 2000 to January 2007 and a memorandum from the former diversion program administrator from June 2000.

The current program administrator stated that he had never seen the memorandum issued by the former program administrator in June 2000 listing the components to be included in the quality review reports. He believes that over the years, this list of reporting components was forgotten and there was no follow-up to ensure that the diversion program reported on all of them. As a result, this memorandum and the ideas within it were never passed down to him. The program administrator is currently reviewing the memorandum to determine the necessity and feasibility of implementing each reporting component.

Upon reviewing the former program administrator's list of what should be reported, the diversion committee chair (chair) stated that a number of these components could be helpful. Because she also had never seen this memorandum before, the chair explained

*Due to personnel turnover and the lack of follow-up, some policies are never fully implemented or are forgotten over time.*

that she, along with the other committee members, would need to determine what measures would currently be most helpful. In addition, the committee may explore other program measures not described in this document, such as case managers' workloads.

### **The Diversion Program Has Not Formally Adopted and Included All of Its Policies in Its Policy Manual**

The diversion committee does not always ensure that policies it adopts are included in the diversion program's policy manual. As a result, due to personnel turnover and the lack of follow-up, some policies are never fully implemented or are forgotten over time. In addition, the program adheres to some policies in its daily practices that were never formalized in the policy manual. Although some program staff may be aware of these policies, adding them to the policy manual would create consistency in practice among all staff and would decrease the chance of their being forgotten in the future. Finally, although policy changes have been approved by the diversion committee in pieces, the policy manual as a whole has never been reviewed and approved by the diversion committee.

As we mentioned in Chapter 2, the Division of Medical Quality approved criteria for annual evaluations of diversion evaluation committee (DEC) members, but this policy was never added to the diversion program's policy manual. Although the former program administrator was aware of this policy and therefore conducted the evaluations, this information was never passed down to the current program administrator, who came to the program in February 2005. As a result, DEC member evaluations have not been conducted since 2003.

Likewise, as we mentioned in the previous section, the medical board and the diversion program did not implement a number of components in the quality review reports that the former program administrator envisioned. This lack of follow-up is due to the fact that policies addressing the planned components of the quality review reports were never added to the program's policy manual.

The program also has other policies that it follows in its daily activities that were never included in its policy manual. For example, as we mentioned in Chapter 2, participants must submit a vacation request to their case managers, or to their group facilitator if they will miss any group meetings, at least two weeks in advance in order to have their random drug tests rescheduled. Although this requirement is stated on the vacation request form, it is not included anywhere in the diversion program's policy manual or in

the participants' diversion agreements. Having this requirement formalized into policy would help create consistency among program staff in handling and approving vacation requests.

In addition, the program's policy manual currently states that case managers are to have regular contact with their participants. Although the policy is not specific in defining how many times per month a case manager should contact each participant, the program administrator explained that case managers should do so at least once each month. Because this is not clearly defined in the program's policies, case managers may be unaware of this standard and fail to follow it.

The chair stated that she recognizes the need for the program to formalize its policies. She indicated that the committee members have not seen all of the policies compiled as one manual and that policy changes are approved in discrete pieces. In the future, the chair stated, she would like to see the committee review and approve the policy manual as a whole and then, on an ongoing basis, ensure that approved policy changes are incorporated into the manual. She indicated that she is aware that without a process to ensure that approved policy changes are documented for the future, they can get lost, as there is turnover among the committee members and staff.

In reference to the diversion committee reviewing and approving the policy manual as a whole, the executive director of the medical board (director) explained that the policy manual includes both policy statements and detailed procedures that program staff use to implement program policy. While he believes that it is imperative that the diversion committee approve program policy, the director said that it is not efficient for the diversion committee, which is made up of physicians who essentially volunteer their time in assisting the medical board, to review and approve all the specific procedures used to carry out its policy directives. Consequently, he suggested that the program administrator and the chair identify policy statements in the manual and then have the committee review and approve these statements rather than the entire manual.

#### **The Diversion Program Still Has Not Implemented a Number of the Enforcement Monitor's Recommendations**

As of April 2007 the diversion program had yet to fully implement a number of recommendations from the enforcement monitor's November 2005 final report. In spite of the diversion program's lack of progress in implementing these recommendations, the medical board has not stepped in to ensure that the recommendations are implemented in a timely manner. As a result, the diversion program

*In spite of the diversion program's lack of progress in implementing the enforcement monitor's recommendations, the medical board has not stepped in to ensure that the recommendations are implemented in a timely manner.*



continues to lack development in some areas. As indicated in Table 5, the enforcement monitor provided 14 recommendations to the diversion program—eight regarding actions the program should take and six regarding actions the program should consider. Of the eight recommendations regarding actions the program should take, the diversion program has fully implemented only two. The diversion program's efforts to implement the remaining six recommendations are still in progress.

**Table 5**  
**The Physician Diversion Program's Response to the Enforcement Monitor's November 2005 Recommendations**

RECOMMENDATIONS FROM THE ENFORCEMENT MONITOR			
THE DIVERSION PROGRAM SHOULD DO THE FOLLOWING:	IMPLEMENTED	IN PROGRESS	NOT GOING TO IMPLEMENT AT THIS TIME
1 Develop standards for work-site and hospital monitors		•	
2 Develop a set of consequences for relapses		•	
3 Evaluate the role, purpose, and structure of the liaison committee	•		
4 Develop protocols for communication with enforcement		•	
5 Update the quarterly quality review reports so they contain the most important information		•	
6 Review the role and duty statements of the group facilitators		•	
7 Develop regulations establishing qualifications and criteria for "evaluating physicians"	•		
8 Develop regulations governing competency examinations for program participants		•	
THE DIVERSION PROGRAM SHOULD CONSIDER THE FOLLOWING:	IMPLEMENTED	IN PROGRESS	NOT GOING TO MAKE A POLICY CHANGE AT THIS TIME
1 Whether there should be a maximum participant cap			•
2 Whether the program should charge practicing participants a fee to cover overhead costs			•
3 The establishment of consistent criteria for termination from diversion program		•	
4 The establishment of a mechanism for termination and revocation of license for board-ordered and board-referred participants who continuously repeat the program		•	
5 Whether there should be a mandatory "practice-cessation" period for participants upon entry into program			•
6 Whether the diversion program is equipped to handle mentally ill participants			•

Sources: Enforcement monitor's final report, diversion committee meeting minutes, and statements from Physician Diversion Program management.

One of the two recommendations that the diversion program implemented is the review and evaluation of the role, purpose, and structure of the liaison committee. The liaison committee was originally created in 1982 to solicit suggestions, submit recommendations, and provide expertise on issues to enhance the diversion program. In February 2006 the Division of Medical Quality and the diversion committee disbanded the liaison committee with the intent of reconstituting an advisory body that would better serve the diversion program. The diversion program is now in the process of developing a diversion advisory council, which will consult on issues facing the diversion program.

One of the six recommendations the diversion program is still in the process of implementing is the development of consequences for relapses. This will include a review of the relapse referral matrix, which guides the diversion program staff in their assessment of the appropriate programmatic response for participants who have relapsed. The enforcement monitor recommended that this matrix be restated and adopted as policy. Although the diversion program has had conversations with the DEC members, group facilitators, and case managers about this issue, the program delayed the completion of the matrix so that it could be discussed at the next annual DEC meeting. As of May 2007 the program had not yet scheduled an annual DEC meeting for 2007. For its part, the medical board has not pressured the program to complete this work, even though it has been nearly two years since the recommendation was made.

In addition, although the diversion program considered all six recommendations that the enforcement monitor proposed it consider, the program has decided not to implement four of them, choosing instead to continue its current policies and practices. The diversion program has delayed its decision as to whether to implement the remaining two recommendations, as it is waiting for the establishment of the diversion advisory council, which will then meet 30 days after each board meeting to discuss these issues. As of April 2007 the diversion advisory council had not yet been formed.

According to the program administrator, it has been the diversion program that has prioritized the enforcement monitor's recommendations and established due dates for their implementation. The diversion program provides the diversion committee with written reports that describe its progress in implementing the recommendations and the due dates for the next actions to be taken. The program administrator indicated that the diversion committee has not requested or attempted to enforce the due dates described in reports to the committee.

***The diversion committee has not requested or attempted to enforce the due dates described in reports to the committee.***

We found that because the due dates are not being enforced, the diversion program often pushed back the dates set for implementing the recommendations. For example, for the recommendation that the program consider establishing consistent termination criteria, the initial update report to the diversion committee listed January 2006 as the date these criteria would be adopted. However, according to the program administrator, the majority of the time at the January 2006 meeting was spent providing the diversion committee with background information regarding the diversion program rather than discussing each recommendation in detail. In subsequent reports, the program listed November 2006 as the due date for establishing termination criteria because the matter was pending discussion by a subcommittee of the diversion committee. In January 2007 the due date was again delayed, this time to February 2007. The next report to the diversion committee listed the due date as April 2007. As of April 2007 this recommendation still had not been implemented.

The program administrator also stated that, in addition to the lack of pressure from the diversion committee to get recommendations implemented, the length of time the committee meets also slows the implementation of the enforcement monitor's recommendations. The diversion committee meets for only one hour each quarter to discuss the entire agenda, including quality review reports, DEC member appointments, and other outstanding issues. According to the program administrator, discussion of the enforcement monitor's recommendations has traditionally taken place at the end of these meetings, and there has not always been enough time to get the diversion committee's full input on each issue.

*The recently appointed diversion committee chair indicated that she shares the concern that changes to the diversion program in response to some of the enforcement monitor's recommendations have not yet been completed.*

The recently appointed chair indicated that she shares the concern that changes to the diversion program in response to some of the enforcement monitor's recommendations have not yet been completed. For instance, she stated that she is concerned that standards have not been implemented for work-site and hospital monitors, even though the committee approved them quite some time ago. In reference to the one-hour committee meetings, the chair agreed that the length of time the committee meets does, at times, affect its ability to fully discuss the enforcement monitor's recommendations. However, she pointed out that the committee members have demonstrated a willingness to attend extra meetings if warranted—as evidenced by the special sessions held shortly after the enforcement monitor published her report.

The chair also stated that she believes the slow implementation of the enforcement monitor's recommendations could be partially attributable to the fact that the same issues are discussed repeatedly. She believes that they should close down discussion of recommendations that both the diversion program and the

committee do not think should be implemented at this time and focus on the outstanding recommendations that need to be discussed and implemented. In addition, the chair believes that the committee should revisit the enforcement monitor's recommendations each year as the diversion program evolves.

### **The Medical Board Added Another Manager to the Diversion Program but Did So in an Area That Did Not Address the Primary Concern of the Enforcement Monitor**

Rather than follow the November 2004 recommendation of the enforcement monitor to reduce the workload of the diversion program administrator by adding two managers—one to supervise the case managers and another to supervise the program support staff—the medical board provided the program administrator with two case manager supervisors. Consequently, although the program administrator received some relief from the hiring of a case manager supervisor in 2005, the addition of a second case manager supervisor at the end of 2006 did little to alleviate the scope and breadth of the duties for which he is responsible. As a result, the program administrator is not able to perform some of the policy development and program outreach he would otherwise like to perform.

In the November 2004 interim report, the enforcement monitor said that the diversion program administrator position was “handling supervision, program oversight, and program development—a burdensome combination of duties which one person cannot completely handle alone.” She then recommended that the medical board add two managers to the program, as previously described. In the final report, published in November 2005, the enforcement monitor noted that the medical board added a case manager supervisor in February 2005 to ensure that case managers fulfill their duties. Subsequently, in July 2006, the medical board created another case manager supervisor position to oversee the three case managers in Southern California, reducing the number of case managers the existing supervisor oversees to three in Northern California.

Although this change likely eased the existing case manager supervisor's burden, we question whether it alleviated in a substantial manner the burden on the program administrator, as described by the enforcement monitor. The program administrator said that, now that the creation of a second case manager supervisor position has already taken place, he questions whether going through the process to switch the role of this manager would really be worth the effort. Although he agrees that he needs more time to focus on policy development and program outreach, the

*Because the addition of a second case manager supervisor did little to alleviate the burden on the program administrator, he is not able to perform some of the policy development and program outreach he would otherwise like to perform.*

program administrator stated that he might be able to reduce his workload by delegating more duties to staff and by creating efficient mechanisms to oversee staff, as we have suggested. He further explained that, in fact, he will be delegating a number of duties to the two case manager supervisors. For example, he plans on having them evaluate group facilitators and also represent program management at many of the DEC meetings. He believes that this last task in particular will allow him the time for many of the other activities, such as program outreach, that he has wanted to perform.

Although we still believe that the organizational structure outlined by the enforcement monitor would have provided greater relief to the program administrator's workload, we can appreciate the argument that a second case manager supervisor position has already been approved and an individual has already been selected and hired. To the extent that the program administrator can delegate tasks to these supervisors, such as attendance at DEC meetings, he should be able to focus on improving the program's policy development and oversight mechanisms, reporting to the diversion committee, and performing program outreach. We encourage the medical board to ensure that its diversion program administrator does so.

### **Recommendations**

To effectively oversee the diversion program, the medical board should require the program to create a reporting process that allows the medical board to view each critical component of the program.

To the extent that the diversion program lacks the data required to report on the performance of critical components of the program, the medical board should require program management to develop mechanisms to efficiently acquire such data so that both the medical board and program management can provide effective oversight.

To ensure that it adequately oversees the diversion program, the medical board should have its diversion committee review, clarify where necessary, and approve all policy statements contained in the program's policy manual. Any informal policies that the program is currently operating under, but that are not in the policy manual, should be reviewed and approved by the diversion committee. Finally, the diversion committee should ensure that any policy directive it approves is added promptly to the manual.

The medical board should ensure that areas of program improvement recommended by the enforcement monitor are completed within the next six months. If necessary, the diversion committee should meet for longer than one hour each quarter until this is accomplished.

The medical board should direct the program administrator to delegate some of his day-to-day tasks so that he can refocus his efforts on program development. To the extent that delegation alone is not sufficient to accomplish this goal, the medical board should reconsider its decision to have two case manager supervisors rather than one case manager supervisor and one supervisor of other program staff.

We conducted this review under the authority vested in the California State Auditor by Section 8543 et seq. of the California Government Code and according to generally accepted government auditing standards. We limited our review to those areas specified in the audit scope section of the report.

Respectfully submitted,

A handwritten signature in black ink that reads "Elaine M. Howle". The signature is written in a cursive, flowing style.

ELAINE M. HOWLE  
State Auditor

Date: June 7, 2007

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## Appendix

### **THE PHYSICIAN DIVERSION PROGRAM HAS MADE IMPROVEMENTS SINCE THE FINAL ENFORCEMENT MONITOR REPORT**

As we discussed in the Introduction, the enforcement monitor was appointed to review the Physician Diversion Program (diversion program) of the Medical Board of California (medical board). The enforcement monitor issued two reports—an interim report in November 2004 and a final report in November 2005. As indicated in Table A on the following pages, the diversion program began addressing some of the enforcement monitor’s concerns prior to the issuance of the final report and has made additional progress since then. However, we also noted that the diversion program has not yet responded to some enforcement monitor concerns, and these areas continue to be deficient.



**Table A**  
**Progress Made by the Physician Diversion Program Since the Issuance of the Enforcement Monitor's Reports**

FUNCTIONAL AREA OF DIVERSION PROGRAM (ATTRIBUTE)	KEY STATISTICS AND FINDINGS FROM THE ENFORCEMENT MONITOR			
	NOVEMBER 2004 INITIAL REPORT	NOVEMBER 2005 FINAL REPORT	KEY FINDINGS FROM OUR REVIEW	PROGRESS SINCE ENFORCEMENT MONITOR'S REPORTS
Staffing	The program administrator position in the diversion program is overloaded; the position should be supported by a case manager supervisor and a supervisor of other staff and functions.	In February 2005 the medical board hired a case manager supervisor.	As indicated in Figure 3 of the Introduction, the medical board has hired a second case manager supervisor. However, as discussed in Chapter 3, this administrative structure has not sufficiently relieved the burden on the program administrator.	The diversion program has improved in this area, but deficiencies still exist.
Staffing	The program's five case managers are so overloaded that all they are able to do is react to relapses; case managers should have no more than 50 cases each.	The medical board submitted a budget change proposal for additional case managers and the conversion of a seasonal clerk position to full time.	As indicated in the Introduction, the diversion program now has six case managers. According to case manager reports, average caseloads have decreased from 53 in November 2005 to 37 in March 2007.	This issue has been addressed.
Staffing	The collection system manager position is significantly understaffed.	In March 2005 the program expanded its existing collection system manager position to a full-time position devoted almost entirely to overseeing drug tests.	Nothing additional to report.	This issue has been addressed.
Case managers (reporting)	Program management allowed two of the program's five case managers to file very few monthly reports between January 2003 and August 2004.	The new case manager supervisor now requires and reviews case managers' monthly reports.	Between November 2005 and October 2006, all case manager reports were submitted as required.	This issue has been addressed.
Drug testing (timeliness)	Twenty-five percent of new participants are not scheduled for any drug tests within one month of their intake interview.	No additional findings or information provided in the final report.	18 percent of the new participants in 2005 and 2006 from our sample did not receive a drug test within one month of their intake interview. As indicated in Chapter 1, the program has dramatically decreased the length of time to perform the first drug test but does not appear to have met its goal of seven days quite yet.	The diversion program has improved in this area, but deficiencies still exist.
Drug testing (timeliness)	Out of 20 relapses reviewed, four participants' drug tests were not resumed within one month following completion of treatment.	No additional findings or information provided in the final report.	The program no longer follows the same process as was reported in the enforcement monitor's report. Participants remain on the drug testing calendar while in treatment. Drug tests resume following completion of treatment according to the dates assigned on the randomly generated calendar.	This issue has been addressed.
Drug testing (randomness)	Only 40 percent of a sample of drug tests were completed as scheduled.	No additional findings or information provided in the final report.	74 percent of scheduled drug tests in June and October 2006 were completed on their randomly scheduled dates.	The diversion program has improved in this area, but deficiencies still exist.
Drug testing (randomness)	The program does not make an effort to track actual collections to ensure that participants receive the required number of drug tests and that the tests occur on their randomly scheduled date.	The program requires monthly reports from the collectors that document that tests have been administered on the scheduled dates. The collection system manager manually verifies that participants are given the required number of tests each month.	The program now reconciles collector reports with actual drug tests. However, as we point out in Chapter 2, this reconciliation process has significant weaknesses that must be improved.	The diversion program has improved in this area, but deficiencies still exist.

