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Agenda Item 7

Members, Division of Medical Quality
Medical Board of California
1426 Howe Avenue, Suite 54
Sacramento, CA 95825

RE: Vertical Prosecution Program Update

Dear Board Members:

At the request of the Division of Medical Quality (DMQ), the following is a report regarding significant steps taken by the Health Quality Enforcement Section (HQE) in the implementation of the vertical prosecution (VP) program which went into effect on January 1, 2006. Statistics gathered by the Medical Board of California (MBC) over the first sixteen (16) months of the program are favorable, demonstrating an overall decrease in the length of time it takes to complete investigations, along with additional improvements in other areas as well. While much progress has been made, there is still much to do. Establishing a common limited data base to permit HQE and the MBC to share case information remains a high priority. Establishing and implementing a plan to co-locate HQE deputy attorneys general and MBC investigators in the same offices, as appropriate, is also an important objective to further enhance the VP program. While these and other important steps lay ahead, the single most significant obstacle that must be overcome is the continuing loss of experienced investigators who, for a variety of reported reasons, are leaving employment with the MBC. The inability of the MBC to provide investigative services resulting from the loss of experienced investigators would seriously jeopardize the continued success of the VP program and, ultimately, undermine the public protection of healthcare consumers statewide.

I. Introduction:

During the 2004-2005 legislative session, Senate Bill 231 was passed by the Legislature and later signed into law by the Governor on October 7, 2005. Effective January 1, 2006, Senate Bill 231 made numerous changes to laws relating to the MBC and HQE. The most significant change effectuated by Senate Bill 231 was the legislative transfer of primary responsibility for investigations from the MBC to HQE, together with the legislative mandate that the "vertical prosecution model" be implemented for cases involving alleged unprofessional conduct by physicians and surgeons.

In order to provide HQE with the statutory authority necessary to discharge its new responsibility to investigate cases, the Legislature added section 12529.6 to the Government Code which defines the "vertical prosecution model" as including the following three elements: (1) each physician and surgeon complaint referred to an MBC district office for investigation shall be simultaneously and jointly assigned to an investigator and HQE deputy attorney general responsible for prosecuting the case if the investigation results in the filing of an accusation; (2) the joint assignment shall exist for the duration of the disciplinary matter; and (3) during the joint assignment, the assigned investigator 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.

In its Report to the Legislature, the MBC has correctly observed that "[w]hile the MBC investigative process is essentially unchanged under the [VP] model, the changes within [HQE], both structurally and procedurally, have been more dramatic." (Medical Board of California, Report to the Legislature, Vertical Enforcement (July 19, 2007) p. 6.)[1] For example, according to the MBC, HQE has been required to: (1) "[d]evelop a database for all cases referred for investigation, not just those that are prosecuted"; (2) "[d]evelop familiarity with all MBC policies pertaining to investigations"; (3) "[b]ecome responsible for all elements of the investigative process on cases resulting in closure or prosecution"; (4) "[p]rovide case direction from the investigative stage through the prosecutorial stage"; and (5) "[p]rioritize a new workload, which included investigative and prosecutorial tasks." (*Id.*, at pp. 6-7.) The examples cited by the MBC are just a few of the significant steps that HQE has taken to successfully implement the VP program.

II. Successful Publication of the Joint HQE/MBC Vertical Prosecution Manual:

With the passage of Senate Bill 231, it became immediately clear that HQE needed to establish policies and procedures to implement the VP program statewide and include them in a manual for use by both investigators and deputy attorneys general. Accordingly, in January of 2006, HQE published its "Vertical Prosecution Manual for Investigations Conducted by Medical Board Investigators" (First Edition, January 2006) addressing the statutory construction of Government Code section 12529.6, as well as the policies and procedures, including dispute resolution, that governed the initial implementation of the VP program. In addition, HQE also participated in the drafting and publication of a "Joint HQE/MBC Vertical Prosecution Protocol." These two documents provided the structural context for the VP program and guided both its initial implementation and day-to-day operations from January to November 2006.

After several months of experience working with the program, in November of 2006, HQE and the MBC staff consolidated the previously published manual and protocol into a single joint HQE/MBC "Vertical Prosecution Manual (Second Edition, November 2006)." This new joint manual incorporated various changes and improvements to the program and strongly emphasized that vertical prosecution is based on a team concept where each member of the VP team makes his/her own valuable contribution toward the ultimate goal of public protection. As of the date of this memorandum, the joint HQE/MBC Vertical Prosecution Manual (Second Edition, November 2006) continues to govern the day-to-day operation of the VP program.

