

## MEDICAL BOARD STAFF REPORT

DATE REPORT ISSUED: November 2, 2007  
 ATTENTION: Board Members  
 DEPARTMENT: Medical Board of California (MBC)  
 SUBJECT: Transition Plan for Diversion Program Participants  
 STAFF CONTACT: Kimberly Kirchmeyer

### REQUESTED ACTION:

Board members approve the transition plan and policy statements for the Diversion Program in the attached memo.

### STAFF RECOMMENDATION:

Staff recommends that the Board members approve the attached plan in order to transition the participants from the Diversion Program which will sunset on June 30, 2008.

### EXECUTIVE SUMMARY:

Since there was no legislation approved to extend the Diversion Program, on June 30, 2008 the legislation authorizing the Diversion Program will become inoperative. However, as of September 21, 2007 there were 203 individuals participating in the Diversion Program and therefore a transition plan for those individuals needed to be developed. In addition, this plan would also need to include what to tell those individuals who are contacting the Board until June 30, 2008 requesting entrance into the Diversion Program. After input from staff and the Diversion Advisory Council, a transition plan was put together as follows:

- Self referrals (75 participants)  
 New participants – The Board will no longer accept self referrals into the Diversion Program  
 Current participants – Those participants who have at least three years sobriety will be evaluated by the DEC and if in compliance will complete the Diversion Program (44 participants). Those participants without three years sobriety, and not deemed to be a danger to the public, will be released from the Program on June 30, 2008 but will be encouraged to seek another program to assist with sobriety (31 participants).
- In lieu of discipline or Statements of Understanding (94 participants)  
 New participants – The Board will fully inform those individuals seeking entrance into the Diversion Program in lieu of discipline that they will not be able to successfully complete the Diversion Program and that on June 30, 2008 they will be referred to enforcement for further action.  
 Current participants – Those participants who have at least three years sobriety will be evaluated by the DEC and if in compliance will complete the Diversion Program (60 participants). Those participants without three years sobriety will need to locate a program similar to the Diversion Program that will monitor him or her until he or she reaches three years sobriety (34 participants). This program will be required to report participant activity to the Chief of Enforcement. Failure to obtain a program will result in the matter being referred to the Enforcement Unit.
- Board ordered (27 participants)  
 Upon approval of the plan, the Board will no longer have the Diversion Program as a condition of a probationary order. However, each new decision will contain a condition stating that the probationer must abstain from drugs/alcohol and must submit to biological fluid testing.

Current probationers – The Diversion Program condition will become null and void on July 1, 2008 and probationers will no longer be required to comply with this condition. However, they must comply with abstaining from drugs/alcohol and must continue to submit to biological fluid testing. One staff member will be responsible for setting up biological fluid testing for probationers on a random schedule.

- Out of State (7 participants)

Current participants – Board staff will continue to liaison with the other state's Diversion Programs to ensure the seven current participants successfully complete the other state's program.

FISCAL CONSIDERATIONS:

Pursuant to Business and Professions Code section 2435.2, the Board will need to reduce the initial and renewal license fees by the amount equal to the cost of operating the Diversion Program. However, the Board will need to maintain one full-time employee to perform the functions associated with the random biological fluid testing required for probationers. Since the funding will be taken from the Diversion Program, this position will be funded by the Board's Probation Unit.

PREVIOUS MBC AND/OR COMMITTEE ACTION:

At the July 2007 Board meeting, the Board members voted to allow the Diversion Program to sunset on June 30, 2008. Additionally, the Board requested a plan be developed to assist in the transition of the Diversion Program for the period between when the motion was made until June 30, 2008.



Date: November 1, 2007

To: Diversion Committee Members

From: Kimberly Kirchmeyer  
Deputy Director

Subject: Diversion Transition Plan

Based upon input from Board Executive Staff and the Diversion Advisory Council, a transition plan has been developed for participants who are currently in the Diversion Program. The Diversion Committee will need to approve staff's proposed policies. If the policies are approved at this committee meeting, the Diversion Committee co-chairs will present this plan to all Board Members for approval.

As of September 21, 2007, there were 203 individuals in the Diversion Program (with seven of the participants participating in similar out-of-state programs). Of those, 75 were self-referrals, 94 were in Diversion in lieu of discipline, and 27 were ordered into Diversion as a result of a disciplinary order. In developing a transition plan, staff recognized that each of these categories had to be treated differently. By way of background, individuals are considered a self referral if they enter the Diversion Program completely voluntarily (no action pending and no future action is brought forward). Pursuant to statute, an individual may enter the Diversion Program in lieu of discipline if the Board determines that the only issues that have been brought to the attention of the Board's investigative unit are substance abuse issues or mental illness (the individual signs a Statement of Understanding with the Enforcement Unit indicating that the Board will suspend its disciplinary process while the individual is in the Diversion Program and will cease the process if the individual successfully completes the Program). Lastly, an individual may enter the Diversion Program as a condition of a disciplinary order, which will also contain a period of probation. (The Board also has 2 individuals in Diversion as part of a Post Accusation Diversion Agreement. This agreement occurred after an Accusation had been filed against a physician, but it states that if the subject successfully completes the Diversion Program, then the accusation will be withdrawn and no action will be taken against the physician. Staff has placed these individuals into the same category as in lieu of discipline participants.)

