

Board of Podiatric Medicine

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The Board of Podiatric Medicine (BPM) regulates the practice of podiatry in California pursuant to Business and Professions Code section 2460 *et seq.* and Article 12 of the Medical Practice Act (Business and Professions Code section 2220 *et seq.*). BPM's regulations appear in Division 13.9, Title 16 of the California Code of Regulations (CCR).

The mission of the Board of Podiatric Medicine is to ensure the protection of consumers through proper use of the licensing and enforcement authorities delegated to it by the legislature. BPM is a consumer protection agency within the Department of Consumer Affairs (DCA) and its Medical Board of California (MBC). BPM consists of four licensed podiatrists and three public members.

The Board licenses doctors of podiatric medicine (DPMs), administers two licensing tests per year, approves colleges of podiatric medicine, and enforces professional standards by initiating investigations and taking disciplinary action where appropriate. In this regard, BPM—through its use of Medical Board enforcement staff—receives and evaluates complaints and reports of misconduct and negligence against DPMs; investigates them where there is reason to suspect a violation of the Medical Practice Act, BPM's enabling act, or BPM's regulations; files charges against alleged violators; and prosecutes the charges at an evidentiary hearing before an administrative law judge (ALJ) from the special Medical Quality Hearing Panel within the Office of Administrative Hearings. In enforcement actions, BPM is represented by legal counsel from the Health Quality Enforcement Section (HQES) of the Attorney General's Office. Created in 1991, HQES is a unit of deputy attorneys general who specialize in medical discipline cases. Following the hearing, BPM reviews the ALJ's proposed decision and takes final disciplinary action to revoke, suspend, or restrict the license or take other appropriate administrative action.

MAJOR PROJECTS

Temporary Fee Increase Alleviates BPM's Fiscal Crisis

With the eleventh-hour amendment and passage of AB 1252 (Wildman), BPM's fiscal crisis has abated—at least temporarily. From January 1, 2000 through January 1, 2002, AB 1252 increases the biennial license renewal fee for podiatrists from \$800 to \$900; effective January 1, 2002, the biennial fee will revert back to \$800. BPM is funded completely by licensing fees, and is required to maintain sufficient revenue for the current fiscal year plus three

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months' worth of operating expenses. Recent budget analyses and projections indicated a declining reserve fund and an overall precarious financial position for the Board. The fee increase was necessary to counter declining revenue due to a 12% decrease in license renewals over the past decade, and soaring enforcement costs caused primarily by one licensee (see LITIGATION).

Proposed licensing fee increases are not popular in the legislature; some legislators refuse to consider them unless the regulated trade association "signs off" on them. This practice presented problems for BPM, because the California Podiatric Medical Association (CPMA) initially expressed opposition to the proposed increase. [16:2 CRLR 57] However, over the summer, BPM and CPMA negotiated an agreement for a temporary increase with an automatic sunset after two years; BPM argued that the only alternative to a fee increase might be merger of the Board into the Medical Board of California, of which it is now a part. Rather than permitting podiatrists to be regulated by physicians, CPMA agreed to the temporary increase and even amended the provision into AB 1252, a bill it was sponsoring, on August 24.

Board to Reevaluate Citation and Fine Process

At its November 5 meeting, the Board is scheduled to discuss a request by public member Joe Girard that BPM's system for issuing citations and fines to licensees be revised. Under Business and Professions Code section 125.9, BPM may adopt regulations establishing a system whereby licensees may be issued citations, fines, and/or orders of abatement in disciplinary cases where the cost and delay of a full-blown disciplinary hearing are not justified. To implement section 125.9, BPM has adopted section 1399.696, Title 16 of the CCR, which establishes the Board's citation and fine system and sets forth the statutory and regulatory sections whose violation justifies a citation and/or fine. Section 1399.696 authorizes BPM's Executive Officer (EO) to issue citations containing orders of abatement and fines for violations by a licensed DPM of the provisions of law referred to within the section. Currently, the EO's decisions to issue citations and fines are not reviewed or ratified by the Board or any member of the Board; the regulation permits the EO to act autonomously.

Over the past few months, defense counsel for embattled BPM licensee Garey Lee Weber (see LITIGATION) has

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argued that Board members should participate in decisions to issue citations and fines. Attorney Matthew Rifat represents Weber and a number of other podiatrists who have been cited or disciplined by the Board, and has written letters to Board members suggesting "abusive enforcement by the Board of Podiatric Medicine's staff" and expressing "serious concerns relating to the excessive use of citation and fine authority by the Board's Executive Officer." Rifat suggests that BPM members should oversee the Board's enforcement program more closely and participate in citation and fine decisions.

