

MEDICAL BOARD STAFF REPORT

DATE REPORT ISSUED: April 6, 2017
 ATTENTION: Members, Medical Board of California
 SUBJECT: Interim Suspension Orders
 STAFF CONTACT: Christina Delp, Chief of Enforcement

REQUESTED ACTION:

This report is intended to provide the Members with an update on the strategies identified to expedite cases where an interim suspension order (ISO) should be sought. No action is needed at this time.

BACKGROUND:

At the May 7, 2015, Medical Board of California (Board) Meeting, the Members directed the Executive Director to work with the Office of the Attorney General's Health Quality Enforcement Section (HQES) and the Health Quality Investigation Unit (HQIU) to identify strategies to expedite cases where an ISO should be sought. After conducting a review of the handling of the ISOs, staff from the Board, HQES, and HQIU identified several improvements to expedite the investigation and issuance of an ISO. There were 14 improvements or policy changes that were identified (see below). Those improvements were discussed with the Members at the October 30, 2015 Board meeting. An update was provided at the July 29, 2016 Board meeting regarding the implementation of the improvements.

The Board continues to make the issuance of ISOs a priority to ensure licensees who practice medicine are not engaging in acts that endanger the public health, safety and welfare of California patients.

The following is a list of the improvements/policy changes that were identified. Numbers 2, 5, 7, 8, 9, 10, 12, 13, and 14 have been implemented by Board, HQES, and HQIU staff. The remaining five improvements are in process and further updates will be provided to Members at future meetings.

- 1) Expert training – for cases alleging physical or mental impairment, training needs to be provided to the Board's subject matter experts on report writing and clarity of reports. The reports need to specifically indicate whether the individual is safe to practice without any restrictions.
 HQIU staff discusses with the experts the need to provide a clear report when the complaint is assigned, specifically stressing to the expert the need to indicate in the report whether the individual is safe to practice with or without any restrictions. In the expert reviewer database, experts are listed by medical specialty. To identify experts in the database that execute physical and mental impairment evaluations, Board staff enhanced the database to categorize these experts so they are easily identifiable by Board, HQIU and HQES staff. Staff has also begun the development of an online training tutorial tailored for these experts that will supplement the primary expert reviewer training being provided to all experts.
- 2) If an expert report states that the individual needs to have restrictions in order to practice safely, an ISO should be considered to pursue an order instituting those restrictions.
 Both the HQES and the HQIU staff identify these cases upon receipt of the expert report and then pursue an ISO. This process is working effectively and ISOs are being sought.

- 3) Board monitoring of all investigation/prosecution cases – on a monthly basis, the Board needs to monitor cases that are at the HQES and at the HQIU to ensure all cases that could be an ISO are moving forward.
Breeze presently provides the capability (activity code) for Board staff to run reports that can be used to track cases at the HQES. This report is ran monthly. However, a new Breeze activity code that can be utilized by HQIU is required to run reports to ensure potential ISO cases in the field are moving forward. The Department of Consumer Affairs (DCA) Enforcement User Group has been alerted to this need and will submit a BreEZe change request to implement this improvement.
- 4) Close monitoring by the Board of the requirement in Business and Professions Code (BPC) section 2220(a) – BCP section 2220(a) specifically states that within 30 days of receipt of a BPC section 805 or 805.01 report, the Board must investigate the circumstances to determine if an ISO should be issued. A process needs to be in place for follow up by the Board with HQIU and the HQES to see if this determination is made in the required timeframe.
Enforcement staff maintains a log of 805 or 805.01 reports and contacts the HQIU within 30 days of receipt of a BCP section 805 or 805.01 report to determine if an ISO can be pursued. Enforcement staff began maintaining the log of reports in September 2015. A review of the data from September 1, 2015 to March 31, 2017, revealed that 168 reports were submitted to the Board and 23 were determined, within the 30 day timeframe, to be situations where an ISO should be pursued. In most circumstances, unless the information in the 805 or 805.01 report is straightforward, HQIU and HQES staff are unable to make a sound determination as to whether an ISO should be sought within the 30 day timeframe. As a result, the medical records and peer review investigation reports must be obtained to make further assessment. On average, it may take 90 days or longer to receive the required documentation when factoring in time to assign the case to an investigator, prepare and issue a subpoena for records, and wait for the facility to return the requested documentation. To reduce this timeframe, Enforcement staff will begin issuing administrative subpoenas to the facilities that submit the 805 and 805.01 reports to the Board. This improvement will not only reduce the timeframe to receive the necessary documentation, but will eliminate a task that the HQIU investigators must complete resulting in a reduction to the overall investigation timeframe. Enforcement staff will begin issuing subpoenas by May 2017.
- 5) Central Complaint Unit's (CCU) immediate transfer of BPC 805 and 805.01 reports – the Board's CCU will immediately transfer these reports via email to both the HQIU and HQES staff upon receipt in order to expedite the process.
Staff from the CCU immediately transfer these cases to the HQIU and the HQES.
- 6) The Board, HQIU, and HQES report reconciliation – Board, HQIU, and HQES staff will, on a monthly basis, reconcile reports for cases that have been referred to the Attorney General's HQES to request an ISO. This will ensure that cases that have been identified as ISO cases are actually prioritized by the Board, HQIU, and the HQES.
Board staff and staff from the HQES continue to meet to reconcile reports, including those cases that were transmitted for an ISO. The last reconciliation with HQES identified 13 cases transmitted to the HQES for the filing of an ISO and accusation. Until an activity code is created for HQIU staff to use to document potential ISO cases, reconciliation of this data cannot begin.

