

April 1, 2013

Sharon Levine, M.D., President  
Medical Board of California  
2005 Evergreen Street, Suite 1200  
Sacramento, CA 95815

Dear Dr. Levine:

As the respective Chairs of the Senate Business, Professions and Economic Development, and the Assembly Business, Professions and Consumer Protection Committees (Committees), we are writing to you regarding the sunset of the Medical Board of California (MBC).

Enforcement issues with the MBC have been a strong focus of the California Legislature for a number of years. Consumer groups have criticized the Board for its failure to protect patients from overprescribing doctors. The media has also raised serious questions about the consumer protection performance of the MBC in protecting consumers from dangerous physicians.

In the Joint Oversight Hearing on March 11, we heard testimony from the MBC in response to the issues raised in the background paper prepared by committee staff. We further wait with anticipation the MBC's written response to all of the issues raised in the background paper within 30 days of the March 11, hearing.

We are writing this letter to emphasize to you the critical importance of addressing the following issues raised in the sunset oversight hearing:

- 1. Enforcement program shortfalls.** The enforcement program shortfalls raised in the background paper that were noted in the 2012 *Los Angeles Times* articles, point to instances in which medical doctors continued to practice and prescribe medication to patients when multiple patients of the doctor had died of an overdose of drugs prescribed by the doctor. When the MBC finds such issues, it is imperative that they take swift and certain action to protect consumers.

In addressing this issue the MBC indicated that a complaint must be filed in order for the MBC to initiate action, and that the MBC does not have authority to take proactive action in enforcement cases. While the MBC's staff indicated following the hearing that the assertion was a misstatement of the Board's authority, we note for

the record that Business and Professions Code (BPC) Section 2220 (a) authorizes the MBC to Investigate complaints against a physician and surgeon “from the public, from other licensees, from health care facilities, or from the MBC.” This unequivocally authorizes the MBC to initiate complaints against a physician. Clearly, the MBC is not prohibited from taking a proactive approach to enforcement.

- 2. Vertical Enforcement Prosecution.** The MBC has indicated its support for the continuation of vertical enforcement prosecution (VE), and has even suggested that VE no longer be considered a pilot program. Even though progress has been made in improving investigations and prosecution of disciplinary cases involving physicians and surgeons under VE over the last 6 years, there still is a long way to go to ensure the public is well protected. However in the hearing the MBC recommended against revisiting the proposal to move the investigators from the MBC to the Department of Justice, as was initially proposed in SB 231 in 2005 which authorized the VE program.

In 2005, the MBC supported SB 231, and in its support of the bill even wrote arguing in favor of VE stating that the model “that combines investigators and prosecutors into a single agency, is time-tested and used by prosecutorial agencies at all levels of government.” It is now curious that the MBC now would recommend against moving investigators to the Department of Justice. It would seem that with the concerns noted with the Board’s enforcement program, that strong consideration should be given to taking steps to further align MBC’s investigators with prosecutors.

- 3. Adoption of Uniform Substance Abuse Standards.** The MBC has not adopted all of the Uniform Standards developed by the DCA’s Substance Abuse Coordination Committee. The Legislature enacted SB 1441 in 2008 to establish within the DCA a Substance Abuse Coordination Committee (SACC) to develop uniform standards and controls for healing arts programs dealing with licensees with substance abuse problems. SB 1441 required each healing arts board within the DCA to use the uniform standards developed by SACC regardless of whether the MBC has a formal diversion program.

The MBC has not yet adopted the Uniform Standards. MBC’s staff previously indicated that as many as half of the sixteen standards did not apply to the MBC, and should not be adopted since they specifically reference a diversion program or elements typically found in a diversion program and the MBC’s diversion program was terminated in 2007. The MBC needs to adopt the Uniform Standards as required by SB 1441 in order to protect patients in California.

- 4. Consumer Protection Enforcement Initiative (CPEI) Positions.** In order to reduce the length of time for health regulatory and enforcement boards to discipline licensees who are in violation of the law, in 2010, the DCA launched the CPEI to overhaul the enforcement process of healing arts boards. CPEI is intended to be a

systematic approach designed to ultimately to reduce the average enforcement completion timeline to between 12 -18 months. In Fiscal Year 2010-11, DCA requested an increase of 106.8 authorized positions and \$12,690,000 (special funds), and 138.5 positions and \$14,103,000 in FY 2011-12 and ongoing to specified healing arts boards for purposes of funding the CPEI. As part of CPEI, the MBC was authorized to hire 22.5 positions, including 20.5 (non-sworn) special investigators and 2 supervisors/managers. 2.5 of those positions were allocated for other boards for which MBC performs investigations, and the positions were transferred to those boards. Of the remaining positions, 2 were filled – a manager and an analyst in its CCU, leaving the MBC with 18 unfilled CPEI positions. Although the ability to fill these positions has been aggravated by the statewide budget crisis, workforce cap position reductions, statewide hiring freeze, elimination of positions due to a statewide mandate for a 5% salary saving reductions, the MBC was given authorization in October 2010 to move forward with hiring these positions.