In preparation for the November 5 discussion, BPM staff solicited comment on Rifat's proposal from its legal counsel and other knowledgeable parties. DCA attorney Bob Miller reported that—to his knowledge—only one DCA board has created a committee of board members that issues citations and fines for one type of minor violation. Medical Board Enforcement Chief John Lancara noted that Medical Board members are not involved in citation and fine decisions, noting that "the whole purpose [of the citation and fine system] is to promote efficiency and expediency, which is defeated when member review becomes part of the process."

BPM also consulted with the Center for Public Interest Law (CPIL), which has been monitoring DCA agencies for twenty years. CPIL opposed the change proposed by Rifat, noting that BPM's citation and fine system is consistent with that of the vast majority of DCA agencies. CPIL noted that the Board's citation and fine process provides "three levels of appeal to the licensee: (1) an informal conference with the executive officer, at the request of the licensee; (2) an evidentiary hearing by an ALJ, followed by Board review of the ALJ's proposed decision; and (3) judicial review of the Board's decision. Thus, the statute and the Board's regulations combine to provide ample procedural due process for a licensee who is unhappy with a citation." CPIL also argued that the pending proposal to require Board member review of the EO's citation and fine decisions "substantially—and fairly radically—departs from (1) the intent of the citation and fine statute (which was to provide an alternative to long, drawn-out disciplinary proceedings which must be reviewed by board members), and (2) the existing Administrative Procedure Act (which requires board members to review proposed ALJ decisions based upon the evidence presented in that proceeding, and in that proceeding alone)...Board members who have other knowledge of the respondent may be required to recuse themselves from participating in the final decision, because their judgment could be 'tainted' by that outside-the-record knowledge." CPIL noted that "most boards—especially boards of relatively small composition, such as BPM—are loath to adopt any procedures which may put any of their decisionmaking members in a position to have to recuse themselves from disci-

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plinary decisionmaking. If BPM were to adopt such a procedure and its members failed to properly recuse themselves, it would deny procedural due process to its licensees, jeopardize consumer protection, and/or expose itself to liability. If BPM adopts such a procedure and enough members must recuse themselves, BPM may be unable to take any disciplinary action whatsoever—thus abdicating its responsibility to enforce its practice act and regulations, and posing a serious risk of harm to consumers who count on it to protect them from incompetent, grossly negligent, or impaired podiatrists. Exposing Board members to information about individual licensees who eventually become respondents in disciplinary proceedings is a lose-lose proposition."

At this writing, Board discussion of this issue is scheduled for November 5.

BPM to Revise Hospital Residency Regulation

On September 17, BPM published notice of its intent to amend section 1399.667, Title 16 of the CCR, which sets forth specific criteria for the Board's approval of podiatric residency programs at hospitals. One of the requirements for a residency program seeking approval by the Board is reasonable conformance with the Accreditation Council on Graduate Medical Education's (ACGME) General Requirements of the Essentials of Accredited Residencies in Graduate Medical Education, as revised effective July 1, 1992, which are incorporated by reference in their entirety into section 1399.667. BPM's proposal would update and incorporate by reference in their entirety the current version of ACGME's Essentials of Accredited Residencies in Graduate Medical Education: Institutional and Program Requirements, as revised effective September 1998.

At this writing, BPM is scheduled to hold a hearing on this proposed amendment at its November 5 meeting.

Update on Other Board Rulemaking Proceedings

The following is an update on recent BPM rulemaking proceedings described in detail in Volume 16, No. 2 (Summer 1999) of the *California Regulatory Law Reporter*:

◆ **Specialty Board Approval Regulations.** At its April 1999 meeting, BPM adopted proposed sections 1399.663 and 1399.681, Title 16 of the CCR, to implement SB 1981 (Greene) (Chapter 736, Statutes of 1998). Among other things, SB 1981 permits BPM to approve private specialty boards and associations whose certificants may advertise the term "board certified" in California, and allows the Board to establish and collect a reasonable fee from each specialty board and association applying for recognition. [16:2 CRLR 58; 16:1 CRLR 80] This new program is based upon a similar process whereby the Medical Board's Division of Licensing approves

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national specialty boards whose certificants may then advertise that they are "board certified" in California. MBC has been reviewing specialty board applications since 1994.

