



# MEDICAL BOARD OF CALIFORNIA



## ENFORCEMENT COMMITTEE

Embassy Suites San Francisco Airport  
Mendocino & Burlingame  
150 Anza Boulevard  
Burlingame, CA 94010

January 31, 2013

## MINUTES

*Due to timing for invited guests to provide their presentations, the agenda items below are listed in the order they were presented.*

### **Agenda Item 1      Call to Order / Roll Call**

Dr. Low called the Enforcement Committee meeting to order on January 31, 2013 at 1:15 p.m. A quorum was present and notice had been sent to interested parties.

### **Members Present:**

Reginald Low, M.D., Chairman  
Dev GnanaDev, M.D.  
Sharon Levine, M.D.  
Ms. Barbara Yaroslavsky

### **Members Absent:**

David Serrano Sewell, J.D.

### **Staff Present:**

Douglas Becker, Investigator  
Susan Cady, Enforcement Manager  
Dianne Dobbs, Department of Consumer Affairs, Legal Counsel  
Tim Einer, Administrative Assistant  
Kurt Heppler, Staff Counsel  
Todd Iriyama, Investigator  
Kimberly Kirchmeyer, Deputy Director  
Natalie Lowe, Licensing Manager  
Armando Melendez, Business Services Analyst  
Regina Rao, Business Services Analyst  
Kevin Schunke, Outreach Manager  
Jennifer Simoes, Chief of Legislation  
Melinda Sundt, Investigator  
Laura Sweet, Deputy Chief of Enforcement  
Renee Threadgill, Chief of Enforcement  
Lisa Toof, Administrative Assistant  
Tracy Tu, Investigator  
Linda Whitney, Executive Director  
Curt Worden, Chief of Licensing

**Members of the Audience:**

Teresa Anderson, California Academy of Physician Assistants  
G.V. Ayers, Consultant, Senate Business, Professions, and Economic Development Committee  
Steve Cattolica, California Society of Physical Medicine and Rehabilitation  
Yvonne Choong, California Medical Association (CMA)  
Zennie Coughlin, Kaiser Permanente  
Kristen Chambers, Kaiser Permanente  
Hank Dempsey, Chief Consultant, Assembly Business, Professions and Consumer Protection Committee  
Karen Ehrlich, L.M., Midwifery Advisory Council  
Julie D'Angelo Fellmeth, Center for Public Interest Law (CPIL)  
Jack French, Consumers Union CA Safe Patient Network  
Doreathea Johnson, Deputy Director for Legal Affairs, Department of Consumer Affairs  
Terry Jones, Supervising Deputy Attorney, Office of the Attorney General  
Tina Minasian, Consumers Union CA Safe Patient Network

**Agenda Item 2      Public Comments on Items Not on the Agenda**

Steve Cattolica, Director of Government Relations for the California Society of Physical Medicine and Rehabilitation, the California Neurology Society and the California Society for Industrial Medicine and Surgery stated that since 2008 their clients have introduced legislation that would establish that utilization review physicians must be licensed in California before providing such reviews. Utilization review decisions made in the vacuum of accountability present a problem of growing proportions. His organization requests that the Medical Board of California (Board) place the issue of utilization review as a practice of medicine and the Board's jurisdiction over licensed utilization review physicians on the agenda for the next meeting.

Yvonne Choong, CMA, requested that the issue of utilization review and the Board's jurisdiction be placed on the next agenda for the Enforcement Committee and the full Board meeting. The CMA agrees with the Board's previous position that a decision to delay, modify or deny medical treatment is the practice of medicine and that the Board has jurisdiction over this act. Ms. Choong indicated that the CMA would like know more about how the Board intends to enforce this position. CMA sees this as three issues that need clarification: 1) whether the Board believes it is the practice of medicine, 2) whether the Board has jurisdiction and 3) what policy or resource changes would need to be made in order to provide the resources that would allow the Board to fully investigate these types of violations.