FUNCTIONAL AREA OF DIVERSION PROGRAM (ATTRIBUTE)	KEY STATISTICS AND FINDINGS FROM THE ENFORCEMENT MONITOR			
	NOVEMBER 2004 INITIAL REPORT	NOVEMBER 2005 FINAL REPORT	KEY FINDINGS FROM OUR REVIEW	PROGRESS SINCE ENFORCEMENT MONITOR'S REPORTS
Drug testing (reporting)	Out of 20 relapses reviewed, the results from four positive drug tests were not reported in time frames ranging from 10 to 14 days and another was not reported for at least three weeks.	No additional findings or information provided in the final report.	As indicated in Chapter 1, out of the 43 positive or negative-dilute tests we reviewed, the results from 10 were not reported within seven days.	The diversion program has improved in this area, but deficiencies still exist.
Drug testing (recording)	The program does not ensure that test results are actually received from the laboratory and downloaded into the Diversion Tracking System (DTS), leading to gaps in the participants' collection records. In addition, more than 300 lab reports received during the testing period did not contain a donor ID and therefore had not been appended to the appropriate participant's record in the DTS.	The medical board's information systems branch created a new DTS whereby urine test results forwarded by the lab are automatically downloaded into the DTS and appended to the participant's DTS file. The collection system manager conducts spot checks for accuracy.	All of our sampled participants' urine test results were automatically downloaded into DTS and no gaps in their collection records were found. However, we found some instances where errors in the recording of participants' donor IDs or collection dates led to inaccuracies in the drug test results.	The diversion program has improved in this area, but deficiencies still exist.
Collectors (evaluation of performance by program)	Deviations from the drug test schedule appear to be tolerated with no discussion or sanction.	The program terminated several collectors who would not adhere to the random schedule and other program requirements.	As indicated in Chapter 2, the program does not document instances when collectors do not adequately perform their duties and has not developed an evaluation mechanism for its collectors.	The diversion program has not adequately addressed this area.
Collectors (reporting)	Only five of the 30 required collector reports were received for December 2003.	No additional findings or information provided in the final report.	23 of the 25 required collector reports were received in October 2006. Missing reports received adequate follow-up.	This issue has been addressed.
Work-site monitors (policy)	The program has not set forth a workable definition of the duties or qualifications of a work-site monitor.	The diversion committee has not yet established meaningful standards for work-site monitors but the program has instituted a new policy that it will no longer approve increases in participant's work hours, or reductions in drug tests, if a participant is not in compliance with work-site monitoring requirements.	As indicated in Chapters 1 and 3, the board's expectations for work-site monitors have been developed but have not been approved or fully implemented. In addition, the current manual does not contain the new policy on increases in participants' work hours or reductions in drug tests, and we did not see evidence of this practice in our review.	The diversion program has not adequately addressed this area.
Work-site monitors (reporting)	Only seven of a sample of 20 participants had a complete, or nearly complete, set of quarterly work-site monitor reports in their file.	Program staff are working with the medical board's information technology unit to develop a mechanism to identify participants not in compliance with the work-site monitoring requirements.	Fifteen of the 18 physicians in our sample who required work-site monitoring reports during the period of our review had a complete, or nearly complete, set of reports in their file. However, as we point out in Chapter 1, there are a number of improvements the diversion program still needs to make in this area.	The diversion program has improved in this area, but deficiencies still exist.

continued on the next page

FUNCTIONAL AREA OF DIVERSION PROGRAM (ATTRIBUTE)	KEY STATISTICS AND FINDINGS FROM THE ENFORCEMENT MONITOR		KEY FINDINGS FROM OUR REVIEW	PROGRESS SINCE ENFORCEMENT MONITOR'S REPORTS
	NOVEMBER 2004 INITIAL REPORT	NOVEMBER 2005 FINAL REPORT		
Therapists (reporting)	None of the 11 participants reviewed had a complete, or nearly complete, set of therapist reports in their file.	The new case manager supervisor is beginning to address this issue with case managers and the program has instituted a new policy that it will no longer approve increases in participant's work hours, or reductions in drug tests, if a participant is not in compliance with therapist reporting requirements.		The diversion program has improved in this area, but deficiencies still exist.
Diversion Evaluation Committee (policy)		The diversion program undertook an overhaul of its manual. The new manual needs to be reviewed by legal counsel, the diversion committee, and the Division of Medical Quality.		The diversion program has improved in this area, but deficiencies still exist.

Sources: Auditor analysis of information obtained from enforcement monitor's initial and final reports and our review of the Physician Diversion Program.

*(Agency response provided as text only.)*

State and Consumer Services Agency  
915 Capitol Mall, Suite 200  
Sacramento, CA 95814

May 30, 2007

Ms. Elaine Howle, State Auditor\*  
Bureau of State Audits  
555 Capitol Mall, Suite 300  
Sacramento, CA 95814

Dear Ms. Howle,

Thank you for giving me the opportunity to respond to your audit addressing the Medical Board of California. I understand that your audit sample included physicians from between November 2005 and October 2006.

In preparing for my confirmation as Agency Secretary in February 2007, I committed to implement recommendations from the Bureau of State Audits. I have directed the Department of Consumer Affairs' new director Carrie Lopez to follow through on your audit recommendations to the Medical Board. Her specific comments are attached.

I have directed the Medical Board to send a six month and one year update on their efforts through the Department of Consumer Affairs. I recognize your recommendations as an opportunity to improve the Medical Board and truly appreciate your support of the Department of Consumer Affairs' goals of protecting California's consumers.

Most Sincerely,

(Signed by: Rosario Marín)

Rosario Marín, Secretary  
State and Consumer Services Agency

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\*California State Auditor's comments appear on page 81.

*(Agency response provided as text only.)*

Department of Consumer Affairs  
1625 North Market Blvd., S308  
Sacramento, CA 95834

May 25, 2007

In reply to: Medical Board of California's Physician Diversion Program Audit

Elaine M. Howle  
State Auditor  
Bureau of State Audits  
555 Capitol Mall, Suite 300  
Sacramento, CA 95814

Dear Ms. Howle:

At the direction of Secretary of State and Consumer Services Agency Secretary Rosario Marin, I am responding to the Bureau of State Audit's findings on the Department of Consumer Affairs' (Department) Medical Board of California (Board), Physician Diversion Program.

It is my understanding that the Board is currently drafting its response and developing an implementation plan for addressing the concerns identified in the audit. It is also my understanding that SB 761 (Ridley-Thomas) is a placeholder bill to address any shortcomings in the diversion program.

The Department's responses to the audit recommendations are listed below.

1. To better monitor diversion program participants, program management should create mechanisms to ensure that group facilitators, therapists, and worksite monitors submit required reports, and that the participants submit required meeting verifications. *The Department concurs with this recommendation. Action: We will work with the Board to review their current technology infrastructure and recommend program improvements where necessary.*
2. To ensure a timely and adequate response to positive drug tests or other indications of a relapse, the diversion program should do the following:
  - Immediately remove practicing physicians from work when notified of a positive drug test.
  - Require diversion evaluation committees (DECs) to provide justification when they determine that a positive drug test does not constitute a relapse.
  - Have a qualified medical review officer evaluate all disputed drug test results if its new advisory committee determines that this action is needed.

*The Department concurs with this recommendation. Action: We will encourage the Board to seek Interim Suspension Orders when appropriate, through the Office of the Attorney General and support their efforts in seeking such orders.*

3. The diversion program should ensure that both the case manager and group facilitator approve all vacation requests and should establish a more timely and effective reconciliation of scheduled drug tests to actual drug tests performed by comparing the calendar of randomly generated assigned dates to the lab results. *The Department concurs with this recommendation. Action: None.*
4. To ensure that it adequately oversees its collectors, group facilitators, and the DEC members, the diversion program should formally evaluate the performance of these individuals annually. *The Department concurs with this recommendation. Action: We will assist and facilitate the Board's efforts in obtaining a Budget Change Proposal (BCP) should it be determined that a BCP is necessary to implement this recommendation.*
5. To effectively oversee the diversion program, the Board should require it to create a reporting process that allows the Board to view each critical component of the program. *The Department concurs with this recommendation. Action: None.*
6. To ensure that it adequately oversees the diversion program, the Board should have its diversion committee review and approve the program's policy manual. Thereafter, the diversion committee should ensure that any policy change it approves is added to the manual. *The Department concurs with this recommendation. Action: None.*
7. The Board should ensure that areas of program improvement recommended by the enforcement monitor are completed within six months. *The Department concurs with this recommendation. Action: If a BCP is necessary to fulfill this recommendation, we will work with the Board to ensure its timely completion.*

The Department will actively encourage the Board to send you a six-month and one-year status reports on its progress with respect to the implementation of the audit recommendations.

Thank you for giving me the opportunity to respond to your audit report. Please feel free to contact me at (916) 574-8200 should you have any questions. Thank you.

Sincerely,

(Signed by: Carrie Lopez)

CARRIE LOPEZ, Director  
Department of Consumer Affairs

*(Agency response provided as text only.)*

Medical Board of California  
1434 Howe Avenue, Suite 92  
Sacramento, CA 95825-3236

May 29, 2007

Elaine M. Howle  
California State Auditor  
Bureau of State Audits  
555 Capitol Mall, Suite 300  
Sacramento, CA 95814

RE: Draft Audit Report – Medical Board of California’s Physician Diversion Program

Dear Ms. Howle:

The Medical Board of California (Board) is in receipt of your draft audit report for the board’s Physician Diversion Program. Thank you for allowing the board to respond to the issues and concerns raised in the report. Enclosed please find our responses to each recommendation.

The board would like to thank the Bureau of State Audits for conducting this audit. Several of the Diversion Program’s processes have been improved, based upon the findings during the auditor’s review. Several of the recommended changes already have been implemented, even before the audit was completed. Other changes are in process and should be finalized in the very near future.

We are gratified that the auditor recognizes the many programmatic improvements made over the past two years, including: a new, real time, Diversion Tracking System; a far superior method of managing and controlling the collection of urine samples from participants, including a full-time collection system manager; the addition of two new case manager supervisors; the lowering of case manager caseloads to an acceptable level by adding additional case managers to the program; the elimination of the Diversion Liaison Committee (which was largely ineffective) and replacing it with a new Diversion Advisory Council which answers to the Board’s Diversion Committee; and the implementation of policies and procedures to ensure the program will operate in a manner that provides maximum public protection.

The Board is committed to implementing the State Auditor’s recommendations and believes these will enhance the public protection improvements already made to the Program. We invite the State Auditor to conduct follow-up reviews at six-months and one-year to ensure the Board has followed through and implemented the recommendations contained in the report.

If you have any questions regarding this response, please contact me at (916) 263-2389.

Sincerely,

(Signed by: Dave Thornton)

Dave Thornton  
Executive Director

## Medical Board of California

### Response to Recommendations of Bureau of State Audits

Audit No. 2006-116

Page 2

#### Chapter 1 Recommendations

**Recommendation:** To better monitor diversion program participants, program management should create mechanisms to ensure that group facilitators, therapists, and worksite monitors submit required reports, and that the participants submit required meeting verifications. When such documentation is not received, program management should have case managers make an effort to obtain this information.

**Response:** The Medical Board (Board) concurs with this recommendation. The Board has been working to finalize written policies and procedures for the entire Diversion Program. These policies and procedures are awaiting final review and approval by the Board's legal counsel. The policies and procedures will include direction to all parties to ensure required documentation is provided to the Program. The policies and procedures will not only inform the reporting party of their requirement to provide written verification/documentation, but also will provide direction to the case manager as to his/her responsibility to update the Diversion Tracking System (DTS) and the participant's file. The policies and procedures also will require the case manager supervisor to conduct follow-up on compliance by case managers for each participant's required documentation by all pertinent parties.

Moreover, the Board will be looking into the feasibility of having all documentation for a participant's file scanned into the DTS so it is documented and readily available for all staff to review. Reports could be generated from the scanned documents indicating whether they have been received. This will greatly assist both the case managers in follow-up of their cases as well as provide the case manager supervisor II the necessary tools to oversee the work of the case managers.

**Recommendation:** The Diversion Program should institute a formal policy to increase or refuse to reduce the frequency of diversion and support group meetings and drug tests when a participant neglects to provide required documentation. In addition, the program's policy should include a provision to not lift or reduce work restrictions unless a participant is in full compliance with worksite monitoring requirements.

**Response:** The Board concurs with this recommendation. The new policies and procedures mentioned above have established a minimum period of compliance with agreement requirements before any changes in a participant's contract will be allowed. No reductions in any participant's agreement (including work restrictions) will be considered if the individual is not in full compliance with his/her agreement (including documentation requirements).

These new policies and procedures will state that a reduction in group meetings will not be considered unless the participant has completed at least three years in the Diversion Program and is in full compliance with his/her agreement. All such requests must be approved by the Diversion Evaluation Committee (DEC) or a DEC consultant.

Reductions in drug screens will require the participant to: 1) be in full compliance with his/her agreement and 2) have no relapses for three years. This request by a participant must also be approved by the DEC or a DEC consultant.



**Medical Board of California****Response to Recommendations of Bureau of State Audits**

Audit No. 2006-116

Page 3

It will be the responsibility of the Program Administrator, in conjunction with the DPCS II, to ensure that these policies are adhered to by case managers and the DEC. All case managers were recently reminded of these requirements.

**Recommendation:** To eliminate uncertainty regarding individual participants' requirements, the program should process a formal amendment to a participant's diversion agreement if the program determines that a requirement should be changed for that physician.

**Response:** The Board concurs with this recommendation. The new policies and procedures will include the requirement that any change in requirements will be in the form of a written formal amendment to the participant's agreement. This procedure has been provided to case managers.

**Recommendation:** To ensure that worksite monitors provide unbiased and complete reports, the diversion program should do the following:

- Ensure that each participant's worksite monitor is approved in advance and has no relationship with the participant that would impair his or her ability to render fair and unbiased monitoring reports.
- Ensure that the newly developed worksite monitor agreements containing conflict-of-interest language are approved by the medical board's executive office and signed by all worksite monitors.
- Notify worksite monitors of any work restrictions imposed on the participant they are monitoring, and direct them to report on compliance with these requirements.

**Response:** The Board concurs with this recommendation. The Diversion Program staff began drafting worksite monitor policies after the release of the enforcement monitor's report. The Diversion Committee approved the draft worksite monitor policy changes in July 2006, however they have not been finalized and implemented. Since these policies were in the drafting process while this audit was being conducted, the auditor's early recommendations also were discussed and included in the draft policies and procedures. The new Diversion Program policies and procedures include the requirements for the worksite monitors as well as instruction to the case managers in outlining what is required for a worksite monitor. The case managers have been given the new requirements and agreements and have been reminded of the importance of compliance with the new worksite monitor policies.

All new potential worksite monitors will be met, in person, by the case manager. The case manager will go over the Agreement to Monitor, which includes the conflict-of-interest information. The monitor's roles and responsibilities will be discussed with the monitor to ensure he/she knows his/her role. Program staff intends that by July 1, 2007 all existing worksite monitors will be provided with the new agreement form and will have signed this new form. Case managers will meet with the existing monitors as well, to discuss the changes. All new worksite monitors will receive the new agreement. The Program will determine if any current worksite monitors have a conflict-of-interest with their participants and take appropriate action, if necessary, to resolve the situation.

## Medical Board of California

### Response to Recommendations of Bureau of State Audits

Audit No. 2006-116

Page 4

Additionally, case managers have begun to, and will continue to, contact worksite monitors when changes occur with a participant's work restrictions. The monitor also will be provided a copy of the participant's new agreement with the amendment which may affect the participant's work.

**Recommendation:** To ensure that participants receive program services on a timely basis, the diversion program should continue its efforts to achieve the goal of completing participants' first drug tests within seven days of their intake interview.

**Response:** As pointed out by the auditor the Program has dramatically improved the time it takes to do the first drug test from 35 days in 2004/2005 to 18 days in 2005/2006 and will continue to work to improve its processes to meet the seven-day goal. At the April 26, 2007 Diversion Committee Meeting, it was reported that the average during the second quarter of fiscal year 2006/2007 was five and one half days from the initial interview to the first drug test. Additionally, the Program is considering requiring the first drug test at the time of the intake interview.

**Recommendation:** To ensure timely and adequate response to positive drug tests or other indications of a relapse, the diversion program should do the following:

- Immediately remove practicing physicians from work upon receiving notice of a positive drug test.
- Provide sufficient justification when it determines that a positive drug test does not constitute a relapse.
- Have the reconstituted liaison committee assess the need to have an MRO [medical review officer] evaluate disputed drug test results, and hire such an individual if it is determined that this action is needed.

**Response:** The Board concurs with this recommendation. The Board feels strongly that there should be zero tolerance when a positive drug test is received. It is the Program's policy to remove a physician from practicing immediately upon notification of a positive drug test; however, as in any program, mistakes or errors in judgment can be made. Due to the seriousness of this recommendation, the Program Administrator will endeavor to ensure that every positive outcome results in the removal of the physician from practicing until further analysis and research can be completed. The Program will develop a method whereby the Program Administrator is notified of every positive drug test, so that he/she can follow-up on the action taken or assist in determining any change in the action to be taken.

Additionally, it will be required that every positive drug test, where it is determined that a relapse did not occur, be justified in writing and this justification will be placed in the participant's file.

The Board will ask the DAC to assess the need for an MRO. If this position to perform an assessment is still needed, then the Board will move forward to hire an MRO to evaluate disputed drug tests.

**Medical Board of California****Response to Recommendations of Bureau of State Audits**

Audit No. 2006-116

Page 5

**Chapter 2 Recommendations**

**Recommendation:** To ensure that it adequately oversees participants' random drug tests, the diversion program should do the following:

- Change existing policy to require both the case manager and the group facilitator to approve all vacation requests prior to the rescheduling of any drug tests.
- Establish a control over the rescheduling of drug tests that prohibits the collection system manager from rescheduling drug tests without a properly approved vacation request and also prevents participants from submitting vacation requests directly to the collection system manager.
- Clarify the vacation request policy for participants, and incorporate the 14-day notice requirement for vacation requests into the participants' diversion agreements.
- Establish a more timely and effective reconciliation of scheduled drug tests to actual drug tests performed by comparing the calendar of randomly generated assigned dates to the lab results.
- Require a program manager to review the drug test reconciliation to ensure that it is complete and accurate.

**Response:** The Board concurs with these recommendations. In regards to vacation requests, the new policies and procedures have been amended to reflect these recommendations. Specifically, the procedure has been changed so that both the group facilitator and the case manager will approve and sign all vacation requests. If a request is sent to the Collection System Manager without the case manager's approval, DTS is checked to see if the request has been noted as approved. If there is no notation in DTS, an email is sent to the case manager to verify that the request has been approved. Only after the case manager notifies the Collection System Manager that the request has been approved, are the collection dates changed to accommodate the request. Lastly, the Program will amend the Diversion Participant Agreement to include the 14-day notice requirement for vacation requests. This has been the policy, but it has not been specified in the agreement so the participant is not fully aware of this requirement in writing at the beginning of his/her enrollment.

Regarding the timely reconciliation of scheduled drug tests, the Program now will reconcile the lab results to the scheduled test twice a month using the calendar and the collectors' collection report and ensure any missed scheduled test will be rescheduled. Further, the Collection System Manager will follow-up with the collector and verify that the proper documentation has been received and provided to the case manager (and other staff as necessary) for further follow-up. Additionally, the Collection System Manager will provide the Program Manager with a bi-monthly summary of the reconciliation of the lab results and scheduled test to ensure the reconciliation is done timely and issues are discovered and addressed quickly.

## Medical Board of California

### Response to Recommendations of Bureau of State Audits

Audit No. 2006-116

Page 6

**Recommendation:** To ensure that it adequately oversees its collectors, group facilitators, and DEC members, the diversion program should do the following:

- Document instances in which the collector moves drug test dates without receiving approval two weeks in advance, makes an error in the submission of a urine sample, or fails to file an incident report when required. In these instances, the collection system manager should contact the collector, determine the cause of the noncompliance and reiterate the need to follow program policy if necessary.
- Maintain updated files on group facilitators to ensure that they stay current with required licenses, certifications, and continuing education requirements.
- Formally evaluate collectors, group facilitators, and DEC members annually and take timely corrective action when these individuals do not fulfill their responsibilities.