Pursuant to the Permit Reform Act of 1981, section 1399.663 would establish the timeframe within which BPM will review specialty board or association applications and the minimum, median, and maximum time periods for notifying the applicant whether its completed application is approved or disapproved for specialty board advertising. BPM's proposed timelines reflect the Medical Board's actual processing times involved in reviewing and either approving or disapproving applications received from specialty board organizations. Section 1399.681 would establish the fee for specialty boards or associations seeking recognition at \$4,030, which is equal to the fee charged by the Medical Board.

At this writing, the rulemaking file on these regulatory changes is awaiting approval by DCA Director Kathleen Hamilton, after which it will be submitted to the Office of Administrative Law (OAL) for approval.

◆ **Citation and Fine Regulations.** Also at its April 1999 meeting, BPM approved proposed amendments to section 1399.696, Title 16 of the CCR, which establishes the Board's citation and fine system and sets forth the statutory and regulatory sections whose violation justifies a citation and/or fine (see above). BPM's proposed amendment would add Business and Professions Code section 2234 (unprofessional conduct) to the list of offenses whose violation justifies the issuance of a citation and fine by BPM. [16:2 CRLR 59; 16:1 CRLR 79] At this writing, the rulemaking file on this regulatory change is awaiting approval by DCA Director Kathleen Hamilton, after which it will be submitted to OAL for approval.

◆ **Disciplinary Guidelines.** Also in April 1999, BPM approved a proposed amendment to section 1399.710, Title 16 of the CCR, which currently requires the Board to consider the November 1, 1996 version of its disciplinary guidelines in reaching a decision in a disciplinary matter. Section 1399.710 does not contain the Board's disciplinary guidelines, but rather incorporates them by reference. Because the Board has modified its disciplinary guidelines since 1996, the Board's proposed amendment to section 1399.710 would incorporate by reference the November 1998 version of its disciplinary guidelines. [16:2 CRLR 59; 16:1 CRLR 79-80] At this writing, the rulemaking file on this regulatory change is awaiting approval by DCA Director Kathleen Hamilton, after which it will be submitted to OAL for approval.

LEGISLATION

AB 1252 (Wildman), as amended August 31, increases BPM's biennial license renewal fee from \$800 to \$900. The fee increase is temporary until January 1, 2002, at which time

the renewal fee reverts to \$800 (see MAJOR PROJECTS). AB 1252 also changes the composition of the Industrial Medical Council (IMC), which—among other things—administers the program for the qualified medical evaluators who do the medical legal evaluations used to resolve disputes regarding the impairment of an injured worker and recommends reasonable levels of fees for physicians participating in the workers' compensation system. The IMC currently consists of nine physicians, two osteopathic physicians, two chiropractors, one physical therapist, one psychologist, and one medical economist. This bill increases from nine to eleven the number of physicians on the IMC, and adds a DPM and an acupuncturist to the Council as well. This bill was signed by the Governor on October 10 (Chapter 977, Statutes of 1999).

SB 1308 (Committee on Business and Professions), as amended September 2, eliminates the Board's fee for an ankle surgery certificate; the requirement to obtain the certificate was repealed by SB 1981 (Greene) (Chapter 736, Statutes of 1998). [16:1 CRLR 80] SB 1308 also makes technical revisions to the Board's enabling act by deleting several obsolete titles. This bill was signed by the Governor on October 6 (Chapter 655, Statutes of 1999).

SB 450 (Speier), as amended August 31, clarifies that when a physician or podiatrist uses the term "board certified" in any advertising, he/she must specify the full name of the approved specialty board that has issued the certification. This bill was signed by the Governor on October 5 (Chapter 631, Statutes of 1999).

SB 836 (Figueroa), as amended August 30, revises and expands the prohibition against fraudulent advertising by health care professionals, including podiatrists. Intended primarily to rid the marketplace of misleading advertising about cosmetic surgery, the bill specifies that use of a misleading image in advertising is unlawful; bars the use of photographs and images that do not accurately depict

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the results of the procedure being advertised, that have been altered from the actual image of the subject depicted, that do not clearly state that the image is a model, and that depict the results of a procedure or present "before" and "after" views without specifying what

procedures were performed; and require "before" and "after" views to be comparable in presentation so that the results are not distorted by favorable poses, lighting, or other features of the presentation, and to contain a statement that the same "before" and "after" results may not occur for all patients. SB 836 also bans scientific claims that cannot be substantiated by reliable, peer-reviewed scientific evidence; limits claims of professional superiority to circumstances that can be substantiated by objective scientific evidence; and limits use of testimonials or endorsements that are likely to mislead by virtue of a failure to disclose material facts. This bill was signed by the Governor on October 8 (Chapter 856, Statutes of 1999).

