MEDICAL BOARD STAFF REPORT

DATE REPORT ISSUED: November 4, 2021
ATTENTION: Members, Medical Board of California
SUBJECT: 2022 Legislative Proposals
STAFF CONTACT: Aaron Bone, Chief of Legislation and Public Affairs

REQUESTED ACTION:

To approve the proposed 2022 legislative proposals, as discussed below. Following approval from the Members of the Medical Board of California (Board), staff will contact the Legislature to seek authors for these proposals.

Background:

In 2020, the Board approved its Sunset Report, which contained multiple legislative proposals, some of which were addressed through SB 806 (see **Item 13.A.4.** for additional information). While SB 806 was being considered by the Legislature, the Board requested amendments to the bill that reflected additional Board priorities.

The following Board legislative proposals and requests were not included in the final version of SB 806:

*2020 Sunset Report Legislative Proposals*

- Adequate increase to physician and surgeon (P&S) fees (p. 206)
- Removal of the Board's two-to-four-month reserve requirement (p. 209)
- Tolling the statute of limitations for subpoena enforcement (p. 211)
- Enhanced medical record inspection authority (p. 212)
- Timely access to pharmacy records (p. 217)
- Establishing a licensed midwife board (p.217)
- Transfer research psychoanalyst program to the Board of Psychology (p. 218)

*Requested Amendments to SB 806*

- Public Board member majority
- Limiting letters of advice to minor violations "unrelated to fitness to practice"

Absent subsequent Board direction, the aforementioned items will remain legislative priorities for the Board.

***New Legislative Proposals - Enforcement***

**Change the Evidentiary Standard to Preponderance of Evidence**

In the case of Ettinger v. Board of Medical Quality Assurance (1982) 135 Cal.App.3d 853, 856, the appellate court held that "the proper standard of proof in an administrative

hearing to revoke or suspend a doctor's license should be clear and convincing proof to a reasonable certainty and not a mere preponderance of the evidence."

Board staff have reviewed the burden of proof required in administrative cases against physicians in other states and United States territories and have learned that 41 allopathic medical boards generally apply the preponderance of the evidence standard to prove their cases in administrative hearings. Thus, by using the higher standard of proof of clear and convincing evidence, California is out of step with most other states, making it more difficult, time consuming, and expensive to prosecute administrative cases here. The Legislature can set forth the burden of proof in disciplinary proceedings via statute, thereby making the Ettinger decision moot.

Suggested change in statute: Add a section to the Medical Practice Act stating preponderance of evidence is the standard of proof for the Board's disciplinary matters.

**Increase Wait Times for Disciplined Licensees to Petition the Board**

Pursuant to Business and Professions Code (BPC) section 2307, a disciplined licensee may petition the Board, under the following circumstances and timeframes:

- Revocation or surrender: After three years, may seek reinstatement of their license. In the revocation order, the Board may specify that a petition for reinstatement may be filed after two years.
    - After one year, may seek reinstatement if the license revoked or surrendered due to mental or physical illness.
- Probation: After two years, a licensee may seek early termination of a probationary period of three years or more.
    - After one year, may seek modification of a probation condition or termination of probation if the probationary period is less than three years.
- Repetitive Petitions: The Board may deny without hearing or argument any petition filed pursuant to BPC section 2307 within two years of the effective date of a decision related to a prior petition.

Whenever the Board receives a petition from a disciplined licensee, it must be evaluated by Board staff and the Attorney General's Office (AGO), as petitions are considered in a hearing before an administrative law judge, who writes a proposed decision. The associated legal and hearing expenses are born by the Board. For example, in Fiscal Year 2020-21, the Board spent more than $155,000 for AGO services litigating petitions for reinstatement, which is only a portion of the Board's total costs pertaining to these petitions (and does not include other types of petitions received by the Board).

Since July 2013, the Board has granted approximately 46 percent of the petitions requesting reinstatement of a physician's license. In Fiscal Year 2018-19 (the most

recent year with no pending petitions), the Board granted approximately 52 percent of the petitions for termination of probation and none of the petitions for modification for probation.

Suggested change in statute**:**

Option 1 – Considering the low petition approval rate and the associated costs, staff propose amending BPC section 2307, as follows:

- Revocation or surrender: After ~~three~~ *five* years, may seek reinstatement of their license. In the revocation order, the Board may specify that a petition for reinstatement may be filed after ~~two~~ *three* years.
    - Eliminate the option to petition after one year if the license was revoked or surrendered due to mental or physical illness.
- Probation: After two years, *or after more than half their probation term has elapsed, whichever is greater,* a licensee may seek early termination of probation.
    - Provide for the automatic rejection of a petition for early termination of probation if the Board files a petition to revoke probation while the petition is pending.
- Repetitive Petitions: The Board may deny without hearing or argument any petition filed pursuant to BPC section 2307 within ~~two~~ *three* years of the effective date of a decision related to a prior petition.

Option 2 – Add a section to the Medical Practice Act that authorizes the Board to establish an application fee for petitioners, not to exceed the Board's reasonable costs to process and adjudicate petitions for reinstatement, early termination of probation, or modification of probation.

**Require Earlier Exchange of Expert Testimony Information**

The use of expert testimony is foundational in disciplinary proceedings. Experts retained by the Board and licensees under investigation may conflict with one another, which may lead to a hearing before an administrative law judge. BPC section 2334 requires the Board and counsel for the licensee to exchange the following information related to expert testimony no later than 30 calendar days prior to the originally scheduled hearing date:

- A curriculum vitae setting forth the qualifications of the expert.
- A complete expert witness report, which must include the following:
    - A complete statement of all opinions the expert will express and the bases and reasons for each opinion.

