



MEDICAL BOARD OF CALIFORNIA



ENFORCEMENT COMMITTEE MEETING

Four Points by Sheraton Sacramento
International Airport
Natomas Room
4900 Duckhorn Drive
Sacramento, CA 95834

Thursday, January 29, 2015
2:00 pm – 3:00 pm

MINUTES

Agenda Item 1 Call to Order/Roll Call

The Enforcement Committee (Committee) of the Medical Board of California (Board) was called to order by Dr. Lewis, Chair. With due notice having been mailed to all interested parties, the meeting was called to order at 2:00 p.m.

Members Present:

Ronald Lewis, M.D., Chair
Howard Krauss, M.D.
David Serrano Sewell, J.D.
Barbara Yaroslavsky
Felix Yip, M.D.

Members Absent:

Elwood Lui
Gerrie Schipske, R.N.P., J.D.

Staff Present:

Liz Amaral, Deputy Director
Nichole Bowles, Staff Services Analyst
Erika Calderon, Associate Government Program Analyst
Ramona Carrasco, Staff Services Manager I
Charlotte Clark, Staff Information System Analyst
Dianne Dobbs, Legal Counsel, Department of Consumer Affairs
Dev GnanaDev, M.D., Board Member
Rashya Henderson, Special Investigator Supervisor
Cassandra Hockenson, Public Information Officer II
Kimberly Kirchmeyer, Executive Director
Nicole Kraemer, Staff Services Manager I
Sharon Levine, M.D., Board Member
Ian McGlone, Associate Government Program Analyst
Armando Melendez, Business Services Officer
Dino Pierni, Business Services Officer

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Denise Pines, Board Member
 Regina Rao, Associate Government Program Analyst
 Paulette Romero, Staff Services Manager II
 Kevin Schunke, Staff Services Manager I
 Jennifer Simoes, Chief of Legislation
 Lisa Toof, Administrative Assistant II
 Kerrie Webb, Staff Counsel
 Susan Wolbarst, Public Information Officer
 Christopher Wong, Associate Government Program Analyst
 Curt Worden, Chief of Licensing

Members of the Audience:

Lee Adamson, Supervising Investigator, Health Quality Investigation Unit
 Teresa Anderson, California Academy Physician Assistant
 Connie Broussard, Senior Deputy Attorney General, Department of Justice
 Gloria Castro, Senior Assistant Attorney General, Department of Justice
 Yvonne Choong, California Medical Association
 Zennie Coughlin, Kaiser
 Julie D'Angelo Fellmeth, Center for Public Interest Law
 Karen Ehrlich, L.M., Midwifery Advisory Council
 Stephen Ellis, M.D.
 Carlyne Evans, Deputy Attorney General, Department of Justice
 Michael Gomez, Deputy Director, Department of Consumer Affairs
 Bridget Gramme, Center of Public Interest Law
 Marian Hollingworth, Consumers Union Safe Patient Project
 Sarah Huchel, Assembly Business & Professions Committee
 Christine Lally, Deputy Director, Department of Consumer Affairs
 Mark Loomis, Supervising Investigator, Health Quality Investigation Unit
 Leslie Lopez, Deputy Director, Business, Consumer Services and Housing Agency
 Roberto Moya, Investigator, Health Quality Investigation Unit
 Bryce Penney, Department of Consumer Affairs
 Patrick Rogers, California Research Bureau
 Brian Sala, California Research Bureau
 Anita Scuri, Department of Consumer Affairs
 Laura Sweet, Deputy Chief, Health Quality Investigative Unit

Agenda Item 2 Public Comments on Items not on the Agenda

No public comments were provided.

Agenda Item 3 Approval of Minutes from October 23, 2014 Meeting

Ms. Yaroslavsky made a motion to approve the minutes from the October 23, 2014 meeting; s/Dr. Krauss. Motion carried.

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Ms. Sweet stated that Investigators at the Health Quality Investigative Unit (HQIU) continue to work on the joint Vertical Enforcement (VE) Manual. She continued with commending the participation of Ms. Scuri, retired annuitant and former legal counsel, who has attended every meeting and allowed her expertise, knowledge and demeanor to affect the nature of the meetings.

