

Gloria Castro, Senior Assistant Attorney General

Senior Assistant Attorney General Gloria Castro leads the Health Quality Enforcement Section in the California Department of Justice, Attorney General's Office. The section prosecutes professional licensing and disciplinary cases against licensees on behalf of state health care oversight agencies, including the Medical Board of California. Ms. Castro joined the Attorney General's Office Civil Rights Enforcement Section in 1999. In 2005, she joined the Health Quality Enforcement Section. She was promoted to Supervising Deputy Attorney General in December 2010. Attorney General Kamala Harris appointed her as the Senior Assistant Attorney General of the Health Quality Enforcement Section in March 2013. Ms. Castro received her juris doctor from the University of Southern California Law School in 1997, and graduated from the University of California, Santa Barbara, in 1994.

THE STANDARD OF CARE IN MEDICAL BOARD DISCIPLINARY MATTERS

Presented by the
Health Quality Enforcement Section



MEDICAL BOARD PUBLICATIONS & RESOURCES

MBC Website Publications: <https://www.mbc.ca.gov/Publications>

Laws and Regulations:

<https://www.mbc.ca.gov/Download/Documents/laws-guide.pdf>

Disciplinary Guidelines:

<https://www.mbc.ca.gov/Download/Documents/disciplinary-guidelines.pdf>

Patient Information Pamphlet:

<https://www.mbc.ca.gov/Download/Documents/laws-guide.pdf>

Complaint Process:

<https://www.mbc.ca.gov/Publications/Brochures/Complaints.aspx>

PRESENTATION OBJECTIVES

What is the definition of the Standard of Care?

How is the Standard of Care applied in Medical Board matters?

GENERAL DUTY OF CARE

Individuals under a Duty of Care must exercise the degree of prudence, competence and caution of a reasonable person depending on the circumstances.

GENERAL STANDARD OF CARE

Vaughn v. Menlove (1837) described the general standard of care as whether the individual “proceed[ed] with such reasonable caution as a prudent man would exercises under such circumstances.”

MEDICAL STANDARD OF CARE ALSO REFERRED TO AS THE STANDARD OF PRACTICE

“That level of skill, knowledge and care in diagnosis and treatment ordinarily possessed and exercised by other reasonably careful and prudent physicians in the same or similar circumstances at the time in question.”

EXPECTATIONS OF LICENSEES

Physicians and Surgeons licensed in the State of California must practice **competently** and **within** the applicable medical standard of practice.

BUSINESS & PROFESSIONS CODE SECTION 2234

Business & Professions Code section 2234 defines “unprofessional conduct” to include:

- (b) **Gross negligence.**
- (c) **Repeated negligent acts.** To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated negligent acts.
 - (1) An initial negligent diagnosis followed by an act or omission medically appropriate for that negligent diagnosis of the patient shall constitute a single negligent act.
 - (2) When the standard of care requires a change in the diagnosis, act, or omission that constitutes the negligent act described in paragraph (1), including, but not limited to, a reevaluation of the diagnosis or a change in treatment, and the licensee's conduct departs from the applicable standard of care, each departure constitutes a separate and distinct breach of the standard of care.
- (d) **Incompetence.**

DEFINITION OF GROSS NEGLIGENCE

Gross negligence is defined as - “*the want of even scant care*” or an ***extreme departure*** from the Standard of Care. The difference between gross negligence and ordinary negligence is the degree of the departure from the Standard of Care.

DEFINITION OF SIMPLE DEPARTURE

The Legislature defined “**unprofessional conduct**” to include ***repeated negligent acts*** in Business and Professions Code section 2234, subdivision (b)(1).

A simple departure from the standard of care means “*the failure to use that level of skill, knowledge and care in diagnosis and treatment that other reasonably careful physicians would use practicing in the same or similar circumstances.*”

DEFINITION OF REPEATED NEGLIGENT ACTS (TWO OR MORE SIMPLE DEPARTURES)

Business and Profession Code section 2234, subdivision (c), indicates that to be *repeated*, there must be ***two or more*** negligent acts or omissions. Further, an initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated negligent acts.

- (1) An initial negligent diagnosis followed by an act or omission medically appropriate for that negligent diagnosis of the patient shall constitute a single negligent act.
- (2) When the standard of care requires a change in the diagnosis, act, or omission that constitutes the negligent act described in paragraph (1), including, but not limited to, a reevaluation of the diagnosis or a change in treatment, and the licensee's conduct departs from the applicable standard of care, each departure constitutes a separate and distinct breach of the standard of care.

DEFINITION OF INCOMPETENCE

The Legislature also enacted Business and Professions Code section 2234, subdivision (d), defining “unprofessional conduct” to include **Incompetence**.

Incompetence is defined as “*An absence of qualification, ability or fitness to perform a prescribed duty or function.*”

ELEMENTS OF EXPERT TESTIMONY

Evidence Code section 720, subdivision (a), permits expert testimony if the individual “*has special knowledge, skill, experience, training, or education sufficient to qualify them as an expert on the subject to which the testimony relates.*”

The standard of care of a physician is a question of fact that must be proven through expert witnesses. (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992.)

EXPERT OPINION FOUNDATIONS

An expert’s opinion may be rejected if the reasons given for it are unsound. (*Kaster v. Los Angeles Metropolitan Transit Authority* (1965) 63 Cal.2d 52.)

PATIENT MEDICAL CARE
OUTCOMES &
PHYSICIAN DISCIPLINARY
OUTCOMES

Patient medical care outcomes (harm or lack of harm) as well as the physician's disciplinary outcome after accusation (revocation, probation or reports to the National Practitioners Database) of the licensee are not *generally* relevant to the Standard of Care.

VIOLATIONS OF
LAWS AND REGULATIONS

In addition to Business and Professions Code section 2234, in some specific scenarios, the Legislature has enacted laws that establish the expectations of a medical provider, such as sexual abuse and misconduct, Business and Professions Code sections 726 and 729.

State agencies and Boards, like the Medical Board, may adopt, amend and repeal regulations which have the force of law, and legislate the applicable Standard of Care, such as the supervision of medical assistants.

BATTLE OF THE EXPERTS

The Standard of Care applicable to a medical professional (i.e., the custom and practice in the relevant Medical community) must be established by expert testimony.

Administrative Law Judges issue a proposed decision stating what side (prosecution or defense) presented the most convincing version of the Standard of Care.

MEDICAL BOARD IS THE DECISION MAKER

The Medical Board considers and votes on proposed decisions issued by Administrative Law Judges.

The Medical Board issues Final Decisions.