**Response:** The Board concurs with these recommendations. As previously stated, the Program has developed new policies and procedures for all persons involved in the Diversion Program, including collectors, group facilitators, case managers, worksite monitors, and DEC members. These policies and procedures will indicate each person's responsibility in the diversion monitoring process. When any new person starts with the Program, he/she will be provided with these policies and procedures and discussions will take place with this person to ensure he/she understands his/her role.

On February 11, 2006 and May 11, 2007, the Program held refresher/training courses to ensure collectors are adequately trained on the policies and procedures related to urine collections. The Program will continue to provide yearly refresher/training courses and conduct individual annual evaluations for current collectors. The evaluation will consist of a written evaluation and discussion of the service provided during the past year. The collectors will sign a contract containing terms and conditions to continue providing services for the upcoming year. The evaluations and contracts will be done yearly.

New collectors will sign a contract containing terms and conditions regarding providing services during the first year and will be closely monitored for the first 30 days to ensure that policies and procedures are being followed. A 30-day evaluation will be conducted that consists of a written evaluation and discussion of the service provided over the past 30 days. If the evaluation is favorable and the Program allows the collector to continue providing services, evaluations and contracts will be done annually as indicated above.

As evidence that these new procedures are providing adequate tools to ensure the Program hires quality collectors, two newly hired collectors were recently terminated within the first 30 days because their performance did not warrant their continued service.

Program staff will conduct an annual review of all group facilitators. This review will include checking the status of their licenses/certifications and ensuring they are in compliance with continuing education requirements. Meetings were held with the group facilitators to discuss the new policies and procedures. New agreements have been drafted and signed by existing group facilitators. In addition to other requirements, the new agreement states the facilitator must notify the Program of any criminal or

**Medical Board of California****Response to Recommendations of Bureau of State Audits**

Audit No. 2006-116

Page 7

administrative action pending against them or their license/certificate. On an annual basis, the group facilitator will be evaluated by the case manager, the DPCS II, the Program Administrator, and the DEC members.

The Board is aware that the DEC members have not been evaluated for some time. However, based upon discussion with the auditors, the Program Administrator began an evaluation process for the DEC members. This evaluation will be completed by other DEC members, group facilitators, and case managers. Evaluation forms were sent to all parties and have been received back by the Program. These evaluations will be reviewed and any necessary action will be taken. This evaluation process will be placed into the policies and procedures and will be conducted on an annual basis.

Failure to comply with the policies and procedures by any person involved in the monitoring process will be discussed with that individual and continued noncompliance will lead to termination of duties.

**Chapter 3 Recommendations**

**Recommendation:** To effectively oversee the diversion program, the medical board should require the program to create a reporting process that allows the medical board to view each critical component of the program.

To the extent that the diversion program lacks the data required to report on the performance of critical components of the program, the medical board should require program management to develop mechanisms to efficiently acquire such data so that both the medical board and program management can provide effective oversight.

**Response:** The Board concurs with these recommendations. The Program has added several elements to its Quarterly Review Reports. However, the Diversion Committee will meet to review the recommendations from June 2000 (as mentioned in the audit report) and determine what elements it believes should be in a report from the Program to the Committee. Once these determinations are made, reports will be set up within the DTS to assist in obtaining the necessary information.

**Recommendation:** To ensure that it adequately oversees the diversion program, the medical board should have its diversion committee review, clarify where necessary, and approve all policy statements contained in the program's policy manual. Any informal policies that the program is operating under, but that are not in the policy manual, should be reviewed and approved by the diversion committee. Finally, the diversion committee should ensure that any policy directive it approves is added promptly to the manual.

**Response:** The Board concurs with this recommendation. As stated in the first response above, Program staff is in the final stages of putting together a policies and procedures manual. All policies within the manual will be reviewed by the full Diversion Committee. Changes requested by the members will be incorporated into the policies and procedures. Once this final version has been completed, any future amendments will be tracked by revision date and revision number. Additionally, any future policies approved by the Diversion Committee will be added to the Program's policies and procedures prior to the next Diversion Committee meeting. Follow-up of this requirement will be performed by the Program Administrator, the Deputy Director, and the Executive Director.

## Medical Board of California

### Response to Recommendations of Bureau of State Audits

Audit No. 2006-116

Page 8

**Recommendations:** The Medical Board should ensure that areas of program improvement recommended by the enforcement monitor are completed within the next six months. If necessary, the diversion committee should meet for longer than one hour each quarter until this is accomplished.

**Response:** The Board concurs with this recommendation. The Diversion Committee has had several meetings to discuss the Enforcement Monitor's report at length. Based upon these meetings, determinations were made that some of the issues/recommendations of the monitor will not be implemented or discussed further. At the April 26, 2007 Diversion Committee meeting other issues were referred to the DAC for review and consideration. The Board intends that the Program and the Committee meet this recommendation and finalize its review and discussion of all the recommendations within six months.

①

**Recommendation:** The medical board should direct the program administrator to delegate some of his day-to-day tasks so that he can refocus his efforts on program development. To the extent that delegation alone is not sufficient to accomplish this goal, the medical board should reconsider its decision to have two case manager supervisors, rather than one case manager supervisor and one supervisor of other program staff.

**Response:** The Board concurs with the delegation of some of the day-to-day tasks from the program administrator. Based upon this recommendation, the Board will be putting forward a budget change proposal requesting a supervisor for the administrative staff of the Program. This will allow the Board to continue to maintain two case manager supervisors and have a supervisor over the support staff.

②

The addition of another case manager supervisor was a decision that the program administrator and the executive staff believe is necessary for several reasons. The case managers are located statewide. The case managers are the individuals responsible for monitoring participants, which is a time-consuming task. In addition to ensuring that the participant is doing everything required in his/her agreement and following up on positive drug tests, they also need to ensure that the group facilitators and worksite monitors are completing their role in the diversion monitoring process (including ensuring documentation is received for all processes). The case manager attends group meetings and DEC meetings. The supervisor is responsible for ensuring that the case managers are performing all of these duties. To do this, the supervisor must also attend group facilitator meetings and DEC meetings as well as meetings with case managers to go over their caseloads.

For one individual to perform this duty statewide is not logical. The travel time did not allow this individual to meet with all case managers and attend group facilitator meetings and DEC meetings as needed. Therefore, the Program Administrator also was attending group facilitator meetings and DEC meetings regularly, which required considerable travel time. In an attempt to provide better oversight, another case manager supervisor was hired. This second supervisor has been able to hold the case managers accountable for their duties and attend necessary meetings. In addition, supervisors have a small caseload of their own, which assists in being aware of the issues of the case managers. This has and will continue to assist the program in ensuring compliance by all involved in the diversion process.

By having two case manager supervisors and requesting a supervisor for the support staff, the Program Administrator will have more time to focus on his responsibilities in accessing the overall compliance of the program with its statutory mandate of public protection.

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## Comments

### CALIFORNIA STATE AUDITOR'S COMMENTS ON THE RESPONSE FROM THE MEDICAL BOARD OF CALIFORNIA

To provide clarity and perspective, we are commenting on the response to our audit from the Medical Board of California (medical board). The numbers correspond with the numbers we have placed in the department's response.

We appreciate that the medical board can choose not to implement all of the enforcement monitor's recommendations. However, for those it intends to implement, we are recommending that the medical board ensure that the recommendations be completed in the next six months, not just reviewed and discussed.

①

To clarify, our recommendation was not that the medical board add a third supervisory position to the Physician Diversion Program (diversion program). Rather, we recommended that the medical board direct the diversion program administrator to delegate some of his day-to-day tasks so that he can refocus his efforts on program development. To the extent that delegation alone does not accomplish this goal, we recommended that the medical board reconsider its decision to have two case manager supervisors, rather than one case manager supervisor and one supervisor of other program staff.

②



cc: Members of the Legislature  
Office of the Lieutenant Governor  
Milton Marks Commission on California State  
Government Organization and Economy  
Department of Finance  
Attorney General  
State Controller  
State Treasurer  
Legislative Analyst  
Senate Office of Research  
California Research Bureau  
Capitol Press



# **Report to the Legislature Vertical Enforcement**

**June 13, 2007**



**Medical Board  
of California**

## Contents

Introduction 1

Executive Summary 3

Summary and Recommendations 7

Findings 13

History 26

Implementation 44

Appendices 47

## Introduction

This report addresses the provisions of SB 231 (Figueroa, Chapter 674, Statutes of 2005) that requires the Medical Board of California (MBC), in consultation with the Departments of Justice, Consumer Affairs, Finance and Personnel Administration, to make recommendations to the Governor and Legislature on the vertical prosecution pilot. (Gov. Code Sec.12529.6) This landmark piece of legislation contained a number of legal and practical improvements to the Board's enforcement program, based on the recommendations of the MBC's Enforcement Monitor after a two-year study.

Under SB 231, effective January 1, 2006, the MBC and the Health Quality Enforcement Section (HQUES) of the Department of Justice (DOJ) were required to implement a vertical prosecution (VP) model to conduct its investigations. Under this legislatively defined VP model, each complaint referred to an MBC district office for investigation is simultaneously and jointly assigned to an MBC investigator *and* HQUES deputy. The goal of this model is to improve the quality of cases investigated, increase teamwork and efficiency, and shorten the time to resolve assigned cases, with the overall goal of increasing public protection.

Throughout much of the legislative process, SB 231 contemplated that MBC investigators would be transferred to the DOJ, thus creating a more streamlined and centralized enforcement system. However, shortly before it was enacted, SB 231 was amended and this proposed transfer of investigators was deleted from the bill. Instead, as amended, SB 231 created a VP pilot under which investigators continued to be employed and supervised by the MBC while, at the same time, they are responsible for conducting investigations under the direction of HQUES deputy attorneys general. While implementation of this VP pilot has presented significant challenges to both agencies, based on the statistical data collected over the first 16 months of this pilot, it appears that the legislative goal of increasing public protection is being achieved. By law, this VP pilot becomes inoperative on July 1, 2008, and is repealed on January 1, 2009, unless a later enacted statute deletes or extends it.

This report will present the overall findings and the recommendations of the MBC regarding the VP pilot; present statistical data showing the results of the VP pilot for the period of January 1, 2006 to April 1, 2007; provide an historical overview of the MBC enforcement program; and finally, summarize the significant steps taken by both MBC and HQE in the implementation of the VP pilot.

NOTE: The new vertical prosecution model impacts both the *investigative* and the *prosecutorial* phases of enforcement. Unlike a county district attorney's office, which is solely engaged in criminal prosecution, not all MBC cases lead to prosecution; therefore, vertical prosecution is a misnomer. MBC refers to the new model as a **vertical enforcement (VE) model**. Throughout this report, the vertical prosecution model will be referred to as the vertical enforcement (VE) model.

## Executive Summary

The Legislature has declared that, “by ensuring the quality and safety of medical care,” the Medical Board of California (MBC), “performs one of the most critical functions of state government.” (Gov. Code § 12529.6, subd. (a)) Since 1876, the MBC’s mission has been to protect healthcare consumers through the vigorous, objective enforcement of the Medical Practice Act.

Over the years, the Legislature has periodically reviewed the MBC’s performance and taken important steps to refine its operations to further improve public protection. Notably, in 1990, major reforms were initiated by SB 2375 (Presley, Chapter 1597, Statutes of 1990), including the establishment of the Health Quality Enforcement Section (HQES) of the Department of Justice (DOJ). In so doing, the Legislature has consistently sought to bring investigators and prosecutors together to investigate allegations of misconduct by physicians and surgeons. During the 2005-2006 session, the Legislature took yet another important step in this process by directing the MBC and HQES to implement the “vertical prosecution model” (herein referred to as vertical enforcement or VE) for such investigations (SB 231 (2005-2005 Reg. Sess.), § 28). The legislative goal of this two-year VE pilot is to bring MBC investigators and HQES deputy attorneys general together from the beginning of an investigation to improve coordination and teamwork, increase efficiency, and reduce investigative completion delays, all with the overall goal of increasing public protection.

The MBC and HQES have worked closely together to implement the VE model. The statistical data collected by the MBC during the first 16 months of the VE pilot shows, when modified to exclude cases prior to implementation of the pilot, an overall decrease of 10 days in the average time to complete an investigation. This decrease is even more significant when consideration is given to fact that the MBC has continued to operate without sufficient investigator staffing and, while it was working to implement the VE model, MBC investigators continued to handle over a 1,000 pending, pre-2006 investigations.

While data is limited, the VE pilot shows promise in a number of areas, and some dramatic improvements have been demonstrated:

- Cases Closed Without Prosecution – The average number of days to close pre-VE cases was 145 days; after VE, it was reduced to 139 days.
- Obtaining Medical Records – Prior to the VE pilot, it took an average of 74 days to obtain medical records; after VE, it was reduced to 36 days.
- Obtaining Physician Interviews – Prior to the VE pilot, the average time between the initial request for an interview and the actual interview was 60 days; after VE, it was reduced to 40 days.
- Obtaining Medical Expert Opinions – Prior to the VE pilot, the average number of days to obtain a medical expert opinion was 69 days; after VE, it was reduced to 36 days.
- Obtaining HQES Filing – Prior to the VE pilot, the average number of days from investigative completion to the filing of an accusation was 241 days; after VE, it took 212 days.
- Interim Suspension Order (ISO) or Temporary Restraining Order (TRO) – Prior to the VE pilot, it took 91 days from the receipt of the investigation to the granting of an ISO or TRO; after VE, it took 30 days.

Reducing investigative completion delays, however, is only one method of measuring improved public protection. The VE pilot was implemented by the Legislature in recognition of “the critical importance of the board’s public health and safety function, the complexity of cases involving alleged misconduct by physicians and surgeons,” and because of “the evidentiary burden in the board’s disciplinary cases . . .” (Gov. Code, § 12529.6, subd. (a)) While difficult to objectively measure through statistics, improving coordination and teamwork between investigators and prosecutors significantly improves the quality of the investigation of these complex cases. When violations of law are discovered, there is also improved quality in the disposition of cases whether they are resolved via settlement or prosecution. Implementation of the VE pilot mandated by SB 231 has resulted in improvement in all of these areas. There is, however, an important additional improvement the Legislature can make to this pilot.

During much of the legislative process, SB 231 provided for the transfer of MBC investigators to the DOJ, with the goal of creating a pure VE model where investigators and prosecutors were employed by the same agency, working together under a single chain-of-command. Ultimately, however, the Legislature elected not to take this final step and, instead, established VE as a two-year pilot with investigators continuing to be employed by the MBC. The decision not to transfer MBC investigators to the DOJ has presented significant challenges to both agencies as they have worked together to implement the VE pilot. It has also resulted in the loss of experienced MBC investigators who, uncertain over their careers, have elected to seek employment with other law enforcement agencies. Thus, while the VE pilot has been beneficial in demonstrating its benefits, the cost of continuing this program in its present state may ultimately undermine the very public protection goals it was originally enacted to achieve.

As part of SB 231, the Legislature directed the MBC, in consultation with the Departments of Justice, Consumer Affairs, Finance, and Personnel Administration, to make recommendations to the Governor and Legislature on the VE pilot established by the bill. (Gov. Code, § 12529.7) Pursuant to that legislative mandate, the MBC hereby submits this report describing the steps taken to implement the VE pilot, its overall impact on public protection, and presenting its recommendation that the Legislature take the final step in this process, of directing the transfer of MBC investigators to the Department of Justice.

An alternative to this recommendation might be for the Medical Board of California to establish its own internal VE by hiring its own prosecuting attorneys and raise the MBC investigator salaries to that equivalent to the special agent classification at the Department of Justice.



## Summary & Recommendations

SB 231 created a vertical enforcement (VE) pilot with investigative and prosecutorial team members in two separate agencies. While considerable progress has been made in developing new policies and procedures, defining participants' roles, and producing quality investigations to implement the VE model, the fundamental structural barrier of having investigators employed by one agency, while their workload is being directed by employees of another, will continue to pose significant challenges to both agencies. Notwithstanding those challenges, statistical data demonstrates that under the VE pilot, cases that should be closed are more quickly identified and egregious complaints are being handled more expeditiously.

The statistical data collected by the MBC for the first 16 months of the VE pilot, when modified to exclude pending pre-2006 cases, shows an overall decrease of 10 days (from 146 to 136 days) in the average time to complete an investigation. Significantly, this decrease has been accomplished with existing staff, with no augmentation to restore the investigator positions lost during the FY 2002-2003.

The Legislature has established a goal that "...an average of no more than six months will elapse from the receipt of the complaint to the completion of the investigation." (Bus. & Prof. Code section 2319) That period has been increased to one year for cases involving "complex medical or fraud issues or complex business or financial arrangements." (Id.) In response to the Enforcement Monitor's recommendations to reduce investigative time, MBC has identified those cases which would fit the definition of "complex" as discussed in the "Implementation" section of this report.

The VE pilot has created a new relationship between prosecutors and investigators. There are positive and negative factors which impact the success of the current pilot, as follows.

### Successes

- Of the 2,104 pending investigations in the shared workload (1,014 pending in the pre-VE workload and 1,090 investigations assigned during calendar year 2006), 874 investigations were closed, 48 citations were issued, 26 investigations were referred for criminal action, and 364 investigations were referred for disciplinary action.
- Investigations that result in a finding of no violation or insufficient evidence are being closed more quickly. In FY 03-04 it took 154 days to close “no violation” cases, while in calendar year 2006, it took 135 days. In FY 03-04, it took 145 days to close “insufficient evidence” cases, while in calendar year 2006, it took 139 days. Both consumers and physicians directly benefit when such investigations are quickly resolved.
- Medical records are being obtained faster. In FY 03-04, it took an average of 74 days to obtain medical records. In calendar year 2006, it took an average of 36 days.
- Physician interviews are occurring in a more timely manner. In FY 03-04, it took an average of 60 days to conduct interviews with subject physicians. In calendar year 2006, it took 40 days.
- The average time for receipt of a medical expert opinion has been reduced by 40%. In FY 03-04, it took an average of 69 days to obtain the medical expert opinion. In calendar year 2006, it took 36 days.
- Accusations are being filed faster. In FY 03-04 it took an average of 241 days from the date the case was initiated to the date an accusation was filed. 45% of the investigations initiated during calendar year 2006 through April 9, 2007, which were approved by HQE for the filing of an accusation, have an accusation filed, with an average time of 212 days.
- Petitions for Interim Suspension Orders (ISOs) and Temporary Restraining Orders (TROs) in emergency cases are being filed faster. ISOs/TROs filed in FY 03-04 took an average of 91 days. In calendar year 2006, they took an average of 30 days.

While the VE pilot has plainly demonstrated substantial public protection benefits, for the following reasons it is unclear whether any further significant improvements can be obtained under the present model. Moreover, the loss of experienced MBC investigators as a result of continuing the pilot in its present state may ultimately undermine the very public protection goals it was originally enacted to achieve. In this regard, the MBC presents the following findings.