It appears that the MBC has been resistant to hiring the non-sworn investigator positions. It is troubling that MBC has not done more to fill these positions. Clearly in approving the positions to reduce enforcement timeframes, the Legislature expected that the boards would immediately fill these positions once approved by the Administration. Considering some of the major enforcement problems which have been identified regarding this Board and a number of those problems being directly related to staffing issues, it seems completely inappropriate that the MBC would delay for any reason hiring the approved investigator positions. The MBC needs to take immediate action to fill the CPEI positions as approved by in the BCP.

- 5. Oversight of surgical clinics.** In 2011, SB 100 (Price) established greater oversight and regulation of surgical clinics, and other types of clinics such as fertility and outpatient settings, and to ensure that quality of care standards are in place at these clinics and checked by the appropriate credentialing agency. The requirements placed upon the MBC regarding these outpatient settings include:
- (1) Adopt regulations regarding the appropriate level of physician availability needed within clinics or other settings using laser or intense pulse light devices for elective cosmetic procedures.
  - (2) Adopt standards that it deems necessary for outpatient settings that offer in vitro fertilization.
  - (3) Adopt regulations MBC deems necessary to specify procedures that should be performed in an accredited outpatient setting for facilities or clinics that are outside the definition of outpatient setting.
  - (4) Outpatient settings are also subject to specified penalties for failure to make required reports about certain adverse events.
  - (5) The MBC must also obtain and maintain a list of accredited outpatient settings on its internet website that includes specified information.

It is still unclear to what extent the MBC has fully implemented these requirements. While the MBC has recently improved some of its offerings on its website, it does not appear to have all the required information, and does not appear to have the ability

to cross reference disciplinary actions against physician owners of the accredited outpatient settings.

- 6. Stipulated settlements below the Disciplinary Guidelines.** The background paper noted the October 2012, an investigative report by the *Orange County Register (Register)* that from July 2008 to June 2011, the MBC settled a number of cases with disciplined physicians for penalties or conditions which were below the MBC's own Disciplinary Guideline standards. In the negotiated settlements, which were the focus of the investigation, the *Register* found 62 of 76 cases in which patients had been killed or permanently injured and had negotiated settlements with physicians. According to the *Register*, 63% of those cases were settled for penalties below the MBC's own minimum recommendations under its Disciplinary Guidelines.

The background paper further asked the MBC to discuss its policies regarding stipulated settlements and the reasons why it would settle a disciplinary case for terms less than those stated in the MBC's Disciplinary Guidelines. Ultimately the MBC indicated that it believes that no change in policy regarding reviewing and approving stipulated settlements is in order. We strongly urge you to reconsider this position, and conduct a more comprehensive evaluation of the penalties agreed to in the settlement of disciplinary cases. While stipulated settlements are often an effective way to resolve a case, when the greater amount of cases are settled for less than the MBC's disciplinary guidelines, it brings into question the consumer protection rationale for such settlements. While there may be factors that cause the discipline to vary from the guidelines, they should be clearly identified in order to ensure that the interest of justice and consumer protection is being served.

- 7. Use of Interim Suspension Authority.** Government Code § 11529 authorizes the administrative law judge of the Medical Quality Hearing Panel in the Office of Administrative Hearings to issue an interim order suspending a license of a physician, or imposing drug testing, continuing education, supervision of procedures, or other license restrictions. This interim suspension order (ISO) authority was the first of its kind for DCA's regulatory boards, being established in 1990. This provision was intended to immediately halt the practice of very dangerous physicians in egregious cases.

A number of the recent newspaper articles critical of the MBC's enforcement practices have highlighted the time it takes to remove a dangerous doctor from practice. Enforcement statistics from the MBC's sunset report show that for the last 3 fiscal years, an average of 23 ISOs or temporary restraining orders (TRO) have been issued. In 2004, the MBC Enforcement Monitor's Initial Report also noted a troubling decline in the use of its ISO authority. In the hearing the Board noted that it sought 36 ISOs in FY 2011/12 and was granted 28 ISOs.

Clearly it is troubling that the Board does not seek more ISOs, given the great

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potential for consumer harm in cases where dangerous doctors continue to practice while the MBC investigates and develops a disciplinary case. At the hearing, instead of exploring ways to enhance its ISO abilities to stop dangerous physicians, the MBC rather seemed more interested in defending the number of ISOs it has recently pursued.

Ultimately, we call upon the Medical Board of California to take a more proactive approach to its consumer protection mission in the areas above. Until such a time as we receive firm commitments from the MBC which shows significant progress in these areas, the sunset extensions for the Medical Board of California (BPC § 2001) and for the Board's executive director (BPC § 2020) will be removed from the sunset legislation.

The consumers of California deserve a proactive Medical Board that places patient protection and interests first ahead of physician interests.

Sincerely,

Senator Curren D. Price, Jr.  
Chair, Senate Business, Professions and Economic Development Committee

Assemblyman Richard S. Gordon  
Chair, Assembly Business, Professions and Consumer Protection Committee

Cc: Ana Matosantos, Director, Department of Finance  
Lark Park, Deputy Legislative Secretary, Governor's Office  
Ana Caballero, Secretary of the State and Consumer Services Agency  
Denise Brown, Director, Department of Consumer Affairs