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1. This report has not been filed with the Legislature.

III. Development of the Investigation Plan and Progress Report:

Under the former Deputy-In-the-District-Office ("DIDO") program which existed prior to the enactment of Senate Bill 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 boards, to provide consultation and related services and engage in case review with the boards' investigative, medical advisory, and intake staff." (Former Gov. Code, § 12529.5, subd. (b).) In essence, DIDO deputies provided only consultation to investigators, medical advisors and executive staff in the investigation and prosecution of disciplinary cases. Thus, under the DIDO program, there was no need for investigators to regularly communicate with, or provide periodic updates to, deputies regarding ongoing investigations.

The enactment of the VP program, however, fundamentally changed the relationship between investigators and deputies. In order to create a vehicle for investigators and deputies to establish and maintain communication regarding ongoing investigations, and permit deputies to provide the statutorily required direction to investigators, HQE developed the "Investigation Plan and Progress Report," otherwise known as the "IPPR." The IPPR was designed to permit the investigator, in the first instance, to exercise his/her professional judgment to identify the steps he/she believes are most appropriate for the timely and efficient investigation of the case. The IPPR is then electronically transmitted by e-mail to the assigned deputy who then reviews and approves it, without or without modifications. Thereafter, the investigator and deputy maintain a "running e-mail thread," communicating and replying to each other by adding information to the e-mail thread as the investigation progresses. The IPPR running e-mail thread also serves as ongoing documentation of the progress of the investigation.

In the initial phase of the VP program, the IPPR format used by investigators varied and was not uniform statewide. However, in June of 2007, an "IPPR Working Group" consisting of personnel from both the MBC and HQE was created and, in July of 2007, the group met and agreed on a uniform IPPR format to be used statewide. The IPPR has become one of the cornerstones of the VP program and its use is now required by both the Joint HQE/MBC Vertical Prosecution Manual (November 2006, Second Edition) and the MBC's own Enforcement Operations Manual.

IV. Technological Achievements and Future Challenges:

The legislative transfer of primary responsibility for investigations from the MBC to HQE also created the immediate need for significant technological improvements in order to satisfy the dramatically increased data inventory, tracking, retention and reporting demands of the program.

In late 2005, HQE proposed the creation of a common limited data base which would receive case information from both the Department of Justice "ProLaw" case management program and the Department of Consumer Affairs' "Consumer Affairs System" (CAS) system. This new common limited data base would have permitted the sharing of case information between HQE and MBC, reduced the time spent by both agencies inputting case specific information into separate data bases, and eliminated the need to reconcile case information and statistics. However, due the technical challenges required to maintain this project and the limited nature of the pilot program this project was not pursued at that time.

This project required that the Department of Justice make substantial modifications to the ProLaw program. HQE worked closely with the Case Management Section (CMS) and, in particular, with Angelo Whitfield, the Department of Justice's information and technology consultant, to develop the Vertical Prosecution Initiative Flow Chart which identified each significant step in a typical investigation and prosecution of a case. The Flow Chart, in turn, permitted the identification of the various data tracking markers which, in turn, permitted HQE to create two sets of Mandatory Docket Events, one for VP investigations and one for administrative prosecutions. HQE deputies then enter the appropriate Mandatory Docket Event in the ProLaw matter for each of their assigned cases, thus permitting CMS to run reports documenting case progress. As of the date of this memorandum, the lists of Mandatory Docket Events is currently under review to determine what, if any modifications, should be made to them.

HQE also worked with CMS to create various Rule Sets for the different types of matters handled by the section. These Rule Sets were developed to permit deputies to quickly and easily enter the Mandatory Docket Events in each of their cases. As of the date of this memorandum, CMS is in the process of refining the available Rule Set to ensure they are all-inclusive and to eliminate unnecessary or redundant rule sets. The completion of this project has been temporarily delayed because the Department of Justice is currently upgrading its Pro Law program to a newer version. This upgrade is anticipated to be completed by October 31, 2007.