Ms. Sweet pointed out that once the whole draft is finished it needs to follow the chain of command and will be sent to the Attorney General's Office (AGO) for adoption as the protocol.

Ms. Sweet wanted the committee to understand that the purpose in all of the manuals has been to set forth the procedures by which the investigations will be directed by the assigned Deputy Attorney Generals (DAGs) and will entail the legal review and provision of legal advice in investigations. Specifically, the manual will cover other important aspects of efficiencies that have been offered by the Department of Consumer Affairs (DCA), some of which already were in the July 2014 VE Manual.

Mr. Gomez stated that he wanted to speak about the VE Manual and the progress that the DCA and the AGO have made regarding the creation of the new VE Manual. He stated that the draft represents a collaborative effort and the participation of the DAGs. The investigative interview is the one outstanding component that needs to be agreed upon in the draft.

Mr. Gomez wanted to briefly explain the most important differences between this protocol and the current Third Edition of the VE Manual, stating that at the onset, the DCA believed the previous versions of the manual have served their purpose.

Mr. Gomez continued by stating that the primary goal was to create a product that reduced delays in the enforcement process and increased accountability, thereby, enhancing consumer protection in California. The secondary goal was to create a product that eliminated the confusion caused by the significant redundancies in the Third Edition, create greater clarity in the organizational product chronologically, make it more user friendly, and to have a neutral tone. This product allows the user to find all the information on one topic in one area and it recognizes that both the investigators and DAGs are trained professionals with separate areas of expertise that should be recognized and respected by each other. In addition, working with the AGO on the manual, DCA has been communicating with Ms. Castro on a regular basis to address current process issues and to ensure that enforcement cases continue progressing in the most efficient and effective manner possible in the absence of a joint manual.

Mr. Gomez continued by stating that HQIU is currently in discussion with the AGO on the creation of an IT cloud that would allow documents and evidence in joint case work to be conveniently available. He noted that Ms. Sweet is working with the AGO to assist in the IT cloud development.

Mr. Gomez provided information on staffing, caseloads and case aging. He stated that there has been no significant change in case handling at this stage and that cases that are being proposed for closure

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or transmittal are sent electronically to Ms. Kirchmeyer for approval. As of this report, there are 17 vacant sworn positions. There are candidates in background to fill at least six of those vacancies. There is heavy competition with other agencies who offer different pay and benefits.

Mr. Gomez continued, stating that several of the Southern California offices are having difficulty recruiting medical consultants. Commander Kathleen Nichols is going to send letters to experts and place articles in newsletters in the San Bernardino, Rancho Cucamonga, and San Diego areas to encourage interested individuals to apply for these positions. Alternative work schedules and more training opportunities in terms of leadership development and management have been offered to the investigators to offset some of the recruitment problems.

Ms. Sweet stated there continues to be a few challenges extracting complete and accurate data from BreEZe, but significant improvement is being made. She said that BreEZe is not yet able to calculate the time between when a case is closed and when it is reopened and there is also a problem calculating cases that have been reassigned. The BreEZe team is aware, and the programmers anticipate a resolution by April 2015.

Ms. Sweet presented the charts in her presentation that explained case timelines, annual productivity and pitfalls, stating that an unintended consequence could be that the average time it takes to close a case in the field office could potentially rise. The cases the investigators are working on are the most difficult and complicated cases. There have been 62 fewer cases closed, 14 fewer cases referred for citation and fine, 50 fewer cases referred to the AGO, and 15 more cases referred for criminal action. VE has presented its own unique challenges, in addition to challenges with the transition. Staff also had to adapt to a different computer system and has not been able to get the usual information to track case progress. The data that is manually extracted, has not been vetted and has not been verified. This information has been maintained in the district offices to track progress.

Ms. Sweet continued talking about the Aged Case Council that was instituted to troubleshoot cases that seem to be languishing. The first demarcation line was cases over 700 days old, but throughout the years, because of the elimination of these old cases, the threshold keeps coming down. The number of days is now 550 when a case comes to the attention of management and to the council.