- The facts or data considered by the expert in forming the opinions.
- Any exhibits that will be used to summarize or support the opinions.

- A representation that the expert has agreed to testify at the hearing.
- A statement of the expert's hourly and daily fee for providing testimony and for consulting with the party who retained their services.

Suggested change in statute: Depending upon the complexity of the case or other factors, 30 days may not be sufficient time to review this information and prepare for a hearing. Therefore, staff propose amending BPC section 2334 to require the exchange of this information no later than 90 calendar days prior to the first hearing. This change is expected to support the timely resolution of cases by reducing the number of delayed hearings, which may occur when counsel (for either side) requires more time to review expert witness reports.

**Mandate Additional Reports to the Board Regarding Physician Misconduct**

Current law[1] generally requires the filing of a report with the Board when a peer review body takes, or recommends, certain actions (e.g., change in staff privileges, termination of employment) against a P&S due to a "medical disciplinary cause or reason[2]" or other unprofessional conduct.

On June 18, 2018, the California State Senate Committee on Business, Professions, and Economic Development held a hearing entitled "Sexual Misconduct Reporting in the Medical Profession: Missed Opportunities to Protect Patients." Among other speakers, the committee heard testimony from a representative of the University of Southern California (USC) regarding the termination of the employment of George Tyndall, a former obstetrician and gynecologist at USC. The USC representative indicated that Tyndall was terminated from employment via a human resources process, rather than one that involved a peer review body. Therefore, USC had no obligation to report this termination to the Board. In September 2019, Tyndall surrendered his license to the Board, following the filing of an accusation involving sexual misconduct.

In 2019, the Legislature added BPC section 805.8, which mandates reporting, to the appropriate licensing entity, of patient (or their representative) complaints made to a health care facility or postsecondary educational institution that allege sexual misconduct by a healing arts licensee.

[1] See BPC sections 805 and 805.01.
[2] Definition: that aspect of a licensee's competence or professional conduct that is reasonably likely to be detrimental to patient safety or to the delivery of patient care.

These sections include substantial penalties for failure to meet the relevant reporting requirements. Taken together, these mandatory reports provide helpful, albeit incomplete reporting obligations to the Board regarding potential unprofessional conduct of licensees.

Suggested changes in statute:

- First, amend BPC section 805.8 to clarify that medical groups, health insurance providers, health care service plan providers, and locum tenens agencies are required to report complaints of alleged sexual misconduct to the appropriate licensing entity. This proposal would include additional health care organizations involved in the coordination and delivery of health care and that may become aware of alleged sexual misconduct.

- Second, add or amend a statute to require any organization that employs a P&S to report to the Board any employment-related discipline imposed (up to and including termination) due to a medical disciplinary cause or reason.

    - Similarly, require any organization that contracts with a P&S, or other organization (e.g., medical group or locum tenens provider) that provides P&S services, to report to the Board when a P&S is dismissed from service, or the contract is terminated, due to a medical disciplinary cause or reason.

**Require Patient Records to be Retained a Minimum of Seven Years**

BPC section 2266 requires a P&S to maintain adequate and accurate records relating to the provision of services to their patients. In essence, this requires a P&S to maintain records for a length of time that corresponds to the standard of care, rather than for a specific time.

BPC section 2230.5 generally requires the Board to file an accusation against a licensee within three years after the Board becomes aware of the alleged act or omission or seven years of when the alleged act or omission occurred, whichever is sooner.

Suggested change in statute: Amend BPC section 2266 to require that adequate and accurate records be maintained for at least a seven-year period after the last date of service to a patient.

**Provide Access to Personal Records Contained within MBC Enforcement Files**

The law generally provides that the Board's enforcement files (including records and data gathered during an investigation) are confidential and may not be released to the

public. Despite this requirement, the law states that the Board shall publish accusations, disciplinary orders, and other information[3] about its licensees on the Board's website.

From time-to-time, the Board receives requests from consumers seeking a copy of their medical records, and related personal information, obtained by the Board during an investigation. The Board produces copies of documents exchanged between the consumer and the Board, but not documents that the Board obtained from other sources as part of the investigation.

Suggested change in statute: Amend BPC section 800 (c) to authorize the Board to provide to a consumer a copy of their personal records obtained during a board investigation, and maintained in the Board's central, investigative, or disciplinary file, within 30 days upon request after paying an appropriate fee, if any, for duplication of the records. The amended statute would refer to the definitions of "consumer" and "personal records" as set forth in Code of Civil Procedure section 1985.3, subdivision (a).

***New Legislative Proposals – Licensing***

In the final days of the Legislature's session and following the approval of SB 806, staff have identified certain matters the Board may wish to clarify through subsequent legislation:

- Clarify that P&S applicants are not limited to attending postgraduate training (PGT) in California[4].
- Clarify that P&S applicants who obtained some PGT training in another state or Canada and are accepted into a PGT program in California must obtain their license within 90 days of beginning their program, regardless of where they attended medical school[5].
- Clarify that the Board may grant a one-time, 60-day extension of the initial expiration date for a P&S licensee. This would facilitate the initial license renewal process when the licensee must show satisfactory evidence of the completion of 36 months of PGT.
- Clarify the following requirements for P&S applicants who participated in an oral and maxillofacial surgery training program[6]:

[3] See BPC section 2027.
[4] See BPC section 2096(a) and (c), as amended by SB 806.
[5] See BPC section 2065(g), as amended by SB 806.
[6] See BPC section 2096(c), as amended by SB 806.

- Must obtain 12- or 24-months credit in a Board-approved PGT program to receive their initial license.
- Must obtain 24-months credit in a combined dental and medical degree program accredited by the Commission on Dental Accreditation (or approved by the Board) prior to their initial license renewal.