Factors Impeding Success:

- There are significant retention problems with MBC investigative staff. On January 1, 2006, MBC had 92 sworn staff positions comprised of 71 investigators and 21 supervisors. On July 1, 2006, SB 231 augmented staff by four investigator positions bringing the total to 96. Of the 96 authorized positions, there was an average statewide vacancy rate of 12.3% during calendar year 2006, which equates to 11.6 positions being vacant.
- Vacancies have occurred when investigators have transferred out of the MBC due to the uncertainty associated with a pilot. Simply put, the temporary nature of a pilot does not allow for long-term planning for investigators' careers. Continuing this pilot will result in further loss of experienced MBC investigators.
- Some experienced MBC investigators have also been attracted to the DOJ special agent position due to the prestige and enhanced benefits associated with that classification.
- There is also reason to believe the VE pilot may have hindered the recruitment efforts of MBC investigators. New applicants have questioned the future of the MBC investigator position, and have been reluctant to join an investigative agency with such an uncertain future.
- Supervisory investigator positions have been vacant for longer periods of time and some investigators were reluctant to promote due to the changing environment and greater demands of VE.
- Having both a lead and a primary deputy on the same case can lead to potential duplication of tasks, case review or case direction which may lead to inefficiencies in the investigation and prosecution of the case.

- The VE pilot has led to some role confusion by DAGs and investigators as the terms “direction” and “supervision,” as used in the statute, are not clearly defined and subject to interpretation.

### Recommendations

Over the years, the Legislature has periodically reviewed the MBC’s performance and taken important steps to refine its operations to further improve public protection. The implementation of the VE model mandated by SB 231 was another important step on that road. During this first year, MBC case data was entered into the DOJ ProLaw software program, but still requires reconciliation with the data in the MBC’s case-tracking system. There was no easy way to transfer data between the two systems and progress continues to be made in this area to reconcile data. In addition, the name recognition associated with the Department of Justice has been helpful in obtaining cooperation when interacting with hospital facilities, other governmental agencies, physician licensees and defense attorneys.

The data suggests there have been decreases in all time frames relating to the investigation and prosecution of VE cases. This improvement has occurred even though the MBC has experienced retention and recruitment issues associated with the uncertainty of this pilot. HQE also had to fill nine vacancies and there is a learning curve associated with new employees. This suggests that in the future a full compliment of experienced team members may lead to further decreases in the time frames of enforcement activities.

In this report, the MBC has demonstrated the significant benefits to both consumers and licensees that can be achieved under the VE model. At the same time, it is unclear whether any significant further improvements are possible under the VE pilot. Moreover, the cost of continuing this program in its present state, in terms of the continued loss of MBC experienced investigators, presents a strong and persuasive argument that the Legislature should take the final step by transferring MBC investigators to the DOJ. Among other things, such a transfer would:

- Permit a more centralized and efficient enforcement program. The transfer of MBC investigators to the DOJ would eliminate many of the fundamental structural barriers inherent in the present system whereby the workload assigned to the investigators employed by one agency is directed by employees under another agency.
- Identify the investigators and DAGs who will work together in designated teams at each office. These relationships may also lead to more rapid resolution of investigations that do not warrant disciplinary action, thereby allowing more time to be spent on the complex cases.
- Allow for the implementation of a single computer data base which would track the investigative and prosecutorial functions (as demonstrated by DOJ Medi-Cal Fraud).
- Allow co-location of deputy attorneys general and investigators to enhance communication between team members, reducing travel time, and the current volume of e-mail communications.
- Permit a more centralized and efficient enforcement program. The transfer of MBC investigators to the DOJ would eliminate many of the fundamental structural barriers inherent in the present system whereby the workload assigned to the investigators employed by one agency is directed by employees under another agency.
- Identify the investigators and DAGs who will work together in designated teams at each office. These relationships may also lead to more rapid resolution of investigations that do not warrant disciplinary action, thereby allowing more time to be spent on the complex cases.
- Allow for the implementation of a single computer data base which would track the investigative and prosecutorial functions (as demonstrated by DOJ Medi-Cal Fraud).
- Allow co-location of deputy attorneys general and investigators to enhance communication between team members, reducing travel time, and the current volume of e-mail communications.

In conclusion, the statistical data collected by the MBC has shown a decrease in all of the time periods related to the investigation and prosecution of cases under the VE model. To alleviate the investigator retention and recruitment problems resulting from the uncertainty associated with this pilot, and open the door to significant further improvements in public protection, the MBC strongly recommends the Legislature take the final step in the process begun long ago and transfer MBC investigators to the Department of Justice.

An alternative to this recommendation might be for the Medical Board of California to hire its own prosecuting attorneys and raise the MBC investigator salaries to that equivalent to the DOJ special agent classification.

The MBC also recommends the term “vertical prosecution” as referenced in SB 231 be changed to “vertical enforcement” in future legislation to more accurately describe the actual process.

## Findings

Initial statistical data from the pilot period identify trends which suggest that the VE model can more quickly identify cases for closure and that certain egregious complaints can be handled more expeditiously. The data also suggested progress in reducing the time frames to complete investigations. However, the pilot time frame was insufficient to address the monitor's concerns regarding the time to complete prosecutions. Since certain MBC investigations can take one year to conduct, the pilot time frame did not provide adequate time to measure the prosecutorial time line of such cases. It is anticipated that the time frame for the litigation phase will be lessened with the earlier involvement of the deputy attorney general in the case.

The MBC's Annual Reports and statistical data reported by the Enforcement Monitor were used to draw comparisons to the data accumulated during the VE pilot (January 1, 2006 through April 9, 2007).

### MBC Annual Report Data Re: Time to Complete Investigations

The MBC's computerized data system, Consumer Affairs System (CAS), is used by the Board to gather data for its publications and Annual Report. As reported, the average number of days to complete an investigation was: 208 in FY 2002-03; 220 in FY 2003-04; 259 in FY 2004-05 and 277 in FY 2005-06. While this data shows an increase in the number of days to complete investigations, several significant factors which directly impact these numbers must be considered:

- Vacant and lost investigator positions lead to longer time lines to complete investigations. In FY 2002-03, the Governor's mandated staffing reduction lowered the number of investigators by 19.
- Beginning in FY 2002-03, and continuing to the present, MBC implemented changes pursuant to SB 1950 which provided the Board with a new prioritization of complaints and investigations. The Board staff also took steps to reduce the number of cases sent to the district offices for investigation without impacting public safety concerns. Some complaints were resolved in the MBC Central Complaint Unit (CCU) via "cease and desist" letters; some complaints resulted in the issuance of citations; while other complaints (e.g.,

violations involving criminal convictions) were forwarded directly to HQE. Eliminating these simpler investigations from the office workload has resulted in the field receiving only the more time-intensive and complex cases. Thus, the apparent increase in the length of time necessary to complete investigations, appears to be the result, at least in part, of the elimination of these less-complex investigations from the statistical data base.

- Another component of SB 1950, begun in FY 2003-04, was the addition of Business and Professions (B&P) Code section 2220.08 requiring CCU to have all quality-of-care complaints reviewed by a medical expert who was in the same specialty as the subject physician, before these complaints were sent to the MBC district offices for formal investigation. This resulted in fewer cases being sent to the district offices. Some of these cases were marginal and often those cases were completed quickly when sent to the office. With this procedural change, these cases were closed in CCU and impacted the average time for completion of investigations.
- Beginning FY 2004-05, there was a procedural change in the way data was collected and reported. All citations initiated from CCU, including a physician's failure to notify MBC of a change of address, were no longer reported as a complaint or an investigation. (They were only reported in the annual statistics as citations issued.) These had been reported as cases opened and closed the same day, and impacted the average time for completed cases.



### Monitor's Report: Cycle Time for Completed Investigations

The Enforcement Monitor focused attention on MBC's case cycle time, from receipt of complaint to completion of investigations. The Monitor's Initial Report presented time frames for completion of investigations by disposition and day range. In FY 2003-04, the average elapsed time from receipt of an investigation to case resolution was 261 days, as reflected in the following chart:

#### FY 2003-2004 Investigative Time Frames by Disposition and Day Range

Day Range	Non-Legal Closure		Referred for Legal Action		Total	
	Number	Percent	Number	Percent	Number	Percent
1 Month or Less	83	7.0	144	23.8	227	12.7
1 to 3 Months	133	11.2	36	6.0	169	9.4
3 to 6 Months	239	20.2	80	13.2	319	17.8
6 to 9 Months	248	20.9	69	11.4	317	17.7
9 to 12 Months	195	16.5	80	13.2	275	15.4
12 to 18 Months	206	17.4	110	18.2	316	17.7
18 to 24 Months	67	5.7	67	11.1	134	7.5
More than 24 Months	14	1.2	19	3.1	33	1.8
Total	1185	100.0	605	100.0	1790	100.0
Average Timeframe	256 days		269 days		261 days	

To contrast the Monitor's data, the same criteria was applied to the CAS data, for the calendar year of 2006 (the VE pilot period). On December 31, 2005, 1,014 physician and surgeon investigations were pending in the MBC district offices. In calendar year 2006, 1,090 physician and surgeon cases were referred to the field. Thus, 2,104 cases were in varying stages of investigation during this pilot period and the average elapsed time from receipt of an investigation to case resolution was 282 days.

## CY 2006 Investigative Time Frames by Disposition and Day Range

Day Range	Non-Legal Closure		Referred for Legal Action		Total	
	Number	Percent	Number	Percent	Number	Percent
1 Month or Less	25	3.3	107	24.7	132	11.0
1 to 3 Months	61	8.0	19	4.3	80	6.7
3 to 6 Months	128	16.7	68	15.7	196	16.4
6 to 9 Months	142	18.6	65	15.0	207	17.3
9 to 12 Months	164	21.4	44	10.1	208	17.3
12 to 18 Months	181	23.7	82	18.9	263	21.9
18 to 24 Months	52	6.8	36	8.3	88	7.3
More than 24 Months	12	1.5	13	3.0	25	2.1
Total	765	100.0	434	100.0	1199	100.0
Average Time frame	296 days		256 days		282 days	

This represents an increase from 261 days to 282 days. However, data modifications were necessary to both charts because they include a significant number of cases that were in the workload *prior* to the start of the time period under analysis. The 2003-04 chart also included workload that is no longer sent to the offices, due to changes in MBC and CCU policies.

Following these modifications, the 2003-04 data reflects cases that were initiated **and** completed during that year and reflects the average time to complete investigations was 146 days. The chart appears as follows.

FY 2003-2004 Investigative Time Frames by Disposition and Day Range for Investigations Initiated and Completed in FY 2003-2004  
(This excludes out-of-state and headquarters cases.)

Day Range	Non-Legal Closure		Referred for Legal Action		Total	
	Number	Percent	Number	Percent	Number	Percent
1 Month or Less	24	6.8	29	24.2	53	11.1
1 to 3 Months	76	21.3	17	14.2	93	19.5
3 to 6 Months	128	36.0	30	25.0	158	33.2
6 to 9 Months	99	27.8	31	25.8	130	27.3
9 to 12 Months	29	8.1	13	10.8	42	8.8
12 to 18 Months	0	0	0	0	0	0
18 to 24 Months	0	0	0	0	0	0
More than 24 Months	0	0	0	0	0	0
Total	356	100.0	120	100.0	476	100.0

A comparison to the 2006 cases (in the VE model) reflect that the average time to complete an investigation is 136 days.

CY 2006 Investigative Time Frames by Disposition and Day Range for Investigations Initiated and Completed in CY 2006  
(This excluded out-of-state and headquarters cases.)

Day Range	Non-Legal Closure		Referred for Legal Action		Total	
	Number	Percent	Number	Percent	Number	Percent
1 Month or Less	22	11.0	19	24.0	41	14.7
1 to 3 Months	47	23.5	13	26.5	60	21.5
3 to 6 Months	73	36.5	19	24.1	92	33.0
6 to 9 Months	38	19.0	22	27.8	60	21.5
9 to 12 Months	20	10.0	6	7.6	26	9.3
12 to 18 Months	0	0	0	0	0	0
18 to 24 Months	0	0	0	0	0	0
More than 24 Months	0	0	0	0	0	0
Total	200	100.0	79	100.0	279	100.0
Average Time frame	136 days		133 days		136 days	

The data from these two modified reports reveals that non-legal closures (investigations which were closed as no violation, insufficient evidence or referred for citation), investigations referred for legal action (referred for criminal filing and/or administrative action) and the overall total, all reflect decreases in time frames.

### Overview of Investigative Workload During the VE Pilot

The CAS data can be viewed in a different format to assess how investigations progressed during the VE pilot. The following chart represents investigations that were in the system on January 1, 2006, as well as investigations which were added through December 31, 2006. The chart reflects the disposition of these investigations between January 1, 2006 and April 9, 2007:

Physician & Surgeon Investigations	Cases Closed with No Action			Citations Issued			Referred for Criminal Action			Referred for Prosecution				Investigations Pending	
	#	%	Avg days	#	%	Avg days	#	%	Avg days	#		%	Avg days	#	%
										Primary Referral	Consolidated Referrals				
1014 pending on 1-1-06	569	56%	378	37	4%	380	17	2%	461	191	51	24%	447	149	14%
1090 opened between 1-1-06 & 12-31-06	305	28%	169	11	1%	198	9	1%	218	80	42	11%	186	643	59%

#### Investigations Pending on December 31, 2005

1,014 investigations were in the investigators' workload at the inception of the pilot. These investigations were in varying stages of development and may have had significant legal involvement under the former HQES DIDO program. While VE was being piloted, these cases also required attention from the newly formed VE teams. Of the 1,014 investigations, 569 or 56% of these investigations were closed, with an average completion time of 378 days. Of the remaining 445 investigations, action was taken as follows. 37 citations (4%) were issued; 17 investigations (2%) were referred for criminal action; and 242 investigations (51%) were identified for potential administrative action. Effective April 9, 2007, there were 149 pre-2006 investigations pending.

#### Investigations Opened After January 1, 2006

1,090 investigations were opened and assigned to the VP teams during 2006 calendar year. The VE protocols were utilized in processing these investigations. Of the 1,090 investigations, 305 investigations (28%) were closed, with an average completion time of 169 days. Of the remaining 785 investigations, 13% resulted in the following actions: 11 citations (1%) were issued; 9 investigations (1%) were referred for criminal action; and 122 investigations (11%) were accepted for administrative action. The data reveals that the average number of days from receipt of the investigation to the investigation completion and acceptance for administrative action averaged 186 days. Effective April 9, 2007, there were 643 investigations (59%) pending.

The data suggests that a large body of work was processed by the team members during this period of time. Of the 2,104 investigations, 874 investigations were closed, 48 citations were issued, 26 investigations were referred for criminal action, and 364 investigations were referred for administrative action. The VE teams worked on the older investigations in the system, as well as focused attention on the newer investigations.

### Comparison of Case Closure Data

Within the 2006 calendar year, it took an average of 135 days to close an investigation, which was determined to have “no violation,” for those investigations opened during this same year. In FY 2003-04, it took 154 days. This data suggests the VE team is able to identify those investigations which should be removed from the investigative workload earlier in the time line.

During the VE pilot period, it took 139 days to close an investigation that had insufficient evidence to result in a prosecution, whereas in FY 2003-04 it took 145 days. This also suggests these investigations are being pulled out of the workload more quickly.

### Delays in Obtaining Medical Records

The Enforcement Monitor reported there were significant delays in the time it took for MBC to obtain medical records. In FY 2003-04, the average time from a request for records by MBC to the receipt of all records was 74 days. Subsequently, the Enforcement Program instituted a zero-tolerance policy change for failure to provide medical records in a timely manner pursuant to Bus. & Prof. Code sections 2225 and 2225.5. The policy was vetted through MBC and HQE, revised in the MBC Enforcement Operations Manual, and distributed to all investigative staff

For cases in the VE pilot assigned in calendar year 2006, the average time to retrieve records was 36 days.

MBC and HQE staff have been diligent to ensure the zero-tolerance policy is enforced and citations have been issued for failure to provide records in a timely manner. The VE pilot has enabled increased participation by DAGs in record acquisition. It appears the involvement of the Department of Justice has also been instrumental in garnering cooperation from law offices, hospitals, physician offices and governmental entities in providing medical records expeditiously.

#### Delays in Physician Interviews

The Enforcement Monitor reported there were inconsistent MBC policies and, therefore, delays in conducting interviews with subject physicians. The average time between the initial request for an interview and the actual subject interview was 60 days.

For investigations in the VE pilot assigned in calendar year 2006, the average time to request an interview with a physician to the completion of the physician interview was 40 days.

The MBC and HQE staff have used their subpoena authority to compel a physician to appear for an interview when there have been delays in appearances.

#### Delays in Obtaining Medical Expert Opinions

The Enforcement Monitor reported MBC had a policy and a goal of obtaining the expert opinion in 30 days. In FY 03-04, the number of days between the time a completed investigation was sent to an expert reviewer and the time the expert opinion was returned to the investigator was 69 days.

MBC data for the request and receipt of an expert opinion in the VE pilot is 36 days.

As part of the VE pilot, HQE DAGs were encouraged to interact with the medical consultants to ensure the appropriate medical expert was selected. This has reduced the number of times a subsequent expert opinion was necessary. The involvement of DAGs earlier in the investigation has served to identify the materials essential for the expert's review, thus eliminating the need for the expert's review of unnecessary documents. When the expert opinion is returned, the DAG can quickly assess the opinion to determine if the expert has followed the guidelines and if the opinion has addressed all the substantive issues referenced in the complaint. If the expert opinion requires clarification, the DAG can readily request clarifying information, rather than waiting for the issue to be resolved at the time of trial. This can also eliminate the unnecessary filing of administrative charges.



### Number of Accusations and Elapsed Time for HQE Filing

The Enforcement Monitor had concerns about the delays in filing accusations from the date HQE received the investigation. The following chart compares cases investigated from calendar year 2006 and accepted by HQE for administrative action between January 1, 2006 through April 9, 2007.

	Accusations Filed				Number of accusations filed where the info from consolidated case is in Accusation (incl in Accusations filed also)	Amended Accusation filed based upon consolidated case information	Disciplinary Actions Taken	
	#	% of referred	Average days from investigation assigned to filing	Average days from completion of investigation to filing			#	Average days from completion of investigation to outcome
<b>1014 investigations pending as of 1-1-06</b>	1072	53	560	110	23	0	36	217
<b>1090 investigations were opened between 1-1-06 and 12-31-06</b>	36	45	212	80	14	8	8	130

#### Investigations Pending on December 31, 2005 <sup>1</sup>

Of the 1,014 (pre-VE) investigations pending in the MBC investigator workload, 242 investigations were accepted by HQE with an average of 447 days from the start of the investigation to the acceptance of the case. (Note: These include 191 primary referrals and 51 consolidated case referrals, which are subsequent cases on the same physician.) Of the 242 investigations, 102 investigations (53% of the 191 primary referrals) resulted in the filing of an accusation. The average number of days from the start of the investigation to this filing date was 569 days. The average time from investigation completion to the filing of administrative charges was 110 days. Final outcome was achieved for 36 investigations in an average of 217 days from the completion of the investigation to the final outcome.