To determine how to transition these participants, the Board will need to address the participants based upon how they were accepted into the program.

#### **SELF REFERRALS**

**PROPOSED POLICY:** Effective upon approval, the Board will inform individuals requesting participation in the Diversion Program that the program will be eliminated on June 30, 2008 and

therefore the individual will need to seek participation in another monitoring/treatment program. Information regarding other programs may be available via the Board's Web site.

***Rationale:*** The Board cannot maintain its current program with a limited number of staff. Additionally, with the Diversion Program ending on June 30, 2008, it would not be substantially beneficial for these individuals to enter the program. Hence, physicians seeking to voluntarily enter the Diversion Program will be denied participation due to insufficient resources.

**PROPOSED POLICY:** Beginning immediately following the Board meeting and ongoing to June 30, 2008, those individuals who are self referrals and have at least three years of sobriety will be referred to a Diversion Evaluation Committee (DEC) for evaluation. If the DEC recommends, and the Program Administrator agrees, that the individual has been in compliance, the individual will be deemed to have completed the Diversion Program and will receive a letter informing them of such. The letter also will recommend that if the participant believes he/she needs assistance to maintain his/her sobriety that he/she seek entrance into another monitoring program. [As of September 21, 2007 there were 44 participants in this category.]

***Rationale:*** Pursuant to Business and Professions (B&P) Code section 2350, three years sobriety and adoption of a lifestyle which will maintain a state of sobriety is to be used to determine completion of the program. In addition, as the Diversion Program continues to lose staff, this mechanism will assist in keeping the caseload down for each monitor.

**PROPOSED POLICY:** On June 30, 2008 those individuals who are self referrals but have less than three years sobriety will be sent a letter stating the Diversion Program is inoperative and there is no longer a monitoring program. The letter will highly encourage participants to seek entrance into another monitoring or treatment program that will assist him or her in maintaining his or her sobriety. [As of September 21, 2007 there were 31 participants in this category.]

***Rationale:*** The Diversion Program will no longer be in existence after June 30, 2008 and will no longer be able to monitor these individuals.

#### **IN LIEU OF DISCIPLINE (STATEMENTS OF UNDERSTANDING)**

**PROPOSED POLICY:** Effective upon approval, the Board will inform those individuals seeking admission to the Diversion Program in lieu of discipline that they will be unable to complete the three year term of sobriety necessary for successful completion of the Diversion Program and therefore any contract signed would be limited to a term ending June 30, 2008, the date on which the program becomes inoperative. At that time, the Board will refer the matter to the Attorney General's office for further action. The participant will be made fully aware of this fact and be given the choice of either entering the program with the knowledge that on June 30, 2008 he or she will be referred to enforcement for further action, or that he or she can proceed through the enforcement process.

***Rationale:*** While the Board cannot deny participation in the Program in lieu of discipline as long as the Program is still legally in operation (pursuant to B&P Code section 2350), it also

should not encourage participants to enter a program that will only be operational until June 30, 2008. With the knowledge that the program will be inoperable, it would not show good faith to have a physician enter the program only for seven months.

**PROPOSED POLICY:** Upon approval and ongoing to June 30, 2008 those individuals who are in the Program in lieu of discipline and have had at least three years of sobriety will be referred to a Diversion Evaluation Committee (DEC) for evaluation. If the DEC recommends, and the Program Administrator agrees, that the individual has been in compliance, the individual will be deemed to have completed the Diversion Program and will receive a letter informing them of such. The letter also will recommend that if the participant believes he/she needs assistance to maintain his/her sobriety that he/she seek entrance into another monitoring program. [currently 60 participants in this category.]

**Rationale:** Pursuant to Business and Professions (B&P) Code section 2350, three years sobriety and adoption of a lifestyle which will maintain a state of sobriety is to be used to determine completion of the program. In addition, as the Diversion Program loses its staff, this will assist in keeping the caseload down for each monitor.

**PROPOSED POLICY:** On January 1, 2008, those individuals who are in the Program in lieu of discipline, but have less than three years sobriety, will be sent a letter stating the Diversion Program will be inoperative as of June 30, 2008. The letter will further state that the participant must locate another program that will monitor the physician's recovery in order for the Board to honor the "diversion" provision. This other program must meet the requirements/protocols of the Board's current Diversion Program. This other program must be willing to report to the Chief of Enforcement on a regular basis and provide information as to whether or not the individual is complying and be willing to immediately notify the Board of any positive drug screening. The letter will further inform the individual that there is a "zero-tolerance" policy on positive drug screenings. Failure to enroll into another program or abstain from drugs/alcohol may subject him or her to discipline by the Board. [currently 34 participants in this category.]