**Agenda Item 3      Approval of Minutes from the July 19, 2012 Meeting**

*Dr. Gnanadev made a motion to approve the minutes from the July 2012 meeting; s/Dr. Salomonson; motion carried.*

**Agenda Item 4      Update on the Expert Reviewer Training**

Laura Sweet stated the second Expert Reviewer Training was scheduled to be held Saturday, February 9, 2013 at University of California – Irvine. She stated the response from this training has been overwhelming. The Board has made modifications to the training and have allocated two additional continuing medical education credits for a total of ten credits for each participant. At this training the expert reviewers are going to be preparing a sample expert opinion that will be graded. Teams that consist of a Supervising Deputy Attorney General, Supervising Investigator II, and a Medical Consultant will grade the actual opinions to make certain that the training is effective.

Ms. Yaroslavsky questioned the make-up of the experts who are attending. She questioned whether they are current experts, Board experts, or are they people that want to become experts.

Ms. Sweet responded that the attendees are current experts in the Board's Expert Reviewer program.

Ms. Yaroslavsky asked if the training might become a requirement in order to be an expert reviewer for the Medical Board.

Ms. Sweet stated that would be ideal.

#### **Agenda Item 5            Central Complaint Unit Progress Report**

Susan Cady stated that the Central Complaint Unit (CCU) had identified goals for improving case aging. She pointed out that previously it took on average 80 days to process a complaint; however, by focusing on shorter time frames to obtain an initial medical consultant review, the average number of days has been reduced by 20. In addition, consultants have been added which helps reduce the time in assigning a case and therefore, the number of days that a case is pending prior to assignment to a consultant has been reduced from 30 days to 7 days. Additionally, no more than two cases are assigned to each consultant which allows for a faster turnaround. The staff also does a follow-up to confirm that the consultants are on track to complete the case within the 30 day timeline. A medical transcription service has been contracted and the amount of time required for case initiation has been reduced from ten to five days. The managers in the CCU continue to monitor the status of ongoing cases to ensure that any obstacles are identified and addressed quickly which has allowed the Board to significantly reduce the average case aging time and meet the goals set in the strategic plan.

Dr. GnanaDev questioned the need for 30 days for the medical consultant to respond.

Ms. Cady responded that sometimes the Board has difficulty finding experts in particular practice specialties and that allowing up to 30 days allows the cases to keep moving. She pointed out that most consultants do not use the 30 days to conduct the review.

Dr. Low suggested that the time line be shortened to two weeks.

#### **Agenda Item 6            SB 1441 Uniform Standards Implementation**

Ms. Cady explained that SB 1441 required the Department of Consumer Affairs (DCA) to establish Uniform Standards regarding substance abusing licensees. She continued that within those uniform standards they focus mainly on two main areas, intake and how licensees are monitored as they come into probation and compliance. Ms. Cady directed the Committee Members to a chart in the Committee packet outlining the Uniform Standards and the Board's implementation.

Uniform standard number one states that the licensees must undergo a clinical diagnostic evaluation and must comply with any recommendations for treatment or restriction. Under the Board's current disciplinary guidelines, when a physician is placed on probation for a substance abuse issue, usually a psychiatric evaluation and a medical evaluation are ordered. These conditions can be ordered as a precedent condition, which means the physician will be suspended from practicing until these evaluations have been completed. This is consistent with the standard developed by the DCA.

The Probation Unit uses experts that have addiction medicine specialties or expertise to perform their initial assessments. The Board's standard language also allows the Board to order another evaluation whenever deemed necessary which is consistent with DCA's guidelines.

Ms. Cady pointed out that at least half of the standards in SB 1441 pertained to boards with an existing diversion program, which the Board does not have. The remaining standards are substantially covered in the Board's disciplinary guidelines for physicians who are placed on probation. Standards 2, 4, and 8 through 10 focus on monitoring for compliance and biological fluid testing. Biological fluid testing is started as soon as the physician is placed on probation and the probation unit uses the testing frequency recommended by DCA in Standard 4. If a physician tests positive for a "banned" substance, the Board has the authority to issue a cease practice order for 15 days which is consistent with Standard 8. DCA's Standards 9 and 10 address the penalty that should be contemplated for a positive test. The Board has opted to refer the matter for a formal investigation to determine if an Interim Suspension Order (ISO) or subsequent disciplinary action is warranted when this occurs.

