



MEDICAL BOARD OF CALIFORNIA

Protecting consumers by advancing high quality, safe medical care.

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Gavin Newsom, Governor, State of California | Business, Consumer Services and Housing Agency | Department of Consumer Affairs

June 1, 2022

The Honorable Evan Low
California State Assembly
1021 O Street, Room 6110
Sacramento, CA 94249-0028

Re: AB 2098 (Low) – Support, if Amended Position

Dear Assemblymember Low:

During their meeting on May 19-20, 2022, the Medical Board of California (Board) adopted a Support, if Amended position on AB 2098, which establishes that the dissemination of “misinformation” or “disinformation” related to COVID-19 by a physician and surgeon constitutes unprofessional conduct, as defined.

The Board faces considerable challenges investigating cases involving a violation of the Medical Practice Act (MPA) related to COVID-19. Oftentimes, complaints received by the Board pertaining to COVID-19 are made by a member of the public and not the patient of the physician. In some COVID-19 related investigations, the Board is unable to identify any specific patients who have been treated by the physician in question. Without a patient’s name, it is impossible to obtain their consent for records and the Board will be unable to identify what patient records to seek in an investigative subpoena.

To help overcome this challenge that appears in various circumstances, the Board proposed amendments to the MPA in its 2020 Sunset Review Report¹ and in its 2022 legislative priorities memo² that would provide enhanced medical record inspection authority.

Under AB 2098, prior to filing an accusation on this subject, the Board “...shall consider both whether the licensee departed from the applicable standard of care and whether the misinformation or disinformation resulted in harm to patient health.” This language does not clearly state whether the Board is required to establish that the licensee in question both violated the standard of care and the misinformation or disinformation led to patient harm prior to bringing disciplinary action. Respondent physicians and their legal counsel, however, are expected to argue that this language requires the Board to meet both criteria prior to filing an accusation. Under existing law, the Board does not have to prove patient harm to impose discipline, so the language in AB 2098 could make the Board’s work in this area more difficult.

¹ See p. 212-215: <https://www.mbc.ca.gov/Download/Reports/sunset-report-2020.pdf>

² See p. 7: <https://www.mbc.ca.gov/Download/Documents/MBCLegislativeRequests-20220105.pdf>

Further, the definitions of “misinformation” and “disinformation” in the bill are key considerations for the Board’s implementation of AB 2098. The definition of “misinformation” is unclear and may lead to legal challenges following the imposition of discipline under this proposed law. If this occurs, the Board will have to use its financial resources, its staff time, and the staff time of the Attorney General’s Office to defend against such litigation. Further, the Board may face significant challenges proving the dissemination of “disinformation,” as it would be required to establish the physician’s intent. Under current law, to prove a violation of the standard of care, the intent of the licensee, generally, is not relevant.

Board Requested Amendments

Due to the above-described concerns, the Board requests the following amendments to AB 2098:

- Provide the Board enhanced authority to inspect medical records as indicated in the Board’s requests in its 2020 Sunset Review Report and 2022 legislative proposals memo.
- Strike subdivision (b) of the proposed Business and Professions Code section 2270. Given the construction of the rest of the section, this language is unnecessary to bring an action against a licensee.

Further, removing that language would provide the Board additional flexibility to pursue these types of cases and eliminate doubt whether the Board must establish both a violation of the standard of care and patient harm prior to bringing a disciplinary action.

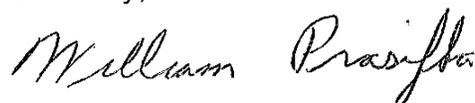
- Amend paragraph 3 of subdivision (c), as follows (new additions in *blue italics* and deletions in ~~red-strikeout~~):

“Misinformation” means false information that is contradicted by contemporary scientific consensus *contrary to the standard of care* ~~to an extent where its dissemination constitutes gross negligence by the licensee.~~

This amendment connects the potential violation to the standard of care, which is a well-established concept followed by the Board and related administrative entities involved in the disciplinary process.

Thank you for your consideration of these requested amendments. Please contact Aaron Bone, Chief of Legislation and Public Affairs, at (916) 274-6251 or via email at Aaron.Bone@mbc.ca.gov if you have any questions.

Sincerely,



William Prasifka
Executive Director

Assemblymember Evan Low: AB 2098 – Support, if Amended

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cc: Members, Senate Business, Professions and Economic Development
Sarah Mason, Senate Business, Professions and Economic Development Committee
Robert Sumner, Assembly Business and Professions Committee
Kayla Williams, Senate Republican Caucus
Mark Ito, Executive Director, Osteopathic Medical Board of California