Ms. Sweet stated that these are the cases that the Medical Board of California (Board) has reviewed in the past. Looking at cases that are 550 days old, there has been improvement. The cases over 550 days have been lowered from January 2014, to January 2015 have been reduced by two. Cases over one year old have seen little improvement, but nothing significant. She provided data by district office. In the offices where there has been stable supervision and staffing, the case aging is generally lower.

She stated the transition has been a great opportunity to review policies and procedures. In the midst of that project there is hope to yield some suggestions for operational efficiencies that have not been considered. Lastly, in a renewed effort to focus attention on the case-aging issue, staff were challenged to reduce cases over 365 days by 20 percent between November 1 and December 31, 2014, with a contest. Six offices were successful, and the contest was reinstated to encourage staff to reduce cases over 365 days by 25 percent by April 1, 2015.

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Ms. Sweet spoke on the significant successes in the criminal arena during the past quarter. A former physician, who surrendered his license, was recently convicted for involuntary manslaughter and is awaiting sentencing. This case was handled by Supervising Investigator Julie Escat from the Valencia office. She stated the former doctor used a combination of lidocaine, fentanyl, oxycodone, and other drugs in a liposuction procedure that lasted more than 14 hours. The cause of death was multiple drug toxicity. The procedure was performed in an unaccredited surgery center, and the physician had no licensed assistants, and no lifesaving equipment in the office. Sentencing is pending.

Ms. Sweet added that in a case managed out of the Glendale Field Office by Investigator Ken Buscarino, a physician was sentenced to prison for prescribing narcotics without a legitimate medical need. He was ordered to spend two years in jail after originally being sentenced to a total of seven years in prison.

The efforts of Investigator Brian Ansay in the Fresno Field Office, who worked as part of a multi-agency taskforce, led to a physician pleading guilty to federal charges for the distribution and dispensing of oxycodone. He was sentenced to almost five years in federal prison.

Ms. Sweet stated the efforts of Larry Bennett in the San Dimas office led to a physician being convicted of distribution of hydrocodone, alprazolam, carisoprodol, promethazine, and money laundering. He was sentenced to over five years in federal prison. There have been quite a few successes, fighting prescription drug abuse.

Ms. Sweet continued, stating the HOIU remains within its budget and on course to do so. However, due to several retirements and some significant payouts, it is a little tighter than anticipated, but not problematic. It means close attention is being paid to the budget and that asset forfeiture monies are being utilizing for training for the HOIU staff.

Ms. Sweet concluded her report by commending the investigative staff for their ability to keep the work moving.

Dr. Lewis praised Ms. Sweet for the progress made and the transitions and improvements that have occurred.

Ms. Castro stated that she wanted to cover a couple of points on operational issues, training, the aspect of criminal cases, conviction case monitoring, and finally the IT cloud. The July 2014 VE Manual is becoming more akin to an operational manual that directs staff and implements what the AGO sees as the directing authority over this program and the provision of legal advice. Staff continues to operate in a transitional period where HOIU is actively interfacing with the AG on a daily basis, and currently, the number of pending investigations is about 1,100. Staff continues to inform HOIU of the best way to present cases to the AGO, such that transition, transmittal guidelines and other operational communications are robust from Mr. Gomez and Ms. Sweet.

Staff continues to work on the transfer of knowledge, techniques, and history between agencies. It is always with the joint goal of protection of the public through high-quality and efficient joint investigations. She stated she and Mr. Gomez continue to discuss ideas for joint training for both

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agencies to improve the quality of investigations. They take very seriously that the VE statutes actually require joint training, so staff will continue to talk about those ideas.

Ms. Castro stated AGO staff continues to follow the July 2014 manual, which already implemented some efficiencies that make it into the joint manual protocol.

There is one major change regarding criminal cases that HQIU will be instituting. The increase in the number of criminal referrals by HQIU. The criminal referrals are sent for consideration to the Deputy Attorney's Office. Ms. Castro stated the AGO is going to start tracking criminal cases more closely after the conclusion of Penal Code Section 23, bail restrictions, specifically due to statutes of limitations issues. In order to be helpful in that regard, those cases will be monitored through lead prosecutors. HQIU has increased the identification of disciplinary matters as criminal cases, and referring cases to the DA's Office.

Ms. Kirchmeyer let the committee know that since removal of the Chief of Enforcement, she has been reviewing the cases.

