

PROPOSED CONCEPTUAL DRAFT
REGARDING 'UNDER INVESTIGATION' DIVERSION PARTICIPANTS

1. Section 2350 of the Business and Professions Code is amended to read:

2350. (a) The division shall establish criteria for the acceptance, denial, or termination of physicians and surgeons in a diversion program. Only those physicians and surgeons who have voluntarily requested diversion treatment and supervision by a committee shall participate in a program.

(b) A physician and surgeon under current investigation by the division may request entry into the diversion program by contacting the Chief or Deputy Chief of Enforcement of the Medical Board of California. The Chief or Deputy Chief of Enforcement of the Medical Board of California shall refer the physician and surgeon who requests participation in the diversion program to a committee for evaluation of eligibility, even if the physician and surgeon is currently under investigation by the division, as long as the investigation is based primarily on mental illness or on the self-administration of drugs or alcohol under Section 2239, or the illegal possession, prescription, or nonviolent procurement of drugs for self-administration, and does not involve actual harm to the public or his or her patients. Prior to referring a physician and surgeon to the diversion program, the division may require any physician and surgeon who requests participation under those circumstances, or if there are other violations, to execute a statement of understanding in which the physician and surgeon agrees that violations of this chapter or other statutes that would otherwise be the basis for discipline may nevertheless be prosecuted should the physician and surgeon be terminated from the program for failure to comply with program requirements.

(1) Any statement of understanding executed pursuant to this subdivision may contain a provision that upon a physician and surgeon refusing to provide biological fluid samples for testing or providing a sample, after testing, which indicates that the physician and surgeon has taken, consumed or otherwise used an unauthorized or unapproved drug or alcohol, the division may immediately suspend his or her certificate pending a hearing held pursuant to section 2350.5. Prior to issuing an order of suspension, the division and the diversion manager shall consult with the physician and surgeon's diversion evaluation committee.

(c) Neither acceptance into nor participation in the diversion program shall preclude the division from investigating or continuing to investigate any physician and surgeon for any unprofessional conduct committed before, during, or after participation in the diversion program.

(d) Neither acceptance into nor participation in the diversion

program shall preclude the division from taking disciplinary action or continuing to take disciplinary action against any physician and surgeon for any unprofessional conduct committed before, during, or after participation in the diversion program, except for conduct that resulted in the physician and surgeon's referral to the diversion program.

(e) Any physician and surgeon terminated from the diversion program for failure to comply with program requirements is subject to disciplinary action by the division for acts committed before, during, and after participation in the diversion program. The division shall not be precluded from taking disciplinary action for violations identified in the statement of understanding described in subdivision (b) if a physician and surgeon is terminated from the diversion program for failure to comply with program requirements. The termination of a physician and surgeon who has been referred to the diversion program pursuant to subdivision (b) shall be reported by the program manager to the division.

(f) Nothing in this section shall preclude a physician and surgeon who is not the subject of a current investigation from self-referring to the diversion program on a confidential basis. Subdivision (b) shall not apply to a physician and surgeon who applies for the diversion program in accordance with this subdivision.

(g) Any physician and surgeon who successfully completes the diversion program shall not be subject to any disciplinary actions by the board for any alleged violation that resulted in referral to the diversion program.

(1) Successful completion shall be determined by the program manager and shall include, at a minimum, three years during which the physician and surgeon has remained free from the use of drugs or alcohol and adopted a lifestyle to maintain a state of sobriety.

(2) Notwithstanding paragraph (1), with respect to mental illness, successful completion shall be determined by the program manager and shall instead include, at a minimum, three years of mental health stability and treatment compliance and adoption of a lifestyle designed to maintain a state of mental health stability.

(h) The division shall establish criteria for the selection of evaluating physicians and surgeons or psychologists who shall examine physicians and surgeons requesting diversion under a program. Any reports made under this article by the evaluating physician and surgeon or psychologist shall constitute an exception to Section 2263 and to Sections 994, 995, 1014, and 1015 of the Evidence Code.

(i) The division shall require biannual reports from each committee which shall include, but not be limited to, information concerning the number of cases accepted, denied, or terminated with compliance or noncompliance, and a cost analysis of the program. The

Bureau of Medical Statistics may assist the committees in the preparation of the reports.

(j) Each physician and surgeon shall sign an agreement that diversion records may be used in disciplinary or criminal proceedings if the physician and surgeon is terminated from the diversion program and one of the following conditions exists:

(1) His or her participation in the diversion program is a condition of probation.

(2) He or she has a disciplinary action pending or was under investigation at the time of entering the diversion program.

(3) A diversion evaluation committee determines that he or she presents a threat to the public health or safety.

This agreement shall also authorize the diversion program to exchange information about the physician and surgeon's recovery with a hospital well-being committee or monitor and with the board's licensing program, if appropriate, and to acknowledge, with the physician and surgeon's approval, that he or she is participating in the diversion program. Nothing in this section shall be construed to allow release of alcohol or drug treatment records in violation of federal or state law.

In addition, this agreement shall authorize the diversion program, upon recommendation by a diversion evaluation committee, to order the physician and surgeon to be examined by one or more physicians and surgeons designated by the diversion program to determine clinical competency. The failure of the physician and surgeon to comply with this order shall constitute grounds for suspension or revocation of his or her certificate. The board shall develop regulations that provide guidelines for determining when this examination should be ordered.

2. Section 2350.5 is added to the Business and Professions Code is added to read:

(a) Any physician and surgeon, who has received a written order of suspension of his or her certificate pursuant to subdivision (b) of section 2350, may request a hearing on the matter. The request for a hearing shall be made within ten (10) days of the suspension order or the right to hearing shall be deemed waived. The rights afforded to the physician and surgeon at the hearing shall include:

(1) To be represented by counsel.

(2) To present written evidence.

(3) To present oral argument.

(4) To have a record made of the proceedings, copies of which may be obtained by the licensee upon payment of any reasonable charges associated with the record.

(b) The only issues at the hearing on the suspension of the certificate shall be the following:

(1) In the case of a refusing to provide a biological fluid sample, whether good cause existed for the refusal.

(2) In the case of a test result which indicates the use, consumption or taking of an unauthorized drug or alcohol, whether:

(A) The use, consumption, or taking of the drug or alcohol was authorized or approved by the program or the physician and surgeon's diversion agreement or statement of understanding.

(B) The collection and testing of the fluid sample were performed in accordance with established procedures and the results of the test were reported accurately to the program.

(c) A request for an administrative hearing does not stay the suspension of the physician and surgeon's certificate. If a hearing is not held within twenty (20) days of the request, the physician and surgeon's certificate shall be restored.

(d) Where the order of suspension is upheld, a written decision shall be prepared within 15 days of the hearing, by the administrative law judge, including findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached. If the order of suspension is not upheld, the physician and surgeon's certificate shall be restored.

(e) Any order of suspension issued pursuant to subdivision (b) of section 2350 shall be subject to judicial review pursuant to Section 1094.5 of the Code of Civil Procedure.