Ms. Yaroslavsky asked for clarification of the process and the allotted timeframe.

Ms. Cady explained that one circumstance that could arise during probation might be that the physician is required to call in daily to the First Lab if they are required to have biological fluid testing. The Board is able to check daily to determine if the licensee has called in and can check on the reason for them not reporting which allows a quick response in terms of missed calls. She also pointed out that if there is a positive test result, the Board would need to check to see if it is related to the physician's lawful prescription. If there is no explanation for the positive test, the Board initiates a case and will send it out for investigation immediately.

Ms. Yaroslavsky asked for clarity regarding the disciplinary guidelines. She wanted to know the time frame for obtaining the medical and psychiatric evaluation and whether the Board designates the evaluator.

Ms. Cady stated that all the time frames for all of these conditions are in the disciplinary guidelines. Typically the evaluation has to be done within the first 30 days of probation.

Dr. GnanaDev questioned the guidelines from DCA that the licensee must cease practice and obtain another clinical evaluation and wanted to know how often does the Board use the cease practice order.

Ms. Cady stated the disciplinary guidelines allow the Board to issue a cease practice order and the time frames are identified in the disciplinary guidelines. A cease practice order can be issued for 15 days and after that it is similar to the timeframe for an ISO, in that there must be an investigation, and the Board must be prepared to file an Accusation within 15 days of the issuance and go to hearing within 30 days from a request for a hearing. If the Board does not file an Accusation within 15 days, then the cease practice order is dissolved and then the Board would need to file an ISO to keep the physician from practicing. The Board does try to rule out any false positives before it takes the steps necessary to remove a physician from practice.

Ms. Yaroslavsky asked for number of cease practice orders that have been issued and if any ISOs were also issued.

Ms. Cady replied that the disciplinary guidelines that authorize the cease practice just went into effect

January 1, 2012. Ms. Cady stated that to the best of her knowledge the Board has not issued any cease practice orders based solely on a positive test yet.

Public comment was received for this agenda item.

Tina Minasian, Consumers Union Safe Patient Project, stated that substance abusing physicians pose a significant risk to patients, who typically are unaware of the physician's problem. When these issues come before the Board, the matter should be addressed through a comprehensive and predictable process that is publicly transparent and has integrity. In 2008 the Legislature passed and the Governor signed SB 1441 establishing a Substance Abuse Coordination Committee (SACC) within the DCA. In April 2011 the committee finalized the SB 1441 uniform standards regarding substance abusing healing arts licensees. These uniform standards are to be used by all of DCA's healing arts boards in addressing substance abusing providers. The Legislative Counsel, the Office of the Attorney General, and the DCA each issued opinions unequivocally stating that the standards are mandatory. The standards must be used by the healing arts boards. Ms. Minasian stated that despite this the Board has not yet adopted all of the uniform standards.

Ms. Minasian stated SB 1441 was explicit that these are uniform standards and the lack of diversion programs is not an acceptable excuse for not implementing the standards. It is not within the discretion of the Board to fail to implement the uniform standards. The following are some examples of the requirements in the uniform standards that Ms. Minasian believed are important but do not find in the Board's adopted guidelines. Uniform Standard 2 states that while awaiting results of a diagnostic evaluation the licensee be randomly tested at least two times per week and that a licensee cannot return to practice until he or she has at least 30 days of negative drug testing. Uniform Standard 4 states that when the licensee is on probation, a minimum range of random testing is required of 52-104 times in the first year of probation and 36-104 in the second year and each year thereafter. In addition, this standard states that the licensee make daily contact to determine whether drug testing is required, requires specific training or certification for specimen collectors and that collectors adhere to US Department of Transportation Specimen Collection guidelines, and that laboratories be certified and accredited by the US Department of Health and Human Services.

Ms. Minasian urged the Board to comply with the requirements of SB 1441 and to implement the full uniform standards immediately.