Ms. Kirchmeyer also stated regarding the budget, the new Deputy Director will be looking at the budget with staff and making sure that the appropriate changes are going to the Board and the HQIU.

Dr. Lewis thanked the presenters and asked for questions from the committee.

Ms. Yaroslavsky asked how the problems in hiring are affecting the caseload, the case closures and the case process times.

Ms. Sweet responded stating that the primary disadvantage is that cases get reassigned causes a loss of continuity and an increase in case aging, and can also increase the caseloads.

Ms. Yaroslavsky asked if cases being closed and reopened changes the bottom line and wanted to know if this is actually manipulating data.

Ms. Sweet replied, stating that there are all types of scenarios. One scenario might be where a case has been closed because there is insufficient evidence to proceed. For example, there is a case where it is a simple departure from the standard of care and the case cannot be acted upon so it is set aside; it's maintained for a period of time. Then there is another complaint with a simple departure from the standard of care, those two cases are combined and the case then moves forward through the disciplinary process. That is not manipulating the data.

Ms. Yaroslavsky reminded the committee about the possibility of taking the numbers as a congruent number out of the statistics as a whole, so that there is a real understanding of how long cases are taking.

Ms. Sweet replied that cases are being closed and not accruing time, but BreZE has not yet learned how to extract that time. The prior system is being used to accomplish this. The BreZE system does not know how to recognize that closure and reopen code, so it computes all that time.

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Ms. Yaroslavsky asked when can the Board expect that BreZE is going to be able to deliver statistics that are timely. Ms. Sweet stated that she had been advised the reports would be available April 2015.

Mr. Gomez added that this close/open-reassignment issue has been one of the focal points in the last rendition of fixes and that staff said it would be corrected by April of this year and at that point the right data points will be counted.

Ms. Yaroslavsky asked if there will be an opportunity to have joint efforts, so that simultaneously there is no time lost.

Ms. Castro responded that if a case is criminal and is under consideration by a DA's office, neither HQIU nor the AGO can make the case proceed faster. She added, they want to operate in a collaborative capacity with our law enforcement partners, but would be proceeding with a parallel investigation.

Ms. Castro stated that a placeholder accusation can always be put in place. This does not jeopardize the criminal case, but puts the public on notice that there is something being filed. If the doctor decides to try his administrative case first, it may have an effect on the criminal case.

Agenda Item 5 Update and consideration of Recommendations from the Marijuana task Force

Dr. Lewis stated that after discussion at the last meeting, regarding changes to the Board's marijuana statement, several members had concerns about removing the requirement for an in-person examination. Therefore, at the full Board meeting, it was determined that a task force of two members would be established to discuss this issue. Mr. Serrano Sewell identified the Chair of the Enforcement Committee, Dr. Lewis, and the Licensing Committee, Dr. Bishop to this task force.

On December 12, 2014, Dr. Lewis and Dr. Bishop met with Board staff in Sacramento to review the Board's current laws, the current marijuana statement, the precedential decision the Board had adopted on this issue and in addition, they reviewed new legislation that had been introduced on this issue on December 1, 2014.

The task force fully reviewed the laws pertaining to an appropriate examination and also reviewed the telehealth laws. Based on discussion and review, there are recommendations that the Committee needs to review and approve, so it can move to the full Board for an approval. The first recommendation is to amend the Board's marijuana statement to address the telehealth issue. Based upon the Task Force review, the law authorizes the initial examination to be performed by telehealth. However, the standard of care must be followed, as do the requirements in Business and Professions Code Section 2290.5, which is the telehealth law. In the section of the marijuana statement on important points to consider when recommending marijuana for medical purposes, the task force recommends the following additional statement: "Telehealth, in compliance with the Business and Professions Code Section 2290.5, is a tool in the practice of medicine and does not change the standard of care."

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The Task Force thought it was important to point this out and draw attention to it, so if a physician expert were to review a physician's care and treatment when recommending marijuana for medical purposes, it must meet the standard of care, whether telehealth is used or not.

Ms. Yaroslavsky made a motion to approve this additional statement and to recommend this change to the full board for approval; s/Dr. Yip.