**Rationale:** Since these participants are in the Diversion Program in lieu of discipline, the Board cannot just dissolve the contract as it will do for the self-referrals. These individuals were brought to the attention of the Enforcement Unit and must fit the criteria in B&P Code section 2350 for completion in order to avoid further action by the Board.

#### **BOARD ORDERED (DISCIPLINARY ORDER)**

**PROPOSED POLICY:** Upon approval the Board will not approve a stipulation that requires participation in the Diversion Program as a condition of a disciplinary order or as a condition to issuing a probationary license. Additionally, the Board will send a letter to the Director of the Office of Administrative Hearings requesting that, since the Diversion Program will become inoperable, the Administrative Law Judges (ALJ) no longer order participation in the Diversion Program as a condition of probation either for disciplinary action or for initial probationary licenses.

In lieu of a Diversion Program condition, all stipulations/ALJ decisions must contain a condition stating that the probationer must abstain from all drugs/alcohol and must submit to biological fluid testing. New language would state:

*“Respondent shall immediately submit to biological fluid testing, at respondent's expense, upon request of the Board or its designee. Within 30 calendar days from the effective date of this decision respondent shall, at respondent's expense, contract with a laboratory or service - approved in advance by the Board or its designee - that will conduct random, unannounced, observed, urine testing a minimum of four times each month. The contract shall require results of the urine tests to be transmitted by the laboratory or service directly to Board or its designee within four hours of the results becoming available. Failure to maintain this laboratory or service during the period of probation is a violation of probation. A certified copy of any laboratory test result may be received in evidence in any proceedings between the Board and respondent. Failure to submit to or comply with the time frame for submitting to, or failure to complete the required biological fluid testing, is a violation of probation.”*

The Board will follow up with a regulatory amendment to codify this change in the disciplinary guidelines.

**Rationale:** With the Diversion Program becoming inoperative on June 30, 2008 it would not be appropriate for the Board to order a condition of probation that could not be fulfilled.

**PROPOSED POLICY:** On July 1, 2008 the Diversion Program condition in a disciplinary order will become null and void and will no longer be considered a condition of probation. However, the individuals will be required to fully comply with the conditions in their order that state the probationer must abstain from drugs/alcohol and must submit to biological fluid testing. The individuals will be required to obtain a drug screening service that will provide testing of the participant. Any refusal to submit to testing, failure either to comply with the time frame for the test or to complete the test, or failure to abstain from drugs/alcohol will be grounds to file a petition to revoke probation.

The Board will need to create a staff position that will provide the lab chosen by the participant with random dates to perform drug screening. This staff person will use the previous Random Drug Generator Program (used by the Diversion Program) to identify random dates to test the participant. This staff person will also liaison with the collectors and laboratories to receive notification of whether the individual is complying with the testing and the outcomes of the test.

Each probationer would be notified that strict adherence to these conditions will be required and any positive drug screening may result in further discipline. Additionally, the probationer will be notified that he/she may seek any monitoring/treatment program he chooses in order to remain in compliance with his probationary order.

***Rationale:*** Since there will no longer be a Diversion Program, this condition can no longer be enforced. Additionally, each probationer knows that a condition of his/her probation is the abstinence of drugs/alcohol.

### **OUT OF STATE**

**PROPOSED POLICY:** The Board will have staff continue to liaison with the other state to ensure these individuals are in compliance with that state's program until completion. Additionally, these participants will be notified that failure to complete the other state's program as required will result in referral of this matter to the Board's Enforcement Unit.

***Rationale:*** The Board does not currently monitor these individuals (except to be in communication with the other state) and this is a very small workload. Because the other state's programs are still operative, it would be appropriate for the Board to remain in contact with this state until the individual completes the other state's program and no further action would be necessary.

### **HOSPITAL REPORTING**

**PROPOSED POLICY:** B&P Code section 821.5 imposes a requirement on peer review bodies to report specified information to the Board's Diversion Program when they initiate and complete or close an investigation into a physician's ability to practice medicine safely that is based on information indicating that the physician may be suffering from a disabling mental or physical condition that poses a threat to patient care. However, B&P Code section 2358 provides that the laws authorizing the Diversion Program will become inoperative on July 1, 2008 and will be repealed as of January 1, 2009 unless those dates are deleted or extended.

Because B&P Code section 821.5 was not repealed, peer review reporting requirements must remain. Therefore, as of July 1, 2008, peer review bodies must continue to provide the reports required by section 821.5 even if the Diversion Program ceases to exist. At that time, peer review bodies will be asked to report to the Board's Deputy Director instead of reporting to the Diversion Program. The Deputy Director will follow the steps provided in B&P Code section 821.5 for resolution of the matter.