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AB 794 (Corbett), as amended August 16, adds podiatrists to Code of Civil Procedure section 1985.3 and clarifies the requirements for Board licensees whose patients' records are subpoenaed in civil litigation. Among other things, the bill expands the definition of "personal records" to include electronic data; conforms the time for production of documents under Code of Civil Procedure sections 1985.3 and 1985.6 to that in Code of Civil Procedure section 2020 (no earlier than 20 days after the issuance, or 15 days after the service, of the subpoena duces tecum, whichever is later); requires that when provided with advance notice of at least five business days, the witness must designate at least a six-hour block of time on a date certain for the deposition officer to copy records subject to the subpoena; adds a presumption that any objection to release of records is waived by a party when his/her attorney signs an authorization for the release; and raises the maximum amount the party serving the subpoena may be charged for clerical costs associated with making the records available, from \$16 to \$24 per person per hour, computed on the basis of \$6 per quarter hour. Governor Davis signed AB 794 on September 21 (Chapter 444, Statutes of 1999).

LITIGATION

BPM's April 1999 decision to place the license of Garey Lee Weber, DPM, on probation for five years has triggered a flurry of litigation in both state and federal courts.

Weber operates three ambulatory surgical centers under the name "Doctor's Foot Care Center" in Los Angeles. BPM's April 26 decision resulted from an accusation alleging gross negligence and incompetence in Weber's treatment of four separate patients. In the four cases, Weber performed bunionectomies involving osteotomies (the cutting of bone); his post-surgical treatment included strapping, taping, splinting, and placement of the foot in a firm-soled post-surgery shoe, and failed to include rigid internal fixation (e.g., the use of screws, wires or other devices to fix the opposite ends of cut bone together) or immobilization (casting). Further, he advised the patients to bear weight on the surgical sites immediately after surgery. Based upon expert testimony presented at the hearing, BPM found that the applicable community standard of care in California calls for internal fixation of the surgical sites, postoperative immobilization of the surgical sites, and instructions to the patients to refrain from weight bearing immediately after surgery. Thus, BPM found incompetence and gross negligence. It revoked Weber's license, stayed the revocation, and placed his license on probation for five years under several terms and conditions, including the following: (1) within 60 days of the decision, Weber must enroll in the Physician Assessment and Clinical Education (PACE) program at the University of California at San Diego at his

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own expense, to undergo assessment and clinical training as recommended by PACE; (2) Weber must conform his practice standards to the Preferred Practice Guidelines established by the American College of Foot and Ankle Surgeons; (3) Weber must pay the Board's administrative costs associated with monitoring his probation agreement; and (4) Weber must reimburse the Board for its investigative and administrative costs. Finally, the order states that "[r]espondent is prohibited from practicing except under the following conditions: Within thirty (30) days of the effective date of this decision, respondent shall submit to the Board or its designee, and receive its prior approval, a plan of practice in which respondent's activities shall be monitored by one of the Board's podiatric medical consultants. The monitor shall provide podiatric reports to the Board." The Board's disciplinary order became effective on May 26, 1999. [16:2 CRLR 60-61]

Weber's thus-far-unsuccessful quest for judicial invalidation of the Board's order began even before the order took effect:

• On April 30, Weber filed a class action suit against the Board in federal court in San Diego. In *Weber v. Rathlesberger, et al.*, No. 99-CV-0900JM-RBB, Weber purported to represent all licensed podiatrists in the state, and alleged that BPM's disciplinary proceeding and order violate the civil rights of all California podiatrists by mandating that they "literally and blindly follow the Preferred Practice Guidelines published by the American College of Foot and Ankle Surgeons." Weber alleged that the defendants—including all Board members and Executive Officer Jim Rathlesberger—"spent several years and several thousand dollars" prosecuting him. He further contended that defendants "bear personal animosity" toward him, and that the Board's decision to discipline him was made during "secret meetings" in violation of the Bagley-Keene Open Meeting Act. In addition to his

civil rights act claim, Weber alleged causes of action based upon negligence, defamation, illegal restraint of trade, abuse of legal process, and tortious interference with prospective economic advantage.

Weber sought \$15 million in lost business revenue and loss of reputation, an order requiring the Board to withdraw its disciplinary decision, punitive damages, and attorneys' fees and costs.