#### Investigations Opened After January 1, 2006 <sup>2</sup>

Of the 1,090 investigations opened after January 1, 2006, 122 VE investigations were accepted by HQES for administrative action (80 primary referrals and 42 consolidated case referrals), with an average of 186 days from the start of the investigation to the acceptance of the case. Of the 122 investigations, 36 investigations (45% of 80 primary referrals) resulted in the filing of an accusation. The average time from the start of the investigation to this filing date was 212 days. (Note: As a comparison, for investigations opened in FY 2003-04 with filings within 15 months, it took an average of 241 days.) During the VE pilot, the average time from investigation completion to the filing of administrative charges was 80 days. (Note: In contrast, the FY 2003-04 Annual Report reflected 107 days for an investigation to progress to this point.) In the VE pilot, final outcome was achieved for eight investigations, in an average of 130 days from the

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On December 31, 2005, there were 140 allied health investigations in the MBC workload. This is also part of the MBC investigator workload from other DCA licensing boards and committees, in addition to the physician and surgeon cases which were the focus of the VE pilot.

2

During calendar year 2006, 183 new allied health investigations were opened. This is also part of the MBC investigative workload from other DCA licensing boards and committees, in addition to the physician and surgeon cases which were the focus of the VE pilot.

completion of the investigation to the final outcome. (Note: As a comparison, for investigations opened and resolved in calendar year 2004, with outcomes within 15 months, 161 was the average number of days.)

During the pilot, all prosecutorial time frames have decreased. It is significant to note that of the investigations initiated during calendar year 2006 which were accepted by HQE for the filing of an accusation, 45% already have an accusation filed. This suggests that having the legal review earlier in the investigation has led to quicker action on those cases which are filed.

#### Number of ISO/TRO filings and the Speed to Obtain

The Enforcement Monitor was critical that MBC appeared to have underutilized the Interim Suspension Order (ISO) and Temporary Restraining Order (TRO) tools that provide extraordinary relief from those physicians who may pose an imminent threat to public safety.

Although the monitor did not measure elapsed time to obtain these orders, the time frame in FY 2003-04 from the receipt of the investigation to the granting of the orders was 283 days. In calendar year 2006, the elapsed time from the receipt of the investigation to the granting of these orders was 274 days.

In FY 2003-04, the monitor noted 22 ISOs/TROs were granted, regardless of the date of when the investigation was initiated. From January 1, 2006 through December 31, 2006, 23 ISOs/TROs were obtained regardless of when the investigation was initiated.

These numbers alone do not represent a significant increase. Upon further examination of the underlying case data, it was determined that six ISOs/TROs were granted in FY 2003-04 based upon investigations initiated during that same time frame and these took an average of 91 days. In contrast, in calendar year 2006, eight ISOs/TROs were granted based upon investigations initiated during this period, which took an average of 30 days.

This data reflects a 67% reduction in the amount of time to obtain an ISO/TRO, thereby demonstrating enhanced public protection.

## History

### Vertical Enforcement Defined

The term, “vertical prosecution” (VP), as defined in the Enforcement Monitor’s Initial Report<sup>3</sup> refers to the continuous involvement of attorney and investigator team members as a case works its way through the investigative and prosecutorial process. Investigators and prosecutors work together in teams from the date a case is assigned for investigation. The purpose of this combined effort is to prepare complex investigations for trial or some other legal disposition. It is often visualized as a vertical chain of events beginning with investigation and proceeding to pleadings, preliminary examinations, pre-trial motions, trials and appeals. While these terms are common to criminal proceedings where VP is used, the majority of MBC cases will result in a disposition other than prosecution. The vertical enforcement (VE) term more accurately describes the process of investigating MBC cases and includes those cases that will be closed without formal action.

In the VE model, the investigation benefits from having legal guidance and assistance from the HQES deputy attorney general at the initial assignment of the case. Under this model, the trial attorney and the investigator are assigned as a team to handle a complex case as soon as it is opened as a formal investigation. The team approach refers to the team assembled for a particular case, allowing for experts or certain specialists to be added to the case, as may be required. In some agencies, different teams are formed for different types of cases, thus maximizing training and the development of different working relationships.

While the prosecutor and the investigator work together during the investigative phase to develop the investigative plan and ensure the gathering of necessary evidence to prove the elements of the offense, they have very different roles. The prosecutor brings the expertise to anticipate legal defenses; provides legal analysis of the incoming evidence to help shape the direction of the case; to assist with uncooperative subjects or third-party witnesses; deals directly with defense attorneys when issues arise; and addresses settlement or plea matters, which often arise early in such cases. In turn, the investigator contributes a peace officer’s experience and insight into the investigative plan and case strategy; performs the

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<sup>3</sup>Enforcement Monitor *Initial Report*, page 134 (including footnote #172)

field investigative tasks, including identification and location of witnesses and subjects; interviews witnesses and subjects; obtains and participates in the review of documentary and technical evidence; assesses criminal histories and other databases; identifies and assists with experts; plans and executes undercover operations; prepares affidavits and specifications for search warrants, serves warrants; makes arrests; assists with witnesses and evidence during the trial phase; prepares investigative reports; and conducts other tasks usually associated with the work of trained peace officers and professional investigators.

#### Enforcement Monitor's Recommendation

SB 1950 (Figueroa, Chapter 1085, Statutes of 2002) appointed an Enforcement Monitor to study the Medical Board of California's Enforcement Program. The study began in November 2003 and occurred over two years. During the first year, the study was devoted to 10 areas including: mission; resources; management structure; complaint, investigation and disciplinary processes; and the use of medical consultants and medical experts.

During the second year, emphasis was placed on measuring any changes implemented by the MBC during year one, analyzing the last year's fiscal year data and assistance with the drafting and advocacy of legislation introduced as a result of the Enforcement Monitor's recommendations. The Enforcement Monitor's Initial Report, released November 1, 2004, included 55 recommendations.

***(Refer to <http://www.mbc.ca.gov/Pubs/Enforcementrept.htm> for the full Initial Report.)***

The Enforcement Monitor's report concluded there were: time delays in the investigative process; inadequate coordination and teamwork between MBC investigators and HQE prosecutors; delays in procurement of medical records; ineffective policies relating to physician interviews; inadequate medical consultant availability and utilization; weaknesses in the medical expert program; need for ongoing training for MBC investigative staff; need for improved coordination with state and local prosecutors; ongoing problems with recruitment and retention of MBC investigators; need to update existing MBC training manuals; and, MBC investigators could benefit from improved access to various databases. While some of these issues were addressed immediately as the MBC implemented new policies and procedures, others could not be addressed without legislation.

The Enforcement Monitor recognized how MBC cases might benefit from the VE model. The Enforcement Monitor envisioned early and continuing attorney/investigator teamwork that is typically utilized by many other prosecutorial offices when handling complicated cases. Certain complex and difficult law enforcement investigations naturally lend themselves to this model and many MBC investigations involve highly technical medical issues, complicated facts, and multiple victims and witnesses.

The monitor envisioned elements of the vertical enforcement model to include:

- Early coordination of the efforts of attorneys, investigators, and other staff;
- Continuity of teamwork throughout the case;
- Mutual respect for the importance of the professional contributions of both attorneys and investigators and the value of having both available in all stages of the case; and
- Early designation of trial counsel, recognizing that the prosecutor who ultimately puts on the case must be assigned from the case's inception to help shape and guide it because any investigation may have a trial as its ultimate outcome.

The Enforcement Monitor described concerns affecting the existing inadequate attorney-investigator coordination and teamwork. "The performance of the MBC's investigative staff and HQE's prosecutors, and the nature of the working relationship between the HQE and MBC, have been studied closely in this project. MBC investigators and HQE prosecutors are hard-working and skilled professionals, and much good disciplinary work is done every day by these dedicated public servants. All parties acknowledge good faith and good efforts on all sides. However, there is clearly room for improvement in the cost, speed, and effectiveness of the administrative enforcement system as presently constituted, as indicated by the lengthy case cycle times and comparatively modest case outputs noted by the state Legislature and other critiques."<sup>4</sup>

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<sup>4</sup>Enforcement Monitor's *Initial Report*, page 129

Vertical Enforcement as Defined in SB 231

SB 231 contemplated that throughout much of the legislative process, MBC investigators would be transferred to the DOJ, thus creating a more streamlined and centralized enforcement system. Since HQE was already statutorily responsible for MBC cases, having the investigators under its jurisdiction seemed a logical choice. However, shortly before it was enacted, SB 231 was amended and this proposed transfer of MBC investigators was deleted from the bill. Instead, as amended, SB 231 created a pilot under which investigators continue to be employed and supervised by MBC while, at the same time, are responsible for conducting investigations under the direction of HQES deputy attorneys general. While the MBC investigative process is essentially unchanged under the VE model, the changes within HQES, both structurally and procedurally, have been more dramatic. For example, under the new VE model, HQES has been required to:

- Develop a database for all cases, not just those that were prosecuted
- Develop familiarity with all MBC policies pertaining to investigations
- Become responsible for all elements of the investigative process on cases resulting in closure or prosecution
- Provide case direction from the investigative stage through the prosecutorial stage
- Prioritize a new workload, which included investigative and prosecutorial tasks

**Implementation of this unique VE model mandated by SB 231 has proved challenging, with authority to direct investigators coming under HQES jurisdiction while, at the same time, authority for investigator supervision remaining with MBC. Both the MBC and HQE continue their efforts to meet and overcome these challenges, in a spirit of cooperation, to achieve the legislative goals of SB 231.**

#### Historical Review: MBC Investigations and Prosecutions

The Medical Board of California is a semi-autonomous occupational licensing agency located within the state Department of Consumer Affairs (DCA). It has been in existence since 1876 when the Legislature first passed the Medical Practice Act. From its inception, there existed a need for the MBC to protect healthcare consumers through the vigorous, objective enforcement of the Medical Practice Act. This remains the MBC's mission today. The MBC has two fundamental responsibilities: licensing applicants under the Division of Licensing (DOL) and the investigation of complaints against its licensees, under the Division of Medical Quality (DMQ). The Enforcement Program, housed under DMQ, has made many improvements over the years to maximize efficiency. This historical review will highlight major events which led to the current structure of the MBC's Enforcement Program with an emphasis on the evolving relationship between the MBC investigative staff and the HQES prosecutors.

#### MBC Investigations During the Early Years

From 1876 to 1913, the Board of Medical Examiners (later renamed MBC) spent most of its energies trying to establish itself as a legal entity with jurisdiction over the medical profession. Little was done to discipline the physician community during this time. The MBC's Enforcement Program was not created until 1913 and initially consisted of one chief counsel and two special agents.

In the decades of the 1920s and 1930s many MBC investigations focused on fraudulent diploma "mills" which issued medical credentials, diplomas and licenses for a cost. The Enforcement Program staff of four grew to a force of 10 individuals during this period. The state was divided in half with a Northern and a Southern Department. Little change occurred during the next two decades.



In the 1960s, the MBC Enforcement Program was responsible for investigating physician licensees as well as certain allied health licensees, as there was a similarity in the types of violations that were investigated. Common offenses involved improper use of prescription drugs, intemperance, illegal abortions and practicing medicine without a license.

Under Governor Ronald Reagan, a proposal was made and approved to centralize the investigative staff from all the licensing boards into one pool of investigators who were assigned to the newly created Division of Investigation under the renamed Department of Consumer Affairs (DCA). This included all the MBC investigators. The restructuring would allow better organization and training of investigators, and the number of field offices could be expanded to certain geographic parts of the state which were underserved. With this reorganization, the Governor appointed a new chief over the Division of Investigation.

During this time, investigator caseloads often ranged from 75 to 100 cases, with a mix of violations. Cases involving physician misconduct could be discussed with the one medical consultant, who was available to the investigators periodically. In addition there was difficulty in monitoring the progress of investigations. By 1975, the number of DCA licensees had exceeded one million and the number of investigators had increased to more than 100. MBC complaints became backlogged over time and the Board was concerned about inadequate public protection.

#### MICRA and AB 1xx - 1975

In 1975, AB 1xx (Keene, 2<sup>nd</sup> Ex Sess., c.1, Statutes of 1975), known as The Medical Injury Compensation Reform Act of 1975 (MICRA), was created to provide relief from high malpractice insurance and also included provisions for a massive reorganization of MBC. The Board's name was changed from the Board of Medical Examiners to the Board of Medical Quality Assurance. The new name was intended to better reflect the goal of assuring quality medicine to the citizens of California. Most important, it bolstered the Enforcement Program by increasing its staff by 54 additional technical, consultant, investigative and support staff.

In 1975, biennial physician licensing fees were increased to \$175. MBC had sufficient funds to hire investigators who would again specialize in medical investigations. By 1976, approximately half of the investigators from the Division of Investigation were transferred, with their existing caseloads, to MBC, thus forming a new investigative unit.

In 1977, the Chief of Enforcement position was created. Under the direction of a supervising investigator, investigators worked with medical consultants who were now staffed in all field offices. If the evidence revealed there might be a violation of law, the completed investigation was then transmitted, or "handed off," to a deputy attorney general (DAG) in the Department of Justice's Licensing Section. These deputies were located in four major metropolitan areas within the state. The DAGs were not specialized and received assignments involving all licensees under the DCA. MBC cases were commingled with the cases from the Division of Investigation and MBC investigations often received the same priority as cases involving licensed hair dressers, tax preparers and security guards.

The assigned DAGs reviewed the case file to determine if the evidence supported the filing of administrative action against a physician's license. Typically, the investigator and the prosecutor performed their roles separately. The workload volume was high, discussion of case evidence on individual cases was often limited and, in some cases, only occurred if the case went forward to hearing.

#### Reduced Board Investigator Staffing and Increased Workload

In July 1988, MBC had 700 complaints awaiting investigation. The Chief of Enforcement reported that since the creation of the Enforcement Program in 1977, all efforts to increase the staff had been denied by the Department of Finance, with the exception of two new investigator positions assigned to the probation surveillance program in 1979. He reminded the Board that three program audits, conducted by the Little Hoover Commission, the Department of Finance and Arthur Young International, had all recommended increasing the staffing of the enforcement program. Because no investigator position increases, annual complaints climbed from 4,265 in 1977 to 6,293 in 1988. In 1977, 2,539 investigations were opened and 2,089 were closed, while in 1988, 2,658 cases were opened with 2,561 closed.

The investigator staffing situation was further complicated in 1988, when the Governor authorized a “golden handshake” retirement option. A significant number of tenured investigators exercised this option to retire early with enhanced benefits and reduced the number of MBC investigators to 40. Faced with a significant number of vacant investigator positions, MBC made a focused effort to recruit, hire and train investigator replacements. The timing of this effort, however, was difficult, as all other state investigative agencies were also faced with vacant positions. Enforcement Program managers also recognized that some state agencies offered investigators caseloads of fewer than 10 cases while Board investigators averaged 30 cases. Other state agencies were able to offer investigators significantly higher pay and some Board investigators took these offers of employment. Recruitment efforts, coupled with background investigations, also impacted the time span when a selected applicant could begin employment. It was generally recognized that basic training for a new MBC investigator required close supervision for a minimum of one year before the new employee could undertake independent work. The combination of these factors led MBC to take a different approach to address the staffing problem.

In April 1989, when responding to the Legislature on the issue of creating a toll-free number for consumers, the Board took the opportunity to inform the Legislature of its staffing needs to safely protect the public. The Board submitted a report to the Joint Legislative Budget Committee entitled, “*Special Budget Report: Curing the Backlog*.” The report detailed complaint increases over a five-year period and pointed out during this same period how MBC had submitted budget requests for 30 additional positions to handle the case growth and resulting backlog. The report recommended 18 permanent new investigator and support staff positions to accommodate case growth, eight limited-term investigator positions, and two limited-term Complaint Analyst positions to eliminate the backlog.

At this same time, the Center for Public Interest Law (CPIL) released its report, *Physician Discipline in California: A Code Blue Emergency*. The report reviewed the MBC Enforcement Program and observed that while more complaints were received, fewer actions were filed and fewer physicians had been disciplined.

The CPIL report was critical of the existing structure whereby MBC had no control over the Licensing Section or the Office of Administrative Hearings, and expressed concern about the time necessary to complete some disciplinary actions. The report offered suggestions for change, including the creation of a unit of prosecutors within the Office of the Attorney General to specialize in medical disciplinary cases. All of these suggestions required legislation.

In May 1989, the Chief of Enforcement advised the Board of the need for additional investigators and detailed efforts by the Enforcement Program to increase MBC investigator's salaries, to be in parity with other comparable state investigative agencies. Based on this discussion, MBC agreed to increase its licensing renewal fees from \$175 (1976) to \$360 biennially. Later in the year, 18 permanent positions and 10 limited-term positions were added to the enforcement program and two new district offices were created in areas where most of the backlogged cases existed.

AB 184 (Speier) changed the Board's name to the Medical Board of California, effective January 1, 1990. At this same time, a toll-free phone line was installed to make it more accessible to consumers and a Centralized Complaint and Investigation Control Unit (later referred to as CCU) was created for more efficient processing of complaints. This new structure allowed for improved communication with consumers on the status of their complaints and eliminated the backlog of unprocessed complaints. The centralized handling of complaints eventually led to redistribution and even workload assignments to the various district offices and allowed for consistency in the types of complaints that were formally investigated.

#### Significance of SB 2375

In 1990, SB 2375 (Presley, c. 1597, Statutes of 1990), also known as the Medical Judicial Procedure Improvement Act, was passed. This bill changed MBC's disciplinary process. It added Government Code section 12529 *et seq.* creating the Health Quality Enforcement Section (HQUES) within the Department of Justice to specialize in prosecuting physicians and other health care practitioners. HQUES was required to be "staffed with a sufficient number of experienced and able employees capable of handling the most complex and varied type of disciplinary actions against the licensees of the division or board." (Bus. & Prof. Code Section 12529) HQUES was also required to assign attorneys "to work closely with each major intake and investigatory unit... to assist in the evaluation and

screening of complaints from receipt through disposition and to assist in developing uniform standards and procedures for the handling of complaints and investigations.” (Bus. & Prof. Code Section 12529.5)

Business and Professions (B&P) Code section 2319 was added, requiring MBC to establish a goal of an average of no more than six months to elapse from receipt of a complaint to the completion of an investigation. Cases involving “complex medical or fraud issues or complex business or financial arrangements” had a goal of not more than one year from receipt to completion. A significant part of SB 2375 was devoted to amending B&P section 2229, redirecting the Board’s primary priority from physician rehabilitation to public protection.

Recognizing the recruitment and retention difficulties of MBC, SB 2375 contained language stating, “It is also the intent of the Legislature that the pay scales for investigators of the Medical Board of California be equivalent to the pay scales for special investigative agents of the Department of Justice, in order to attract and retain experienced investigators.” On April 20, 1990, MBC members voted to support SB 2375 with a specified amendment, which stated in part, “Add statutory provisions to raise Medical Board of California investigator salaries to prevent loss of experienced investigators to higher-paying agencies.” The objective of the amendment was to “Get legislative intent recorded to say that the pay scales of the investigators of the Medical Board of California be increased to within 5% of the pay scales for the special agents of the Department of Justice in order to stem the loss of experienced investigators to higher paying state agencies, and to attract new investigators.” This amendment was not incorporated, but the intent language stayed in the bill.