- 7) Request that the Office of Administrative Hearings (OAH) expedite ISO decisions and serve the Board, along with the Attorney General's Office, to ensure timely receipt of decisions where ISOs are issued or denied. In addition, when granting an ISO on an ex parte basis, the OAH should also issue the ISO immediately at the conclusion of the ex parte hearing, rather than taking the matter under submission, so that the physician can be immediately and personally served with the ISO before leaving the hearing. Taking such matters under submission, in order to prepare a detailed decision to be issued later is only appropriate at the conclusion of a noticed hearing on the ISO petition.

The OAH has been setting ISO cases in a timely manner. However, OAH stated that only the AGO would be served with the ISO decisions. In regard to OAH immediately issuing the ISO, OAH stated that a Deputy Attorney General representing the Board can request that the Administrative Law Judge (ALJ) issue an ex parte ISO at the conclusion of the hearing, but it is not always possible or appropriate for an ALJ to do so. OAH added that each case presents different facts and issues, and the ALJ may need to briefly take a matter under submission in order to reach a well-informed decision regarding whether an ex-parte ISO is legally and factually supported.

- 8) Recommend training to the OAH on impairment and how it impacts the practice of medicine. Such training could be provided by the Physician Assessment and Clinical Training Program (PACE) staff, if available.

In October and November 2016, PACE provided training to OAH on physician impairment, including how fitness for duty evaluations can measure impaired physicians.

- 9) Update the investigation report synopsis – HQIU will clearly identify in the case synopsis of a Report of Investigation that the case is being transmitted for an ISO and an Accusation.

The Board, HQIU, and the HQES changed the case disposition process and the decision to transmit the case for an ISO is clearly identified on the new case disposition form.

- 10) The Lead Prosecutor (LP) and the Supervising Investigator I should review each case immediately upon receipt and throughout the course of the investigation to determine if the case should be identified and handled as an ISO. In addition, during quarterly case reviews, both the LP and the Supervising Investigator I shall review all the cases to identify if there is a need to seek an ISO. Throughout the course of any investigation, the Deputy Attorney General and the Investigator shall alert their chain of command that the evidence has changed the matter to an ISO.

All complaints forwarded to the field for investigation are evaluated by the Supervising Investigator I and Lead Deputy Attorney General when the complaint is received to determine if it is a possible ISO case. Board staff work with HQIU and the HQES to ensure this is being completed. Additionally, during quarterly case reviews and throughout the investigation, the investigative team is constantly evaluating whether the facts of the case warrant the issuance of an ISO.

- 11) Add ISO cases to the Monthly Investigative Case Activity Report (MICAR) – adding these cases to the MICAR report will immediately inform the Senior Assistant Attorney General that a case is being transmitted for an ISO so that the case can be closely monitored.

The Board's Information Systems Branch is updating the MICAR report to include the capture of ISO data.

- 12) Any disagreement on whether a case should be processed as an ISO should be immediately placed into the dispute resolution process and follow the chain of command.
With the new vertical enforcement manual, the dispute resolution process is clearly delineated and is being used by both HQIU and AGO.
- 13) As soon as possible, establish a parallel criminal/administrative investigation policy and process for cases where HQIU designates a Board investigation as criminal. Providing for a parallel policy will help protect the Board's integrity in its investigation process when these dual pathways arise. Additionally, staff anticipates this policy will eliminate the need to wait for a criminal case to proceed through the criminal process before seeking an ISO (or a Penal Code section 23 Order). This may result in an investigator assigned to the criminal investigation and a separate investigator assigned to the administrative investigation. This would allow the investigations that have been designated as criminal by HQIU, which may also be ISO cases, to proceed in the administrative process if warranted by the evidence.
A policy was developed and approved by HQIU and AGO.
- 14) Create an activity code within the BreEZe system to identify a case as an ISO case for monitoring and statistics.
The DCA's Enforcement User Group (EUG) has been alerted to this need and will submit a BreEZe change request to implement this improvement.