Dr. Ellis, a cannabis physician from San Francisco, stated that he has been recommending marijuana for about 15 years and that he has greater than 10,000 patients. Average patient is 49 years old, and seventy-two percent are male.

Dr. Ellis said he believes the idea of opening up to allow telehealth, or telemedicine, for cannabis recommendations will be a disaster. He recommended that the committee state in the case of marijuana recommendations, the standard of care requires an in-person evaluation, for the initial visit at least.

Motion passed.

Dr. Lewis continued with the second recommendation from the Task Force. They determined it was necessary to amend Business and Profession Code Section 2242 to state, "a recommendation for marijuana must have an appropriate prior examination." Currently, this section of law states in part, "Prescribing, dispensing, or furnishing dangerous drugs as defined in Section 4022 without an appropriate prior examination and a medical indication constitutes unprofessional conduct." In the precedential decision the Task Force reviewed, it stated that a recommendation is not a prescription. Therefore, the Court did not find a violation of Section 2242. The Task Force recommends a modification to Section 2242 to require an appropriate examination prior to recommending marijuana. During a review of the new legislation, it was found that this amendment is currently in Assembly Bill (AB) 26.

Dr. Lewis stated the Task Force recommendation is to have staff continue to meet with the bill's author's office and to be sure that they are aware of how important this amendment is to the law. The recommendation is also to have staff monitor this bill throughout the legislative process. If the legislation does not move through this year, then the recommendation would be to put this amendment forward as a Board-sponsored legislative proposal for 2016. At this time, the Task Force would ask to continue this discussion to tomorrow's legislative agenda item when the Board will be taking a position on AB 26.

Ms. Yaroslavsky made a motion to recommend to the full Board that Section 2242 be amended either via AB 26 or via Board legislation; s/Dr. Krauss. Motion carried.

Dr. Lewis stated, lastly, the Task Force recommends watching both AB 26 and AB 34. AB 34 is currently a spot bill. AB 26 changes the law to require an in-person examination for any recommendation for marijuana. If this legislation passes, staff will need to amend the Board's marijuana statement to comply with the new statutory requirements. Therefore, the Task Force is recommending waiting until this legislative year is complete before any changes are made.

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Dr. Lewis asked if there were any additional questions from members of the committee.

Dr. Krauss said while it is not the Enforcement Committee that determines Board policy, he still has concerns about telehealth being utilized for this purpose, and looks forward to the Board establishing policy on that matter.

Agenda Item 6 Update and Consideration of Next Steps Regarding the Disciplinary Action Demographics Study

Ms. Kirchmeyer stated that previously an issue of disciplinary demographics came before the Board and the Board asked that the statistics be reviewed again and they were presented in October. Based on the comments that were received at the last meeting, once those statistics were presented, the Members directed staff to go back and research a potential third-party organization that could analyze the data that was provided. One of the organizations mentioned was the Office of Health Equity, (OHE) which is under the Department of Public Health.

Ms. Simoes stated she spoke to OHE regarding their role and based upon their response decided to move in a different direction. Ms. Simoes stated that she did contact the California Department of Public Health's OHE, she found out that when recommendations come from the community they are forwarded to the Director of the Department of Public Health where policy changes could be made. She stated that when she explained what the Board was looking at doing, OHE said that they do not have the staff to do a statistical kind of review. They also said that they are very interested in collaborating with the Board on this project but it does not fall in line with the mission of the OHE.

Ms. Kirchmeyer stated that once she and Ms. Simoes received the previous information they discussed other entities that have done studies for state organizations and agencies such as the California Research Bureau (CRB). She stated the CRB is required by law to assist with state studies. Ms. Kirchmeyer then introduced Brian Sala and Patrick Rogers from the CRB. She asked Mr. Sala to give the Board a short update on the duties of the CRB. She also asked the Board to authorize staff to do a memorandum of understanding (MOU) with the CRB to be the third-party entity to gather the data that the Board has regarding this issue, interview the individuals who have come forward on this issue, and prepare a report after their research. Ms. Kirchmeyer also asked the Committee to authorize Dr. Krauss to look at the methodology behind the study working with the CRB.