### Efforts to Increase MBC Investigators' Salaries

Consistent with the intent language, in June 1990, the MBC took more action to increase investigators' salaries and provided detailed documentation to DCA outlining investigator vacancies and transfers. Analysis reflected that the duties and level of responsibility of the DCA, Special Investigator series were comparable to the DOJ Attorney General investigator, who conducted Medi-Cal fraud investigations. However, in January 1991, DCA proposed that the salary level for the new DCA investigator classification series be aligned to the Department of Corporations investigator series. Three months later, the State Personnel Board established a new series for Investigator, DCA with a salary consistent with the Department of Corporations Investigator series. This represented a 10% salary increase, although MBC investigator salaries were still not aligned with the DOJ Special Agent series.

### Response to SB 2375

In early 1991, all backlogged cases were assigned to MBC investigators. The MBC renewed its efforts to increase investigator staffing and received the support of both the Department of Finance and the State and Consumer Services Agency. Fourteen additional investigator positions and 10 support staff positions were requested. These positions were added to the new district offices and reduced caseloads from the 27-30 level, to the 20-23 level.

During this same year, the Office of the Attorney General implemented the provisions of Government Code section 12529 and created the specialized HQES to handle disciplinary actions against physicians. Initially, the 22 deputies assigned to HQES set a goal of filing accusations within 60 days of receipt of a referred case. However, HQES was initially understaffed and cases became backlogged in its office.

In April 1991, an Auditor General report was released that found that the MBC would be unable to complete investigations in a six-month period, noting that an average investigation took 14 months. This was attributed to an unusually high vacancy rate in MBC investigator positions and excessive caseloads. The report also found that HQES was taking approximately six months to file an accusation in a fully investigated case.

In the Fall of 1991, the MBC raised its licensing renewal fees to \$400 biennially, and agreed to consider another fee increase to finance additional HQES staff.

In 1992, HQES experienced significant delays in filing accusations (486 days). There appeared to be a miscalculation on the number of hours it would require a DAG to review a case, draft pleadings, litigate and follow up on a case. The discussion resulted in an agreement by MBC to fund 27 additional DAG positions and four paralegal positions. To fund these DAG positions as well as more time for administrative law judges, the Board increased its biennial licensing renewal fee to \$500.

#### SB 916

In 1993, SB 916 (Presley, c. 1267, Statutes of 1993) was passed and again revised the MBC's Enforcement Program. It included a number of provisions and authorized the MBC to increase its biennial licensing renewal fee from \$500 to \$600.

Investigator staffing problems were exacerbated in 1994 when DPA established a \$200 recruitment and retention pay differential for Los Angeles County for incumbents in the Special Investigator and Senior Special classifications for the Department of Motor Vehicles and Employment Development Department. In 1995, the Department of Health Services was added. This same year, DCA submitted a request to DPA for investigator recruitment and differential pay; however, it was denied in 1996.

In March 1995, the Auditor General report, required by SB 916, noted that HQES deputies were assigned caseloads of 30. A backlog of unfiled cases was growing and HQES had requested funding to hire additional attorneys.

During this time, the MBC's Chief of Enforcement reported a 23% increase in complaint volume the prior two years, with no corresponding increase in staff. Investigator caseloads were growing, and there was a 10% vacancy rate in investigator positions because trained MBC investigators were leaving for other

agencies with higher pay and lower workload of lesser complexity. The Chief of Enforcement urged a fee increase to finance investigator positions and attorney positions, but this was denied. In 1996, when the complaint volume further increased and the time for completed investigations increased, the Board voted to seek legislation to increase the biennial licensing renewal fees. At this time, the Board's new executive director sought other fiscal efficiencies in the program and avoided the need for increased fees.

#### Creation of the "DIDO" Program

In 1997, the "Deputy In the District Office" or "DIDO" program was implemented. HQES hoped the accusation filing time would drop from 134 days (in 1996) to 90 days as a result of the earlier involvement by an attorney in the investigative design and in the records procurement process. This program required a DAG to work in the MBC Central Complaint Unit and in the 12 offices one or more days a week to provide legal assistance and guidance throughout the "lifetime" of a complaint. Conceptually, the DAG would interact with board investigators, and give legal advice on a variety of matters. In CCU, the part-time DAG was primarily involved in the review of complaints and was asked to provide an opinion if a formal investigation was necessary. In the offices, the DAG assisted with active investigations (e.g., subpoena enforcement to help investigators obtain requested medical records; reviewing medical expert opinions to determine if the medical issues were sufficiently described; and reviewing all active cases before they were formally referred to HQES for prosecution) HQES met its goal of filing accusations in a more timely manner. However, the limited interaction allowed by the DIDO program was not always sufficient to match the time and complexity of the MBC investigations. The DAGs assigned to the DIDO Program also had other duties and responsibilities that sometimes prevented them from dedicating all their time to active MBC investigations. The DAGs were assigned active prosecution caseloads, which required them to review the case evidence, prepare legal correspondence, interact with defense counsel, prepare witnesses for testimony, draft subpoenas, prepare for settlement conferences and litigate cases. They were also required to present all cases through the appeals process before the Board, Superior Courts, Courts of



Appeal, and Supreme Court. While balancing their trial calendar, DAGs would also provide legal assistance and guidance to investigators on active cases. However, when cases were formally transmitted to HQES, often a different DAG, other than the DIDO was assigned to the case. Legal strategies sometimes differed, and investigators were sometimes given new direction on these referred cases. As with any "hand-off" method that involves the transfer of a case from one attorney to another, the DIDO model often resulted in a duplication of efforts and delays.

In the Fall of 1997, the MBC underwent "sunset" review by the Joint Legislative Sunset Review Committee. The average investigative time cycle to complete a case was 336 days and HQE averaged 134 days of elapsed time from receipt of a case to the filing of an accusation. The MBC investigator caseloads were still high.

In October 2001, Governor Davis imposed a hiring freeze. Although MBC is a special funded agency where salary savings would not assist the general fund deficit, MBC was required to cease the filling of any position which became vacant including investigator positions. During this year, MBC Enforcement Program reduced the investigative cycle time to 204 days, and an average of 112 days elapsed between HQES receipt of a case and the filing of an accusation.

In Fall 2002, as a result of the continuing budget freeze and budget control language, MBC lost 15.5 positions, which included eight enforcement positions. The hiring freeze continued through FY 2002-03 and FY 2003-04 and imposed an additional 12% budget reduction in personnel. MBC lost a total of 44.8 positions, including 29 enforcement positions, which included 19 investigators and supervisors. MBC's investigator positions were reduced from 90 in FY 2000-01 to 71 by June 30, 2004, a 25% loss. Due to these same freezes, HQES lost six prosecutor positions, assigned to the Los Angeles area.

#### Enforcement Monitor

In September 2002, SB 1950 (Figueroa, c. 1085, Statutes of 2002) was signed and made a number of changes to the MBC Enforcement Program. It created an "Enforcement Monitor," who was appointed by the DCA Director for a two-year period to study the effectiveness of the MBC Enforcement Program and extended the existence of the MBC until the monitor's findings and recommendations could be evaluated. SB 1950 authorized the MBC to increase its biennial fees from \$600 to \$610.

In 2003, several changes were implemented in CCU, utilizing "cease & desist" letters and other mechanisms, which resulted in the field receiving only the more time-intensive and complex investigations.

In August 2003, the Enforcement Monitor was appointed pursuant to SB 1950, and provided two reports to the Legislature. The Initial Report released November 1, 2004, described the existing investigative process and contained 55 recommendations for program improvement. MBC implemented many of these recommendations; however, certain changes could not be made without legislation.

#### SB 231

In April 2005, SB 231 (Figueroa, c. 674, Statutes of 2005) was introduced. It underwent a number of amendments until it was signed by the Governor on October 7, 2005. A critical part of the new law found and declared that "the Medical Board of California, by ensuring the quality and safety of medical care, performs one of the most critical functions of state government. Because of the critical importance of the board's public health and safety function, the complexity of cases involving alleged misconduct by physicians and surgeons, and the evidentiary burden in the board's disciplinary cases, the Legislature finds and declares that using a vertical prosecution model for those investigations is in the best interest of the people of California." When the Legislature closely studied this situation, they envisioned a need to improve the communication between the MBC investigators and DAGs with the goal of creating stronger investigations and quicker case resolution.

Throughout calendar year 2005, MBC and HQES managers discussed options for implementing VE. The initial language in SB 231 had contemplated the transfer of MBC investigators to HQE. Consideration was given to whether VE could be piloted in a designated geographic area, however this option posed several obstacles including investigator inequity, i.e., permitting a limited number of investigators to transfer to DOJ as special agents may be perceived as unfair by those investigators not permitted to transfer.

MBC researched what other VE models existed in state service. One of the few VE models was utilized by DOJ, Bureau of Medi-Cal Fraud (BMF). MBC recognized that the MBC structure was compatible with BMF and thus MBC could incorporate the BMF model. Major similarities exist between the MBC and BMF:

- BMF employs 106 sworn special agents, 31 deputy attorneys general (DAGs), 25 auditors and support staff *(MBC employs approximately 100 sworn investigators, and approximately 16 medical consultant positions. HQES is presently staffed with approximately 53 DAGs.)*
- BMF special agents and auditors are housed in 11 offices; prosecutors are located in four separate offices statewide *(MBC has 11 offices and prosecutors are located in four separate offices statewide).*
- The BMF VE triangle “team” consists of an agent, attorney and auditor and the triangle “spins” to focus attention on the lead person who is most responsible for the case at a given juncture. *(MBC’s triangle team could consist of an investigator, attorney and, as necessary, a medical consultant.)*
- BMF cases are assigned to an intake special agent and a DAG via a DOJ software program called ProLaw, where documents, photos, audit reports, etc. can be scanned. *(MBC cases could be assigned via the CAS system which could be adapted to exchange information with ProLaw.)*
- BMF special agents and DAGs use computer docking stations and access ProLaw from various offices. *(MBC could acquire the equipment to implement this system.)*

- BMF case discussions are ongoing among the team members, are usually in person, and often take place where the evidence is located. DOJ supervisors can participate in any of these meetings. As necessary, team members communicate via their cell phone or by ProLaw. *(MBC could implement this method of operation.)*
- BMF disputes regarding case resolution are resolved at the lowest level; however, the special agents can raise their concerns to the BMF Chief. The DAGs can raise their concerns to the BMF Chief DAG. Final dispute resolution rests with the Medi-Cal Fraud Director. *(MBC could implement this resolution process.)*

SB 231 did not contemplate how the transfer of MBC sworn staff to DOJ would occur, nor was the discrepancy in classification addressed. MBC's Chief of Enforcement met with DOJ labor-relations personnel and learned that DOJ only has one classification for its sworn staff: Special Agent.

In September 2005, the Board's Executive Director met with the Senior Assistant Attorney General for HQES to consider a design for the VE relationship. They envisioned the replacement of the DIDO program with a team of deputies being assigned to each MBC office. They recognized that a significant number of MBC cases result in closure without disciplinary action, and therefore, vertical enforcement of these cases would not be necessary. The HQES team leader was construed to be an "advice and consultation" deputy, who in conjunction with the supervising investigator, would be responsible for assessing every case for its potential for administrative action. If a case was thought to present potential for prosecution, it would be assigned to a deputy to whom prosecutorial responsibility was attached. The major concern regarding the implementation of this model was the lack of sufficient staffing within the Los Angeles Metropolitan area. The Senior Assistant Attorney General for HQES believed this model would be phased into various areas of the state as vacant DAG positions were filled.

On October 7, 2005, SB 231 was signed by the Governor. The final version of the law differed dramatically from what either MBC or HQE had envisioned. Throughout much of the legislative process, SB 231 contemplated MBC investigators would be transferred to the Department of Justice, thus creating a more streamlined and centralized enforcement system. However, shortly before it was enacted, SB 231 was amended and this proposed transfer of investigators was deleted from the bill. Instead, as amended, SB 231 created the VE model under which investigators continue to be employed and supervised by the MBC while, at

the same time, are responsible for conducting investigations under the direction of HQES deputy attorneys general. SB 231 created a two-year pilot and required this report on the VE model to be submitted to the Legislature by July 1, 2007.

At the November 4, 2005 DMQ meeting, the Chief of Enforcement reported that SB 231 had been signed and a two-year pilot would begin, effective January 1, 2006. This pilot was viewed as a “first step” in a process which would culminate when the investigators and prosecutors were in the same agency.

HQE created a Lead Prosecutor who would be assigned to each office to review all incoming cases and a Primary Deputy who would be assigned to cases where prosecution would go forward. Flexibility would be necessary when deputies were called into trial and to ensure urgent priorities were expeditiously handled. To ensure all members of the team understood their respective roles in the process, new joint operating protocols would be needed. The protocols would clearly define the roles and responsibility of each member while staying focused on the ultimate goal, which was the timely and efficient completion of investigations and, where violations were uncovered, prosecution of the case.

In December 2005, all HQES deputies and MBC investigators attended joint meetings to discuss the implementation of the pilot. The content of SB 231 was discussed, and all attendees were encouraged to be flexible to adapt to necessary changes as the pilot unfolded. New MBC policies, impacted by this new relationship, and which had been vetted by MBC and HQES, were distributed to all participants. HQES deputies were assigned to specific MBC offices and the new teams were introduced. Questions were raised regarding the handling of the pending caseload, which was created under the former DIDO model. There was general agreement that a phasing-in process would probably be necessary to resolve these cases.

## Implementation

On January 1, 2006, the Medical Board of California (MBC) and Health Quality Enforcement Section (HQUES) of the Department of Justice (DOJ) implemented the vertical prosecution model, as mandated by Gov. Code section 12529.6. (MBC refers to it as vertical enforcement (VE).) This model, a two-year pilot program, is a new concept never before implemented by another state agency. Implementation of this unique model, where members of the team are from two different governmental agencies with separate hiring authorities, communications systems, and chains-of-command, has presented significant challenges. To meet those challenges, MBC and HQUES have taken significant steps, both individually and jointly to successfully implement the program.

HQUES and MBC met throughout calendar years 2005 and 2006 to discuss issues, such as: how to handle the large volume of pending pre-VE cases, protocols the agencies would utilize, how communication by the VE teams would be undertaken, and how success of the pilot would be measured. Senior management from both agencies discussed the global issues impacting the pilot, while task forces were established to examine pre-VE policies, create new procedures and select reporting formats.

Both agencies agreed the VE pilot included three basic elements. First, each complaint of alleged misconduct by a physician and surgeon referred to an MBC office for investigation must be simultaneously and jointly assigned to an MBC investigator and HQUES deputy attorney general. Second, that joint assignment must exist for the duration of the case. Third, under the direction of a deputy attorney general, the assigned MBC investigator is responsible for obtaining the evidence required to permit the Attorney General to advise the MBC on legal matters such as whether a formal accusation should be filed, dismiss the complaint, or take other appropriate legal action. (Gov. Code section 12529.6.)

The MBC's Enforcement Operations Manual, a compilation of Enforcement Program policies and procedures, required modifications to comport with SB 231. After the revisions were made, they were carefully reviewed by both the MBC and HQUES to ensure consistency and agreement.

Because the Enforcement Monitor highlighted MBC's inability to meet the 180-day legislative goal for non-complex investigations and the one-year goal for complex investigations (Bus. & Prof. Code section 2319), efforts were undertaken to assess the MBC's policies. Consequently, new policies were developed to address delays encountered when seeking to obtain medical records and conducting physician interviews.

MBC staff also defined the criteria for a "complex" investigation.<sup>5</sup> After applying this criteria to the current caseload, 40% of the caseload met the definition of "complex."

SB 231 stated that investigations were under the "direction" of HQES, however, the statute did not define "direction" or provide guidance on how to implement the VE model. While initially unable to reach agreement on a joint manual, in January 2006, HQES published its "Vertical Prosecution Manual for Investigations Conducted by Medical Board Investigators (First Edition, January 2006)," and both HQES and MBC published their "Joint HQE/MBC Vertical Prosecution Protocol (First Edition, January 2006)." HQES and MBC renewed their efforts to develop a joint manual and, in November 2006 successfully and jointly published their "Vertical Prosecution Manual (Second Edition, November 2006)." (*Refer to Appendix.*)

HQES has also significantly revised many of its policies and procedures. For example, as part of its implementation of the VE model, HQES created the position of a "Lead Prosecutor" to be assigned to each of the MBC district offices. Lead Prosecutors are assigned, along with a second deputy attorney general, to each complaint referred to an MBC district office. At the outset, Lead Prosecutors determine whether a complaint warrants further investigation or should be closed. Since the majority of complaints referred to MBC district offices do not result in the filing of disciplinary charges, the Lead Prosecutor acts as the primary deputy attorney general for the duration of the investigation.

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5

Such complex cases include, for example, cases requiring subpoena enforcement, drug cases with pharmacy audits and undercover operations, fraud/ethical violations, cases presenting unique legal issues (licensing, accreditations, advertising and unfair business practice violations, off-label use of medications), cases involving the corporate unlicensed practice of medicine, unique patient legal status (dependent children/conserved adults, etc.), as well as unique medical issues (bariatrics, neurosurgery, infertility, prescription drug tampering), cases involving three or more patients, high-profile cases (celebrity - intermediaries), as well as multiple violations cases (e.g., sexual abuse and misconduct, drug violations, quality of care, and/or fraud).

Whenever a Lead Prosecutor determines, whether upon initial review of the complaint, or as the investigation progresses, it is likely that a violation of law may be found, the second deputy attorney general assumes primary responsibility for the case for all purposes.

The DOJ has also made significant modification to its ProLaw computer software used to track investigations and prosecutions. In an effort to overcome co-location barriers, HQES also installed upgraded computers in each MBC district office for use by the deputy attorneys general.

A new investigation report format was instituted at the beginning of the VE model to enable investigators to advise DAGs of case progress on an ongoing basis. Minimally, the investigator and the assigned DAG will confer at three stages of an investigation: 1) upon initial case assignment; 2) prior to the interview with the subject physician and 3) prior to the submission of case documents for an expert review.

Generally, new governmental programs are rarely implemented in a vacuum and the VE model was no exception to this rule. All new complaints received in MBC offices after January 1, 2006, have been investigated under the new VE model. However, as of December 31, 2005, there were 1,014 pending physician and surgeon cases under investigation. Thus, while HQES and MBC were in the process of implementing the VE model, they continued to handle this large volume of cases primarily under the "DIDO" model,<sup>6</sup> where, upon completion, the investigation was transmitted to HQES for prosecution. At the present time, the majority of these pre-VE cases have been resolved.