On June 19, the Attorney General's Office moved to dismiss Weber's complaint based on improper venue and failure to state a claim for which relief can be granted. On the venue issue, the AG argued that the proper venue is the judicial district where the claim arose or where all defendants reside. Because Weber sued the Board members and other state government officials in their official capacities, they may only be sued in federal court in Sacramento, the place of their official residences. The AG also argued that Weber's civil rights

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claims for money damages against a state official in his/her official capacity are barred by the Eleventh Amendment, and that his claim for damages against defendant Rathlesberger is barred by the doctrine of absolute quasi-judicial immunity. Following oral argument in August, the court issued a September 23 order granting the AG's motion to dismiss for improper venue, and denying its other motion to dismiss as moot.

• On July 9, Weber filed a series of motions in Orange County Superior Court. Among other things, Weber sought a stay of the Board's April 26 decision and a temporary restraining order (TRO) to stop the Board from suspending his license for his failure to comply with the terms of probation set forth in the April 26 order. According to the Board's probation officer, Weber

failed to enroll in the PACE program within 60 days of the decision, nor did he submit a practice monitoring plan to the Board within 30 days of the effective date of the decision. Under the express language of the decision, Weber "is prohibited from practicing" unless he complies with those and other conditions; thus, on June 28, the Board's probation officer informed Weber that he could not practice under the terms of the April 26 order. Weber's TRO motion sought to invalidate that decision.

Once again, the AG argued that Weber had filed his motions in the improper court, contending that the proper forum for this matter is Los Angeles County Superior Court. The AG further argued that a stay of the Board's April 26 decision would be improper for several reasons—including the fact that Weber had not timely filed his petition for judicial review. According to the AG, the agency's decision was issued on April 26, it became effective on May 26, and the time within which to seek

judicial review of that decision expired on June 25—however, Weber's counsel did not file his petition until July 9. Thus, Weber would be unable to support his request for a stay of the Board's decision because he cannot prove that the public interest will not suffer and that BPM is unlikely to prevail on the merits—both of which must be shown under Code of Civil Procedure section 1094.5(h)(1).

Following a hearing on July 9, the Orange County Superior Court denied Weber's request for a stay of the Board's order, and transferred the remainder of the matter to Los Angeles County Superior Court.

• On July 26, Weber filed *Garey Lee Weber v. State of California Board of Podiatric Medicine*, No. BS058388, a petition for writ of mandate, in Los Angeles County Superior

Court, and renewed his application for a stay of the Board's April 26 decision. Weber essentially claims that the Board's decision is not supported by the evidence presented at the hearing, and that its finding that the practice guidelines of the American College of Foot and Ankle Surgeons constitute the standard of care is "underground rulemaking" violative of the rulemaking procedures of the Administrative Procedure Act. On August 6, the court denied Weber's request for stay, and scheduled oral argument on the petition for writ of mandate for November 2. Since then, the parties have agreed to a postponement of their briefing deadlines and the date for oral argument.

• Meanwhile, on October 27, the Board filed an accusation and a petition to revoke Weber's pro-

bation with the Office of Administrative Hearings. On behalf of the Board, Deputy Attorney General Carlos Ramirez alleged that Weber's ongoing failure to comply with key terms of the Board's April 26 decision justifies revocation of his license. Specifically, the AG alleged that (1) Weber had yet to enroll in the PACE program, (2) he continued his practice of podiatric medicine without submitting a practice monitoring plan, as required by the April 26 decision, and (3) although he had filed a quarterly report with the Board on September 17, it contained "false or misleading statements."

In filing the October 27 accusation, BPM rejected an October 21 settlement proposal in which Weber offered to (1) terminate his many legal actions against the Board, (2) agree not to perform non-fixated first metatarsal osteotomies and, "in the event that the performance of such a surgery is detected through litigation or otherwise, Dr. Weber will immediately and voluntarily surrender his license to practice podiatric medicine"; and (3) "pay reasonable costs and expenses in his discipline case"—in exchange for the Board's agreement to "rescind its disciplinary order against Dr. Weber and to expunge the public record of that discipline."

At this writing, the Board is scheduled to meet in closed session to discuss the ongoing litigation at its November 5 meeting.

FUTURE MEETINGS

- November 5, 1999 in Los Angeles.
- February 16, 2000 in Sacramento.
- May 5, 2000 in San Francisco.
- November 3, 2000 in San Diego.

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