Mr. Sala introduced himself as the acting Director of the CRB which is a division of the California State Library. He stated that the CRB was created in 1991 to provide independent, nonpartisan policy research and reference services for the Legislature, the Governor's Office, and other executive branch entities. He continued stating the CRB is a central services agency and is funded through the general fund and the central services cost recovery fund.

Mr. Sala reminded the Committee that the CRB conducted an analysis of the Medical Board's enforcement activities and disclosure policies in 2008 at the direction of the Legislature and that the project required the Board to provide CRB with full access to its confidential licensing and disciplinary data. Mr. Sala stated that if CRB were to take on this project they would need full access to the confidential data, both the survey data and the licensing and disciplinary data in order to develop a clear understanding of the statistical properties of that data as related to the questions of interest.

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This would require an MOU or an Interagency Agreement (IA) between the Board and the State Library.

The CRB does not have an exemption on the Public Records Act. It would be necessary that confidentiality is addressed in the MOU. Mr. Sala emphasized that CRB services are provided under the understanding that CRB retains full editorial control and independence. CRB works for its clients, but all conclusions belong to CRB. CRB takes direction from the client on the nature of the product, but retains full control over the actual analysis and delivery of that product.

Ms. Kirchmeyer stated that she had mentioned the CRB to the Governor's Office and they were supportive.

Dr. Lewis asked, who owns the data, who has access to it, and what can the Board do with the data when there is a third party performing statistical analysis and/or collecting the data.

Mr. Sala replied, in the prior project relating to Board data, the statute specified that CRB would have full access to the confidential data, and the same confidentiality restrictions on the data will be applied. All the necessary protections for the data are put in place. The only data that is presented publicly, is in aggregate form making sure that the potential for revelation of identifiable information about any individual licensee is treated very carefully.

Ms. Kirchmeyer commented that it would be the Board's data that they would actually be analyzing.

Dr. Krauss stated that it is important to also look ahead as to the distribution of the report, because it should be reported first and only to the Board, and to allow the Board to be the releasing organization of the analysis, so it is not viewed by the public as something that the Board may not have solicited, then released to the public.

Dr. Sala stated this is a matter for specification in the MOU. CRB is pleased to work with the Board to specify the format it would prefer for public release.

Dr. Sala noted the key point that CRB wants to make regarding their work is that CRB has expectations of retaining full editorial control over content, and that is the assurance that CRB wants to give to the Board's interested parties. He added stating the Board is receiving CRB's unbiased best analysis.

Mr. Serrano Sewell recommended CRB work with Ms. Kirchmeyer in release of the report in a way that is open and transparent but provides the reviewer and the reviewee the opportunity to have a report that is beneficial and serves its purpose.

Ms. Yaroslavsky made a motion to request approval from the Board to enter into an MOU with the CRB to complete the study, working with Dr. Krauss on the methodology; s/Dr. Krauss.

Ms. Choong, California Medical Association, stated that the California Medical Association is supportive of the recommendation to have CRB perform this analysis. She added that they are supporters of ethnic diversity within the physician population.

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Ms. D'Angelo Fellmeth, Center for Public Interest Law, stated that the CRB and Dr. Sala, completed an excellent report in 2008. That report, was the subject of successful legislation last year, AB 1886, Eggman, which has now improved the Board's public disclosure policy to the benefit of patients. Dr. Sala and CRB has made an important contribution to the Board already, and this would be another important contribution in the area of physician diversity.

Motion carried.

Agenda Item 7 Future Agenda Items

Dr. Lewis asked for future agenda items.

Dr. Krauss suggested that the Board discuss marijuana and schedule drugs as they relate to telehealth, and the need for an in-person evaluation. Dr. Krauss explained that as he previously expressed he has reservations about individuals using telehealth as a first examination for recommendations for marijuana, he also has similar concerns about telehealth potentially being an avenue for first prescription for schedule drugs. He believes it is a subject for the Enforcement Committee.

Dr. Lewis stated that the last agenda item is adjournment and asked for a motion to adjourn.

Motion made by Ms. Yaroslavsky; s/Dr. Lewis. Motion carried.

Agenda Item 8 Adjournment

There being no further business, the meeting was adjourned at 3:00 p.m.

The full meeting can be viewed at www.mbc.ca.gov/board/meetings/Index.html