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Under the former Deputy-in-District-Office ("DIDO") program, which existed prior to the enactment of SB 231, a deputy attorney general was required to "frequently be available on location at each of the working offices at the major investigation centers of the Board, to provide consultation and related services and engage in case review with the Boards' investigative, medical advisory, and intake staff." (Former Gov. Code section 12529.5(b))



## APPENDIX A

### Government Code Section

**12529.** (a) There is in the Department of Justice the Health Quality Enforcement Section. The primary responsibility of the section is to investigate and prosecute proceedings against licensees and applicants within the jurisdiction of the Medical Board of California including all committees under the jurisdiction of the board or a division of the board, including the Board of Podiatric Medicine, and the Board of Psychology. (b) The Attorney General shall appoint a Senior Assistant Attorney General of the Health Quality Enforcement Section. The Senior Assistant Attorney General of the Health Quality Enforcement Section shall be an attorney in good standing licensed to practice in the State of California, experienced in prosecutorial or administrative disciplinary proceedings and competent in the management and supervision of attorneys performing those functions. (c) The Attorney General shall ensure that the Health Quality Enforcement Section is staffed with a sufficient number of experienced and able employees that are capable of handling the most complex and varied types of disciplinary actions against the licensees of the division or board. (d) Funding for the Health Quality Enforcement Section shall be budgeted in consultation with the Attorney General from the special funds financing the operations of the Medical Board of California, the California Board of Podiatric Medicine, and the committees under the jurisdiction of the Medical Board of California or a division of the board, and the Board of Psychology, with the intent that the expenses be proportionally shared as to services rendered. (e) This section shall become inoperative on July 1, 2008, and, as of January 1, 2009, is repealed, unless a later enacted statute, that becomes operative on or before January 1, 2009, deletes or extends the dates on which it becomes inoperative and is repealed. **12529.** (a) There is in the Department of Justice the Health Quality Enforcement Section. The primary responsibility of the section is to prosecute proceedings against licensees and applicants within the jurisdiction of the Medical Board of California including all committees under the jurisdiction of the board or a division of the board, including the Board of Podiatric Medicine, and the Board of Psychology, and to provide ongoing review of the investigative activities conducted in support of those prosecutions, as provided in subdivision (b) of Section **12529.5.** (b) The Attorney General shall appoint a Senior Assistant Attorney General of the Health Quality Enforcement Section. The Senior Assistant Attorney General of the

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Health Quality Enforcement Section shall be an attorney in good standing licensed to practice in the State of California, experienced in prosecutorial or administrative disciplinary proceedings and competent in the management and supervision of attorneys performing those functions. (c) The Attorney General shall ensure that the Health Quality Enforcement Section is staffed with a sufficient number of experienced and able employees that are capable of handling the most complex and varied types of disciplinary actions against the licensees of the division or board. (d) Funding for the Health Quality Enforcement Section shall be budgeted in consultation with the Attorney General from the special funds financing the operations of the Medical Board of California, the California Board of Podiatric Medicine, and the committees under the jurisdiction of the Medical Board of California or a division of the board, and the Board of Psychology, with the intent that the expenses be proportionally shared as to services rendered. (e) This section shall become operative July 1, 2008. **12529.5.** (a) All complaints or relevant information concerning licensees that are within the jurisdiction of the Medical Board of California or the Board of Psychology shall be made available to the Health Quality Enforcement Section. (b) The Senior Assistant Attorney General of the Health Quality Enforcement Section shall assign attorneys to work on location at the intake unit of the boards described in subdivision (d) of Section **12529** to assist in evaluating and screening complaints and to assist in developing uniform standards and procedures for processing complaints. (c) The Senior Assistant Attorney General or his or her deputy attorneys general shall assist the boards, division, or allied health committees, including the Board of Podiatric Medicine, in designing and providing initial and in-service training programs for staff of the division, boards, or allied health committees, including, but not limited to, information collection and investigation. (d) The determination to bring a disciplinary proceeding against a licensee of the division or the boards shall be made by the executive officer of the division, the board, or allied health committee, including the Board of Podiatric Medicine, or the Board of Psychology, as appropriate in consultation with the senior assistant. (e) This section shall become inoperative on July 1, 2008, and, as of January 1, 2009, is repealed, unless a later enacted statute, that becomes operative on or before January 1, 2009, deletes or extends the dates on which it becomes inoperative and is repealed. **12529.5.** (a) All complaints or relevant information concerning

licensees that are within the jurisdiction of the Medical Board of California or the Board of Psychology shall be made available to the Health Quality Enforcement Section. (b) The Senior Assistant Attorney General of the Health Quality Enforcement Section shall assign attorneys to assist the division and the boards in intake and investigations and to direct discipline-related prosecutions. Attorneys shall be assigned to work closely with each major intake and investigatory unit of the boards, to assist in the evaluation and screening of complaints from receipt through disposition and to assist in developing uniform standards and procedures for the handling of complaints and investigations. A deputy attorney general of the Health Quality Enforcement Section shall frequently be available on location at each of the working offices at the major investigation centers of the boards, to provide consultation and related services and engage in case review with the boards' investigative, medical advisory, and intake staff. The Senior Assistant Attorney General and deputy attorneys general working at his or her direction shall consult as appropriate with the investigators of the boards, medical advisors, and executive staff in the investigation and prosecution of disciplinary cases. (c) The Senior Assistant Attorney General or his or her deputy attorneys general shall assist the boards, division, or allied health committees, including the Board of Podiatric Medicine, in designing and providing initial and in-service training programs for staff of the division, boards, or allied health committees, including, but not limited to, information collection and investigation. (d) The determination to bring a disciplinary proceeding against a licensee of the division or the boards shall be made by the executive officer of the division, the board, or allied health committee, including the Board of Podiatric Medicine, or the Board of Psychology, as appropriate in consultation with the senior assistant. (e) This section shall become operative July 1, 2008. **12529.6.** (a) The Legislature finds and declares that the Medical Board of California, by ensuring the quality and safety of medical care, performs one of the most critical functions of state **government**. Because of the critical importance of the board's public health and safety function, the complexity of cases involving alleged misconduct by physicians and surgeons, and the evidentiary burden in the board's disciplinary cases, the Legislature finds and declares that using a vertical prosecution model for those investigations is in the best interests of the people of California. (b) Notwithstanding any other provision of law, as of January 1, 2006, each complaint that is referred to a district office of the board for investigation shall be simultaneously and jointly assigned to an investigator and to the deputy attorney

general in the Health Quality Enforcement Section responsible for prosecuting the case if the investigation results in the filing of an accusation. The joint assignment of the investigator and the deputy attorney general shall exist for the duration of the disciplinary matter. During the assignment, the investigator so assigned shall, under the direction of the deputy attorney general, be responsible for obtaining the evidence required to permit the Attorney General to advise the board on legal matters such as whether the board should file a formal accusation, dismiss the complaint for a lack of evidence required to meet the applicable burden of proof, or take other appropriate legal action. (c) The Medical Board of California, the Department of Consumer Affairs, and the Office of the Attorney General shall, if necessary, enter into an interagency agreement to implement this section. (d) This section does not affect the requirements of Section **12529.5** as applied to the Medical Board of California where complaints that have not been assigned to a field office for investigation are concerned. (e) This section shall become inoperative on July 1, 2008, and, as of January 1, 2009, is repealed, unless a later enacted statute, that is enacted before January 1, 2009, deletes or extends the dates on which it becomes inoperative and is repealed. **12529.7.** By July 1, 2007, the Medical Board of California, in consultation with the Department of Justice, the Department of Consumer Affairs, the Department of Finance, and the Department of Personnel Administration, shall report and make recommendations to the Governor and the Legislature on the vertical prosecution model created under Section **12529.6**.

## APPENDIX B

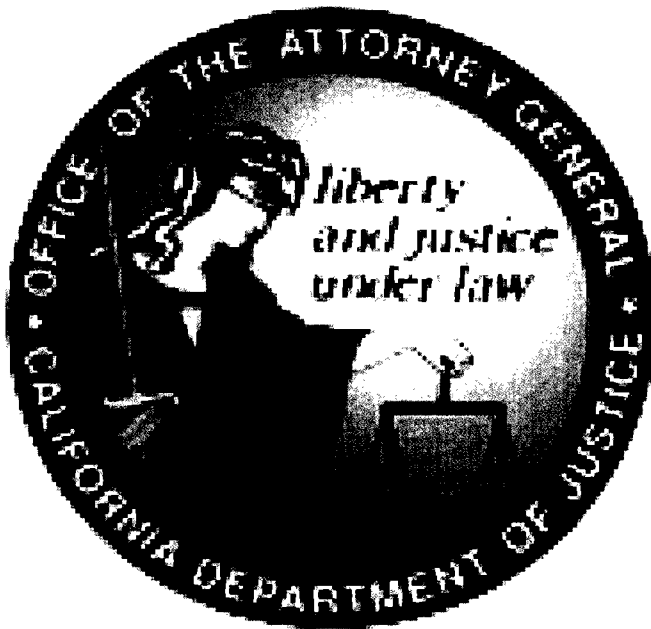
Vertical Prosecution Manual (Second Edition,  
November 2006)

# Vertical Prosecution Manual

(Second Edition, November 2006)

Health Quality Enforcement Section  
Office of the Attorney General  
of the State of California

Medical Board of California  
Department of Consumer Affairs



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## Table of Contents

<b>Preface</b>	<b>1</b>
<b>I. The Vertical Prosecution Team</b>	<b>2</b>
<b>II. Vertical Prosecution Under Senate Bill 231</b>	<b>3</b>
<b>III. Cooperation and Consultation in Direction and Supervision</b>	<b>4</b>
<b>IV. Direction of Investigation</b>	<b>4</b>
<b>V. Lead Prosecutor</b>	<b>5</b>
<b>VI. Receipt of Complaint and Assignment of Staff</b>	<b>6</b>
<b>VII. Investigation Plan and Progress Report</b>	<b>7</b>
<b>VIII. Documentation of Significant Communications</b>	<b>8</b>
<b>IX. Investigation Reports</b>	<b>8</b>
<b>X. Periodic Review of Ongoing Investigations</b>	<b>9</b>
<b>XI. Witness Interviews</b>	<b>9</b>
<b>XII. Pagination of Investigation Material Before Transmittal to Expert</b>	<b>9</b>
<b>XIII. Acceptance of Cases for Prosecution</b>	<b>10</b>
<b>XIV. Content of Investigation File</b>	<b>10</b>
<b>XV. Approval of Proposed Closure of Investigation</b>	<b>10</b>
<b>XVI. Submissions of Proposed Accusations for Filing</b>	<b>11</b>
<b>XVII. Filing of Requests to Set with the Office of Administrative Hearings</b>	<b>11</b>
<b>XVIII. Subpoena Review and Enforcement</b>	<b>11</b>
<b>XIX. Interim Orders of Suspension and Penal Code Section 23 Appearances</b>	<b>11</b>
<b>XX. Petitions for Competency, Physical and Mental Examinations</b>	<b>11</b>
<b>XXI. Administrative Hearings</b>	<b>12</b>
<b>XXII. Disagreements</b>	<b>12</b>
<b>XXIII. Statistical Measure of Efficiency of the Vertical Prosecution Model</b>	<b>12</b>
<b>XXIV. Implementation of the “Vertical Prosecution Model” with Existing Staff</b>	<b>13</b>
<b>XXV. Future Revisions to this Manual</b>	<b>13</b>

## **I. The Vertical Prosecution Team:**

Vertical prosecution is based on the team concept with each member working together with other members to achieve the common goal of greater public protection for the people of California. The development of a cohesive and positive team based on respect for the vital roles played by each team member is critical to the success of this pilot program. The following is a description of the duties, responsibilities and vital roles of each member of the vertical prosecution team.

- Investigators develop and update investigative plans, conduct fair, impartial and thorough investigations and participate in the administrative hearing process, all under the supervision of their Supervising Investigators I and II, Deputy Chiefs, and Chief of Enforcement, and direction of the assigned Primary Deputy Attorney General.
- District Medical Consultants provide medical input and assistance through review of medical records, participation in subject interviews, selection of expert reviewers and evaluation of expert opinions, all under the supervision of their Supervising Investigators I and II, Deputy Chiefs, and Chief of Enforcement, and direction of the assigned Primary Deputy Attorney General.
- Supervising Investigators I supervise a staff of assigned investigators, medical consultants, investigator assistants and clerical staff to ensure the forward progression of the caseloads for which they are responsible. Supervising Investigators I are responsible for ensuring that cases are investigated in a timely and efficient manner and in conjunction with directions from the Primary Deputy Attorney General and that investigator support continues through the prosecution of the case when disciplinary charges are filed. Supervising Investigators I also complete monthly reports, monitor case progress through quarterly case reviews and handle personnel matters as necessary.
- Supervising Investigators II supervise a staff of Supervising Investigators I assigned to a geographical area and oversee the general operation of that area. Supervising Investigators II develop and implement board policy, are the first-line resolution attempt at the citation and fine informal conference, sign subpoenas duces tecum, develop, coordinate and implement training, handle complex personnel matters and act as a liaison with other government entities.
- Deputy Chiefs directly manage a staff of Supervising Investigators II, as well as the overall enforcement operations program, including training, internal affairs, background investigations and probation.
- The Chief of Enforcement supervises the Deputy Chiefs and manages the overall enforcement program to facilitate its efficient operation.



- Primary Deputy Attorneys General work closely with other team members and, in conjunction with Supervising Investigators I, direct investigators in the obtaining of evidence. Primary Deputy Attorneys General provide legal advice to the client and prosecute the case when disciplinary charges are filed.
- Lead prosecutors are assigned to specific Board district offices, act as the principal liaison to that office, are jointly assigned with another deputy on each case, act as the Primary Deputy Attorney General when so assigned and, when not so assigned, continue to monitor the progress of the investigation and appropriateness of directions from the Primary Deputy Attorneys General.
- Supervising Deputy Attorneys General supervise and provide support for their Deputy Attorneys General, oversee and monitor investigations within their respective geographical areas, and supervise the prosecution of cases when disciplinary charges are filed.
- Senior Assistant Attorney General, HQE, in conjunction with the Executive Director of the Medical Board, oversees and bears responsibility for all investigations and prosecutions within the jurisdiction of the Board's Enforcement Program.

## **II. Vertical Prosecution Under Senate Bill 231:**

The three principle elements of the “vertical prosecution model” can be briefly summarized as follows:

1. Each physician and surgeon complaint referred to a district office of the board for investigation shall be simultaneously and jointly assigned to an investigator and to the deputy attorney general in the Health Quality Enforcement Section responsible for prosecuting the case if the investigation results in the filing of an accusation.
2. The joint assignment of the investigator and the deputy attorney general shall exist for the duration of the disciplinary matter.<sup>1</sup>
3. During the assignment, the investigator so assigned shall, under the direction of the deputy attorney general, be responsible for obtaining the evidence required to permit the Attorney General to advise the board on legal matters such as whether the board should file a formal accusation, dismiss the complaint for a lack of evidence required to meet the applicable burden of proof, or take other appropriate legal action. (Gov. Code, § 12529.6.)

While the Legislature has expressly limited the mandatory use of the “vertical prosecution model” to cases involving physicians and surgeons (Gov. Code, § 12529.6, subd. (a)), HQE and the Medical Board have determined that it shall be used in cases involving all licensees and applicants within the jurisdiction of the Board, except criminal cases.

### **III. Cooperation and Consultation in Direction and Supervision:**

The fundamental purpose underlying the vertical prosecution pilot program is to bring investigators and deputy attorneys general together from the beginning of an investigation in order to improve coordination and teamwork, increase efficiency, and reduce investigation completion delays, all with the overall goal of increasing public protection. At the same time, however, it is important to recognize that the authority and responsibility to supervise investigators remains vested in Supervising Investigators I and II who continue to play an essential and vital role in both the Medical Board's Enforcement Program, as well as the success of this pilot program.

It is vitally important that Supervising Investigators I and II and deputy attorneys general cooperate and consult with each other in order to provide consistent, clear instructions to investigators. By doing so, Supervising Investigators I and II and deputy attorneys general will not only help achieve the legislative goals underlying this vertical prosecution pilot program but, at the same time, help reduce instances where an investigator is unsure whom he/she works for or feels torn between two sets of inconsistent instructions.

In exercising the statutory authority of direction under Government Code section 12529.6, deputies should be careful not to do so in a manner that undermines the supervision authority of Supervising Investigators I and II. Likewise, Supervising Investigators I and II should be careful not to exercise their supervision authority in a manner that undermines the direction authority of deputy attorneys general. Cooperation and consultation are the keys to ensuring these expectations are met.

### **IV. Direction of Investigation:**

Teamwork is an essential component of the Legislature's new "Vertical Prosecution Model" which brings investigators and deputy attorneys general together from the very beginning of an investigation through closure or completion of the prosecution. The shared goal of both the Board and HQE in implementing the Legislature's new "Vertical Prosecution Model" is to improve the quality of both investigations and prosecutions of cases involving alleged misconduct by licensees.

Variations of vertical prosecution are employed by many law enforcement agencies. Such models generally rely on a team concept that typically involves the joint assignment of an investigator and prosecuting attorney, the latter with responsibility and authority to direct the investigator in the accumulation of evidence necessary to evaluate and, if violations of law are discovered, prosecute the case. The "Vertical Prosecution Model" enacted by the Legislature in Senate Bill 231 is such a model with the single notable exception that, here, the investigators are employed by the Board and the attorneys by the California Department of Justice. Prior to the enactment of Senate Bill 231, investigators worked at the direction of their Supervising Investigators I and II, Deputy Chiefs, and the Chief of Enforcement, when conducting an investigation. However, effective January 1, 2006, Senate Bill 231 requires that investigators work at the direction of their jointly assigned deputy attorney general. (Gov. Code, § 12529.6, subd. (b).)

“Direction,” as that term is used in section 12529.6, includes, but is not limited to, the authority and responsibility to direct the assigned investigator to complete investigative tasks, obtain required testimonial and documentary evidence, make periodic reports regarding the progress of the investigation, and complete additional tasks necessary to prepare and present the case for hearing.<sup>2</sup> Such authority and responsibility also includes setting investigative priorities in conjunction with the Supervising Investigator I, monitoring the progress of the investigation to ensure its completion in a timely and efficient manner, determining when an investigation should be closed as well as when an investigation is completed such that the case is appropriate for acceptance by HQE for prosecution.

Investigators continue to work under the supervision of the Supervising Investigator I of the District Office.<sup>3</sup> It is anticipated that Supervising Investigators I and II, Deputy Chiefs, and the Chief of Enforcement will assist in ensuring that investigators complete investigative assignments, as directed by the assigned deputy attorney general, in a timely and efficient manner.

While the passage of Senate Bill 231 represents a significant change with regard to who makes the ultimate determination regarding the manner, extent and duration of each investigation, as a practical matter, deputy attorneys general and Board investigators will continue to work as a strong team with each member contributing his or her own unique talents to the investigation and prosecution of physician disciplinary matters.

#### **V. Lead Prosecutor:**

As part of the implementation of Senate Bill 231, the new position of Lead Prosecutor has been created. One Lead Prosecutor shall be assigned to each of the Board’s District Offices.<sup>4</sup> The Lead Prosecutor shall be physically present at the assigned District Office to the extent that it is necessary to fully discharge his or her responsibilities, as described herein.

The Lead Prosecutor shall be assigned to, and shall review, each complaint referred to the District Office for investigation. In addition to the Lead Prosecutor, a second deputy attorney general shall be assigned by the Supervising Deputy Attorney General to each complaint as well. The Lead Prosecutor shall act as the primary deputy attorney general on the case for all purposes until and unless replaced by the second deputy attorney general, as described below.

An investigator shall be jointly assigned to the case by his or her Supervising Investigator, in consultation with the Lead Prosecutor. The investigator shall work with, and at the direction of, the Lead Prosecutor as the primary deputy attorney general on the case.

The Lead Prosecutor shall determine whether the complaint warrants further investigation or whether it should be closed without further investigation. If the Lead Prosecutor determines an investigation should be closed without further investigation, he or she should consult with the Supervising Investigator I. Disputes regarding whether a complaint merits further investigation should be handled in accordance with Section XXII, below.

