

Medical Board of California**Agenda Item 5**

July 16, 2007

TO: Members
Division of Medical Quality

FROM: Kimberly Kirchmeyer, Deputy Director



SUBJECT: Oral Argument Process

In the Enforcement Monitor's Report, Julie D'Angelo Fellmeth, the Board's Enforcement Monitor, recommended that the Medical Board of California (MBC) should discuss the value of the Division of Medical Quality's (DMQ) review of Administrative Law Judge's (ALJ) decisions. One aspect of this recommendation was that the oral argument process was flawed. The overall message was that the DMQ should eliminate or reform the oral argument process. Some issues of concern, from her perspective were that the arguments are not confined to the evidence in the record and the ALJ is not the same judge present at the original hearing so he/she cannot ensure new evidence is not entered into the record; the respondent is given the opportunity to address the panel, though not under oath; the DMQ panel is not present at the hearing and are not judges, but they are allowed to "second guess" the findings of a qualified judge; and the client (DMQ) hears argument from its own counsel (Deputy Attorney General).

Based upon this recommendation, the issue of the DMQ's review of decisions was part of the discussions regarding the MBC restructuring. Although consensus was reached on changing the review process of decisions (i.e. default decisions and stipulations for surrender of license will not be forwarded to the DMQ panels for review), there was not a decision reached on how to restructure the oral argument process. Therefore, a two-member committee, Cesar Aristeiguieta, M.D. and Frank Zerunyan, J.D., was appointed to review and discuss this issue and develop a recommendation.

Dr. Aristeiguieta and Mr. Zerunyan met to discuss recommendations developed by staff. They also met with an ALJ to obtain their input into the process and any assistance they could provide on recommended changes to the process. After discussion and consideration, the committee has determined that at this time the MBC should try to enhance the oral argument process, rather than abolish it. In an effort to do that, the attached regulations have been drafted to 1) require the respondent to be placed under oath if they address the panel, 2) authorize the ALJ or a panel member to request a party support their oral argument by citation to the record, and 3) places specific requirements on the written argument.

The committee is asking the DMQ to review this amended and new regulation language and make a motion to allow staff to move forward in setting a regulatory hearing at the November board meeting.

1364.30 Procedures for the Conduct of Oral Argument

- (a) A party who wishes to present oral argument to the panel of the division that issued an order of nonadoption or reconsideration shall make a written request for oral argument not later than twenty (20) calendar days after the date of the notice of nonadoption or the order granting reconsideration.
- (b) An administrative law judge will preside at oral argument. The administrative law judge may sit with and assist the panel members with their closed session deliberations.
- (c) The arguments shall be based only on the existing record and shall not exceed the scope of the record of duly admitted evidence. No new evidence will be heard. The panel members may ask questions of the parties to clarify the arguments, but may not ask questions that would elicit new evidence. The administrative law judge and any panel member may ask a party to support the party's oral argument on a matter with a specific citation to the record.
- (d) The administrative law judge shall stop an attorney, a party, or a panel member if the line of questioning or argument is beyond the record or is otherwise out of order.
- (e) The administrative law judge shall offer the respondent an opportunity to address the panel regarding the penalty. If the respondent elects to address the panel, the administrative law judge shall place the respondent under oath.
- (f) The sequence of, and time limitations on, oral argument are as follows:
 - (1) First -the respondent licensee and/or his or her legal counsel, who shall be limited to fifteen minutes.
 - (2) Second -the deputy attorney general, who shall be limited to fifteen minutes.
 - (3) Third -the respondent licensee's rebuttal or that of his or her legal counsel, which shall be limited to five minutes.
 - (4) Fourth -the deputy attorney general, who shall be limited to five minutes.

NOTE: Authority cited: Sections 2018 and 2336, Business and Professions Code. Reference: Section 2336, Business and Professions Code.

1364.32 Written Argument Submitted in Response to an Order of Nonadoption or Reconsideration

- (a) Written argument submitted in response to an order of nonadoption or reconsideration shall:
 - (1) State each point under a separate heading or subheading summarizing the point and support each point by argument, and citation of authority if applicable; and
 - (2) Support any reference to a matter in the record by a citation to the volume and page number of the record or exhibit number where the matter appears.

NOTE: Authority cited: Sections 2018 and 2336, Business and Professions Code. Reference: Section 2336, Business and Professions Code.