Julie D'Angelo Fellmeth, CPIL, agreed with Ms. Minasian and stated despite what the chart appears to indicate the Board has not properly implemented the Uniform Standards. She explained that Business and Professions Code Section 315 required each healing arts board to use the Uniform Standards in dealing with substance abusing licensees, whether or not a board chooses to have a formal diversion program. She stated the Board's approval of the regulations for the Board's disciplinary guidelines occurred in January 2011 before the Uniform Standards were even finalized in April 2011. Therefore, the full and correct version of the Uniform Standards was not approved and section 1361 of Title 16 of the California Code of Regulations only refers to the Board's disciplinary guidelines that are discretionary. Ms. Fellmeth stated the language does not refer to the Uniform Standards and no Board regulation refers to or incorporates the full Uniform Standards. Section 1361 says that deviation from disciplinary guidelines is appropriate in the discretion of the Board, which is true for the disciplinary

guidelines, but it is not true for the Uniform Standards and three different legal opinions state they must be used.

Ms. Fellmeth added the DCA Director directed all boards to adopt a regulation that clearly requires each board to use the Uniform Standards in mandatory fashion when dealing with a substance abusing licensees. In addition, the regulations requiring use of the Uniform Standards in substance abuse cases should be separate from the Board's disciplinary guidelines regulations. Lastly, Ms. Fellmeth stated the Board has neither adopted such a regulation nor properly incorporated into its disciplinary guidelines all of the Uniform Standards required to use when dealing with substance abusing licensees. SB 1441 applies to all healing arts boards regardless of whether they have a formal diversion program for substance abusing licensees or not.

Ms. Fellmeth urged the Board to initiate a rule making process to adopt a new regulation, separate and apart from the discretionary disciplinary guidelines regulations requiring the SB1441 Uniform Standards in substance abuse cases.

Doreathea Johnson, Chief Counsel and Deputy Director for Legal Affairs at DCA stated she wanted to reiterate what was stated by the two previous speakers. The DCA agrees with respect to the fact that the implementation plan that has been proposed to the Enforcement Committee of the Board did not take into consideration the mandate that was placed on the DCA and on each of the healing arts boards. The SB 1441 standards apply to all of the boards and the implementation plan that has been proposed does not take that into consideration. Ms. Johnson stated there was a great deal of confusion at the inception of this implementation and the passage of SB 1441. In an effort to mitigate that confusion a request for a legal opinion was requested of both the Legislative Counsel and the Attorney General's Office. The opinions were consistent to the extent they said it was mandated that the Uniform Standards be applied across all boards uniformly. This uniform application has not been done by the Board. The DCA understands the Board took action with regards to the disciplinary guidelines prior to the completion of the process by the SACC, but there was an expectation that the Board would go back and amend its disciplinary guidelines and regulations to fully implemented the SB 1441 Uniform Standards. Ms. Johnson requested that this matter be referred back to the Enforcement Committee so that it can promulgate regulations that fully implement the standards set forth in SB 1441.

**Agenda Item 7          Update on Outreach Proposal to Medical Societies**

No discussion occurred on this agenda item and the matter was tabled.

**Agenda Item 8          Agenda Items for the April 2013 Meeting**

Dr. Low requested the utilization review issue and the Board's compliance with SB1441 be on the next agenda.

Ms. Yaroslavsky requested an explanation as to how experts are assigned to a case and how Board staff matches the specialty to the case.

Dr. Low requested not only a discussion on assigning expert reviewers, but also the medical consultant and the entire process.

Ms. Yaroslavsky requested that a discussion be held as identified in the Board's Strategic Plan on the current laws and their relevance to the practice of medicine in today's atmosphere. She believes that some laws may be outdated or need amending.

Dr. Low stated he believe this is beyond the scope of the Enforcement Committee.

Ms. Yaroslavsky wanted to know how the Board interprets the priority that is set up in legislation on the deployment of resources.

**Agenda Item 9          Adjournment**

There being no further business, the meeting was adjourned at 2:31 p.m.

The full meeting can be viewed at:

<http://www.youtube.com/watch?v=GN2PzUgpFMQ&list=PL6Up7Y6dOLoq7KBLYiat7q5d6uyhCVfob&index=1>