If the Lead Prosecutor determines that the complaint warrants further investigation, he or she will so inform the assigned investigator who, in turn, shall prepare a plan of investigation. (See Section VII, below.) Except as noted below, the Lead Prosecutor shall review and approve, with or without modifications, the original plan of investigation submitted by the assigned investigator.

In some cases, the Lead Prosecutor will function as the primary deputy attorney general throughout the investigation and prosecution of the case. Whenever the Lead Prosecutor determines, either upon review of the original complaint or as the investigation progresses, that it is likely a violation of law may be found, the second deputy attorney general shall replace the Lead Prosecutor as the primary deputy attorney general on the case for all purposes. The Lead Prosecutor will promptly notify the assigned investigator and his or her Supervising Investigator I, in writing, of any such transfer of primary responsibility. Copies of this new assignment shall be sent to the Supervising Deputy Attorney General, Supervising Investigator II, Deputy Chiefs and Chief of Enforcement. Following transfer of responsibility, the Lead Prosecutor shall continue to monitor the progress of the investigation and appropriateness of directions from the primary deputy attorney general.

It is anticipated that the second deputy attorney general shall immediately become the primary deputy attorney general in all cases involving allegations of sexual abuse or misconduct, mental or physical illness affecting competency to practice medicine, and complex criminal conviction cases.

## **VI. Receipt of Complaint and Assignment of Staff:**

Upon receipt of a complaint from the Central Complaint Unit, the Supervising Investigator I will review and assign the complaint. The supervisor will enter the assigned investigator name into the CAS system. The Supervising Investigator I will notify the Lead Prosecutor of the assignment and provide the Lead Prosecutor with a hard or electronic copy of the complaint.

The Lead Prosecutor will enter the case into ProLaw and assign him or herself as the primary deputy attorney general, except for complaints involving sexual abuse or misconduct, mental or physical illness affecting competency to practice medicine, and complex criminal conviction cases. The Lead Prosecutor will insert in the Prolaw "Notes" tab (second tab in the Matters module), under the SYNOPSIS, the following additional information regarding the case: (a) the name of the investigator assigned to the case; (2) whether the case is appropriate for an ISO or other pre-accusation relief; and (3) any other information the Lead Prosecutor determines is significant. The Lead Prosecutor will then send an e-mail which includes all of the information in the Notes Tab to the Supervising Deputy Attorney General and Supervising Investigator I.

The Supervising Deputy Attorney General will assign a second deputy attorney general to the case. Even though a second deputy is assigned, the Lead Prosecutor will remain as the "primary" on the case, i.e., the deputy responsible at any given time for the direction of the investigation. However, when it appears likely that the investigation will result in the filing of an accusation, a petition for pre-accusation relief or a civil action, or when the investigation

involves allegations of sexual abuse or misconduct, mental or physical illness affecting competency to practice medicine or criminal conviction cases in a complex matter, the second deputy will be made the "primary." While the Lead Prosecutor will remain assigned to the case and will continue to monitor the case, only the primary deputy attorney general will direct the investigation.

The Supervising Deputy Attorney General will send an e-mail to the Lead Prosecutor, second DAG, and Supervising Investigator I notifying them that the case has been assigned and identifying who shall be the primary deputy on the case. If and when the primary deputy changes from the Lead Prosecutor to the second deputy, the Supervising Deputy Attorney General will send an e-mail to the investigator notifying him or her of the change and copy the Lead Prosecutor and the Supervising Investigator I.

The Supervising Deputy Attorney General will send an e-mail to his or her secretary with instructions to open the physical investigative file and to deliver that file to the primary deputy on the case. The secretary will deliver the physical investigative file to the primary deputy.

The Supervising Investigator I will enter the primary deputy attorney general assignment into the CAS Supervisor Notebook.

## **VII. Investigation Plan and Progress Report:**

Each investigation shall begin with the development and approval of a plan of investigation. The plan shall be updated as significant events occur, as tasks are completed, and as the plan is changed. While it is expected that the primary deputy attorney general and investigator will regularly discuss all aspects of the case, all updates and changes to the plan are to be documented as provided below.

Within five (5) business days of an initial assignment of an investigation, the assigned investigator shall prepare, and submit to the primary deputy attorney general for review and approval, a proposed plan of investigation.<sup>5</sup>

In preparing the initial IPPR, the assigned investigator, should discuss the proposed investigative plan with his/her Supervising Investigator I, as necessary. The initial IPPR should contain the steps the investigator believes are most appropriate for the timely and efficient investigation of the case. Upon completion, the initial IPPR should be submitted by the assigned investigator to the primary deputy attorney general electronically as an e-mail attachment, with a copy sent to the Lead Prosecutor and Supervising Investigator I.

Within five (5) business days of receipt of the initial IPPR, the primary deputy attorney general shall review and approve the plan, with or without required changes or modifications, by way of a reply e-mail sent to the assigned investigator and copied to the Supervising Investigator I, Lead Prosecutor (if not the primary) and Supervising Deputy Attorney General. The primary deputy attorney general shall insure that a copy of the initial approved IPPR is placed in the Attorney General's ProLaw program.

The investigation is to be conducted pursuant to the IPPR. The assigned investigator and primary deputy attorney general should discuss proposed changes or modifications to the initial IPPR, as necessary and, if approved by the primary deputy attorney general, such changes or modifications should be confirmed in writing by e-mail.

The assigned investigator and primary deputy attorney general shall maintain a running e-mail thread, replying and communicating to each other by adding information to the e-mail thread as the investigation progresses which will then serve as ongoing documentation of the progress of the investigation. The primary deputy attorney general is charged with the responsibility of maintaining a copy of that running e-mail thread in the Attorney General's ProLaw program.<sup>6</sup>

As the investigation progresses, significant events occur and investigative tasks are completed, the assigned investigator shall keep the primary deputy attorney general informed by way of the running e-mail thread.

The assigned investigator shall inform the primary deputy attorney general in writing, by way of the running e-mail thread, of the dates of significant witness interviews, including the initial physician interview. The primary deputy attorney general shall notify the investigator if he or she will be participating in an interview. If so, the primary deputy attorney general, assigned investigator and District Medical Consultant (if he or she will be present for interview) should discuss the topics each will cover during the interview.

Finally, primary deputy attorneys general and investigators are reminded of the importance of sending copies of the initial IPPR and subsequent IPPR e-mails to both the Lead Prosecutor and Supervising Investigator I. This is essential since they are charged with insuring the overall efficient operation and timely completion of the investigation.

#### **VIII. Documentation of Significant Communications:**

All significant communications between the primary deputy attorney general and assigned investigator shall be reduced to writing by the originator of the communication. In addition to the initial IPPR and subsequent IPPR e-mails, it is recommended that these communications be documented by e-mail. Copies of all such e-mails shall be maintained by the primary deputy attorney general in the investigation case file. Documenting such significant communications will help avoid misunderstandings and allow Lead Prosecutors, Supervising Investigators and Supervising Deputy Attorneys General to monitor the progress of investigations.

#### **IX. Investigation Reports:**

Investigation reports are to be kept current. The investigator should keep the report of investigation current and record all events as soon as possible, and preferably no more than five (5) business days following the event.

**X. Periodic Review of Ongoing Investigations:**

The primary deputy attorney general and assigned investigator, and the Supervising Investigator I as necessary, should participate in the periodic review of ongoing investigations. While it is preferable that such reviews take place in person, participation electronically is permitted where necessary.

A case review, including the District Medical Consultant whenever possible, shall take place prior to referral of the matter to an expert. This review should, whenever possible, be conducted in person and include a review by the primary deputy attorney general of the investigation report and attachments. The primary attorney shall also insure the chosen expert is an appropriate expert to review the case, taking into consideration the expert's board certification and area of current active practice. Documents provided to the expert shall comply with the relevant provisions of the Board's Enforcement Operations Manual. Prior to submitting a case to an expert reviewer, the investigator should reference the Standards for Case Submission to Expert Reviewer (EOM section 7.4).

The assigned investigator should promptly provide a copy of the initial expert report to the primary deputy attorney general and District Medical Consultant. The primary deputy attorney general, District Medical Consultant and assigned investigator should determine whether all relevant matters have been reviewed and addressed by the expert, whether clarification of the expert's initial opinions and conclusions is needed, and whether additional further investigation (e.g., a second physician's interview) is required. After receipt of the initial expert report, the primary deputy attorney general is also strongly encouraged to consult with the District Medical Consultant to make this determination. If additional further investigation is required, the primary deputy attorney general shall inform the assigned investigator in writing, preferably by e-mail, with copies of that e-mail being sent to the investigator's Supervising Investigator I, Lead Prosecutor and Supervising Deputy Attorney General.

**XI. Witness Interviews:**

Throughout the course of the investigation, the primary deputy attorney general may elect to participate in witness interviews including the physician's interview. The primary deputy attorney general shall advise the assigned investigator if he or she will be participating in any witness interview. In such cases, prior to the commencement of the interview, the primary deputy attorney general should discuss the topics each will cover during the interview. If the District Medical Consultant will be present for the interview, he or she should be included in the pre-interview discussion as well.

**XII. Pagination of the Investigation Material Before Transmittal to Expert:**

Prior to transmittal of the investigation material to an expert for review, the assigned investigator, or his or her designee, shall paginate the investigation material. Page numbers shall be affixed to the investigation material in such a fashion as not to obscure any of the written information contained thereon. When referring to particular documents in the investigation material, the expert reviewer shall refer to specific page numbers in his or her expert report.

As of the date of the publication of this Second Edition of Vertical Prosecution Manual, the Medical Board does not presently have sufficient investigation support staff to paginate the investigation material as provided in this section. It is anticipated that, once sufficient investigation support staff have been retained by the Medical Board, the pagination of investigation material described in this section will be done prior to transmittal to an expert for review.

### **XIII. Acceptance of Cases for Prosecution:**

Within five (5) business days of submission of the completed investigation, the primary deputy attorney general shall determine whether the case will be closed or accepted. If accepted for prosecution, the primary deputy attorney general shall communicate his or her acceptance of the case in writing by way of running e-mail thread which shall be sent to the assigned investigator, the Supervising Investigator I, the Lead Prosecutor and the Supervising Deputy Attorney General. The acceptance of the case by the primary deputy attorney general does not preclude the possibility that further investigation may be required.

### **XIV. Content of Investigation File:**

Upon acceptance of the case by the primary deputy attorney general, the assigned investigator should deliver a copy of the entire investigation file, along with a memorandum documenting acceptance, to the Lead Prosecutor for delivery to the appropriate Supervising Deputy Attorney General. The entire investigation file shall consist of all documents related to the case, regardless of relevancy and regardless of the place where they are maintained (e.g., master file, investigator's copy of the file, or any other file, formal or not) beginning with and including the original complaint and related documents initially received by the District Office from the Board's Central Complaint Unit.

### **XV. Approval of Proposed Closure of Investigation:**

In cases in which the report of investigation recommends closure, the primary deputy attorney general shall, within ten (10) business days, review the proposed closure and indicate either approval or disapproval. Any failure to comply with this time limitation shall be brought to the attention of the Supervising Deputy Attorney General.

If, at any stage in the investigation, the primary deputy attorney general concludes the investigation should be closed, he or she shall submit a proposal to close the investigation to the Lead Prosecutor by e-mail, with a copy of that e-mail being simultaneously sent to the assigned investigator, the Supervising Investigator I, and Supervising Deputy Attorney General. Within ten (10) business days, the Lead Prosecutor shall review the proposed closure and indicate in writing either approval or disapproval of the proposal. Any failure to comply with this time limitation shall be brought to the attention of the Supervising Deputy Attorney General. If approved, the Lead Prosecutor shall send notification of the case closure to the primary deputy attorney general, assigned investigator, and Supervising Investigator I. If disapproved, the Lead Prosecutor shall indicate in writing any additional investigative tasks that shall be completed.



If the Lead Prosecutor is the primary deputy attorney general at the time of the proposed closure, he or she shall close the case and notify, by e-mail, the assigned investigator, Supervising Investigator I, and Supervising Deputy Attorney General, of the closure. Disagreements regarding proposed closures of investigations shall be resolved as described in Section XXII, below.

**XVI. Submission of Proposed Accusations for Filing:**

The primary deputy attorney general should submit a proposed Accusation for filing to the Executive Director of the Board within thirty (30) calendar days of acceptance of the case for prosecution.

**XVII. Filing of Requests to Set with the Office of Administrative Hearings:**

Within fifteen (15) calendar days of receipt of the Notice of Defense, the primary deputy attorney general shall submit a request to set to the Office of Administrative Hearings.

**XVIII. Subpoena Review and Enforcement:**

Prior to issuance, all subpoenas requesting document production shall be supported by declarations which demonstrate that the particular records sought are relevant and material to the investigation. The declaration should be factually sufficient to permit a reviewing court to independently make a finding of good cause to order the documents disclosed. Within ten (10) business days after the determination that a subpoena will be necessary to compel document production, the assigned investigator shall submit the subpoena and supporting declaration for review and approval by the primary deputy attorney general. Preparation of the subpoena and supporting declaration shall be the responsibility of the assigned investigator. Subpoena enforcement actions shall be the responsibility of the primary deputy attorney general and shall be filed in the appropriate court within thirty (30) business days of acceptance of the subpoena enforcement request.

**XIX. Interim Orders of Suspension and Penal Code Section 23 Appearances:**

The Lead Prosecutor shall identify those cases in which an Interim Order of Suspension (“ISO”) or Penal Code section 23 (“PC 23”) appearance is necessary and shall so notify the Supervising Deputy Attorney General. In such cases, the Supervising Deputy Attorney General shall designate the second deputy attorney general as the primary deputy attorney general who shall be responsible for obtaining any necessary ISO or making any necessary PC 23 appearance. The Supervising Deputy Attorney General shall notify the assigned investigator, Lead Prosecutor, and Supervising Investigator I of such designations.

**XX. Petitions for Competency, Physical and Mental Examinations:**

The primary deputy attorney general shall be responsible for preparing and filing petitions for competency, physical and mental examinations.

## **XXI. Administrative Hearings:**

After the filing of an Accusation, there are often additional investigative tasks that must be completed in order to prepare a case for an upcoming administrative hearing. When additional investigation is required post-accusation to prepare for, or present the case at, the administrative hearing, the primary DAG will notify the assigned investigator of the required additional investigation by e-mail, with a copy to the Supervising Investigator I, Lead Prosecutor (if not the primary) and Supervising Deputy Attorney General.

The assigned investigator is expected to attend the administrative hearing unless the primary deputy attorney general, in consultation with the Supervising Investigator I and Supervising Deputy Attorney General, releases the investigator. While such attendance necessarily takes time away from the investigator's other cases, the investigator's attendance and participation at the administrative hearing will ultimately benefit the prosecution of the case and the investigations and prosecutions of future cases.

## **XXII. Disagreements:**

Occasionally, a disagreement may arise between an assigned investigator and primary deputy attorney general regarding an investigation. Whenever this occurs, the assigned investigator should first discuss his or her concerns directly with the primary deputy attorney general in an effort to resolve the disagreement. If the disagreement remains unresolved, the assigned investigator and primary deputy attorney general should discuss the matter with the Lead Prosecutor, Supervising Investigator I and/or Supervising Investigator II. If the disagreement remains unresolved, the matter shall be submitted to the Supervising Deputy Attorney General who, after consultation with the Chief of Enforcement, shall issue a determination.

It is the expectation of both the Senior Assistant Attorney General and the Executive Director of the Medical Board that, in the vast majority of cases, the determination of the Supervising Deputy Attorney General will resolve the disagreement. If, however, the disagreement remains unresolved, it shall be submitted to the Senior Assistant Attorney General who, after consultation with the Chief of Enforcement and the Executive Director of the Medical Board, shall issue a final determination.

## **XXIII. Statistical Measure of Efficiency of the Vertical Prosecution Model:**

In addition to any other statistical measure that may be later identified, one statistical measure that shall be used to assess the efficiency of the vertical prosecution model, as described in Senate Bill 231, shall be the length of time from receipt by the Board's District Office of the original complaint from the Board's Central Complaint Unit to the date that the investigation is closed or a Request to Set is submitted to the Office of Administrative Hearings. Both Board investigators and HQE deputy attorneys general are jointly responsible for this statistical measure of efficiency. In its early stages, it is anticipated that use of the "vertical prosecution model" may extend the time it takes to complete some investigations.

#### **XXIV. Implementation of the “Vertical Prosecution Model” with Existing Staff:**

It is important to recognize that both the Board and HQE are presently in the process of recruiting, hiring and training additional personnel to fully implement the Vertical Prosecution Model contained in Senate Bill 231. This is a continuing process and, as the Board and HQE become fully staffed, there will be a far greater likelihood that the legislative goals of efficiency and enhanced public protection which underlie Senate Bill 231 will be achieved.

#### **XXV. Future Revisions to this Manual:**

It is anticipated that this “Vertical Prosecution Manual (Second Edition, November 2006)” will undergo future revisions and refinements as HQE and the Board continue on their joint mission to protect the public health, safety and welfare.

#### **Endnotes:**

1. Case reassignments, which are a routine occurrence in any law enforcement agency, including HQE, are necessitated for any number of reasons. For example, a case may be reassigned as a result of the illness or death of a deputy, the transfer of a deputy to another section or his/her termination of employment with the Attorney General’s Office, the hiring of a new HQE deputy, a maternity leave, conflict of interest, and also for purposes of managing the case load of both individual deputies and the HQE section statewide. Likewise, an investigation may be reassigned from one investigator to another for similar reasons as well. While the presumption is that an original joint assignment will be maintained throughout the duration of a disciplinary matter, appropriate case reassignments will be made when necessary to insure the efficient, thorough and timely investigation and prosecution of cases.

2. The word “direction” has been defined as “[t]he act of governing; management; superintendence” (Black’s Law Dictionary, 4th ed. (1968) at p. 547, col. 1) and “[t]hat which is imposed by directing; a guiding or authoritative instruction; order; command” (*Id.*). The word “superintend” means “[t]o have charge and direction of; to direct the course and oversee the details; to regulate with authority; to manage; to oversee with the power of direction; to take care of with authority.” (*Id.*, at p. 1606, col. 1; cf. Gov. Code, § 12529.5, subd. (b) [“The Senior Assistant Attorney General and deputy attorneys general working at his or her direction . . .”].)

3. The word “supervise” has been defined as “[t]o have general oversight over, to superintend or to inspect.” (Black’s Law Dictionary, 4th ed. (1968) at p. 1607, col. 1.) The word “superintend” means “[t]o have charge and direction of; to direct the course and oversee the details; to regulate with authority; to manage; to oversee with the power of direction; to take care of with authority.” (*Id.*, at p. 1606, col. 1.)

4. Until such time as HQE is fully staffed with a sufficient number of attorneys, it may be necessary for a Lead Prosecutor to be assigned to more than one of the Board’s district offices.

5. In the vast majority of cases, the primary deputy attorney general shall be the Lead Prosecutor assigned to the District Office where the assigned investigator works.

6. This can be accomplished either by dropping and dragging updated copies of the entire e-mail thread into the ProLaw matter or by cutting and pasting the entirety of the e-mail thread text into the Case Diary in the matter.