In order to provide HQE deputy attorneys general with continuing access to the Department's case tracking and e-mail computer programs, the Department installed computers in each of the MBC's district offices. Additional resources were later expended to successfully resolve significant connectivity and computer security issues and, ultimately, it became necessary for the Department to install new upgraded computers in each of the MBC's district offices. More recently, the MBC developed a "read only" limited data base that it has made available to HQE. At the present time, HQE is studying whether information from this data base can be effectively migrated to the ProLaw case management program.

While HQE continues to work to improve its own data tracking and reporting capabilities, the creation and maintenance of a common limited data base to permit the sharing of case information between HQE and the MBC is a top priority for both agencies in order to further enhance the VP program. The Board's Executive Director, the Board's Deputy Director, Mr. Whitfield and I have met on several occasions and are currently working to accomplish this objective. However, at this time, the completion of this project has temporarily delayed due to the upgrade of its Pro Law program, mentioned above. Mr. Whitfield is expected to attend the next Board meeting and be available to answer questions you may have on the technical aspects of this project.

V. VP Training for HQE Deputies and Legal Support Staff Statewide:

The implementation of the VP program, like any new governmental program, required extensive training for both HQE deputies and the Department's legal support personnel to permit them to assume their new duties and responsibilities under the program. In order to meet this challenge, in October of 2006, HQE conducted statewide training in San Diego for all Lead Prosecutors and Supervising Deputy Attorneys General. Supervising Deputy Attorneys General have also continued to provide on-the-job training on the VP program for all deputies in their respective sections. In addition, the Department's legal support personnel have received necessary training on a variety of subjects including, for example, the opening and closing of VP investigations within the ProLaw program.

VI. The Results of the VP Program from January 2006 to April 2007:

The MBC statistical data collected during the first sixteen (16) months of the VP program show, when modified to exclude cases prior to implementation of the program, an overall decrease of ten (10) days in the average time to complete an investigation. (Medical Board of California, Report to the Legislature, Vertical Enforcement (July 19, 2007) p. 1.) Statistical data gathered by the MBC also reflects improvement in several other important areas as well. (*Id.*, at p. 2.) These improvements are not, however, the only measure of the program's overall success.

> "Reducing investigation completion delays . . . is only one method of measuring improved public protection. The [VP] model 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 investigation of these complex cases and, where violations of law are discovered, the ultimate settlement or prosecution of these cases. Implementation of the [VP] model mandated by SB 231 has resulted in improvement in all of these areas." (*Id.*, at p. 2.)

VII. The Continued Success of the VP Program Depends on the MBC's Ability to Recruit, Hire, Train and Maintain a Staff of Experienced Investigators:

In order for the VP program to remain successful, the MBC must maintain a sufficient staff of experienced investigators to investigate the often complex cases of alleged unprofessional conduct by physicians and surgeons.

According to its Report to the Legislature, on January 1, 2006, the MBC had ninety-two (92) sworn staff positions comprised of seventy-one (71) investigators and twenty-one (21) supervisors. (Medical Board of California, Report to the Legislature, Vertical Enforcement (July 19, 2007) p. 25.) Between January 2006 and July 19, 2007, there have been a total of nineteen (19) separations (six retired, two resigned and eleven transferred). (*Id.*, at p. 26.) Low salaries and a more complex workload than other agencies were some of the reasons cited by investigators who left employment with the MBC. (*Id.*)

It cannot be overstated that the continued success of the VP program depends, in large part, on the ability of the MBC to provide investigative services on cases of alleged misconduct by physicians and surgeons.

IX. Conclusion:

As the MBC has correctly observed, implementation of the VP program has required HQE to make significant structural and procedural changes in order to successfully carry out its new and expanded duties and responsibilities under the program. While much has been accomplished and early statistical data demonstrates its benefits, further improvements can and should be made to the VP program. Establishing a common limited data base to share case information, and implementing a plan to co-locate HQE deputy attorneys general and MBC investigators in the same offices, as appropriate, remain top priorities. Most importantly, efforts must be made to stem the continuing loss of experienced investigators who, for a variety of reported reasons, are leaving employment with the MBC. Continued loss of experienced investigators would seriously jeopardize the overall success of the VP program and, ultimately, would undermine the public protection of healthcare consumers statewide.

I hope the foregoing has been of some assistance to you. Please let me know if you have any questions regarding the foregoing or if I can be of any further assistance.

Sincerely,

CARLOS RAMIREZ
Senior Assistant Attorney General

For EDMUND G. BROWN JR.
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