

MEDICAL BOARD OF CALIFORNIA

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Protection of the public shall be the highest priority for the Medical Board of California in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.

— Business and Professions Code § 2000.1

The Medical Board of California (MBC) is a consumer protection agency within the state Department of Consumer Affairs (DCA). The 15-member Board consists of eight physicians and seven public members. MBC members are appointed by the Governor (eight physicians and five public members), the Speaker of the Assembly (one public member), and the Senate Rules Committee (one public member). Members serve a four-year term and are eligible for reappointment to a second term. Several standing committees and ad hoc task forces assist the Board.

The primary purpose of MBC is to protect consumers from incompetent, grossly negligent, unlicensed, impaired, or unethical practitioners by responding to complaints from the public and reports from health care facilities and other mandated reporters. MBC reviews the quality of medical practice carried out by physicians and surgeons, and enforces the disciplinary, administrative, criminal, and civil provisions of the Medical Practice Act, Business and Professions Code section 2000 *et seq.* MBC also provides public record information about physicians to the public via its website and individual requests, and educates healing arts licensees and the public on health quality issues. The Board's regulations are codified in Division 13, Title 16 of the California Code of Regulations (CCR).

MBC is responsible for ensuring that all physicians licensed in California have adequate medical education and training. In this regard, the Board issues regular and probationary licenses and certificates under its jurisdiction, administers a continuing medical education program, and administers physician and surgeon examinations to some license applicants. MBC also oversees the regulation of licensed midwives; polysomnographic technologists, technicians, and trainees; research psychoanalysts; and medical assistants.

On December 13, 2018, then-Governor Jerry Brown [appointed](#) Susan F. Friedman and Laurie Rose Lubiano, J.D., to MBC. Ms. Friedman was a career network news producer for NBC News, is Vice-Chair of the Los Angeles County Commission on Mental Health, a founding board member of The Alliance for Children’s Rights, and former President of the Los Angeles County Commission on Children and Families. Ms. Lubiano is intellectual property counsel with The Climate Corporation and served as a member of the Daly City Planning Commission.

At this writing, the Board has two vacancies—both physician members—which must be filled by Governor Gavin Newsom.

MAJOR PROJECTS

Petition for Rulemaking: Approved Medical Assistant Certifying Organizations

On November 9, 2018, Ellison Wilson Advocacy, LLC, on behalf of the National Health Career Association (“Petitioners”), submitted a [petition](#) for rulemaking to MBC pursuant to Government Code section 11340.6. Petitioners requested that MBC amend section 1366.31, Title 16 of the CCR to revise the Board’s criteria for approving organizations that certify medical assistants pursuant to section 1366.31(c)(1). Medical assistants are generally not legally required to receive certification in order to perform their technical supportive services. However, medical

assistants must receive certification from an MBC-approved certifying organization if they will be training other medical assistants. Current section 1366.31 requires that approved medical assistant certifying organizations be non-profit and tax-exempt organizations. Petitioners requested that MBC amend the section to strike this requirement, thus making for-profit medical assistant certifying organizations eligible for MBC approval.

As reported by MBC staff, according to the original rulemaking file, the purpose of the regulation was to avoid approving certifying agencies motivated solely by profits and not by training quality and patient safety. Petitioners contend that many for-profit certifying organizations create non-profit extensions of their existing organizations solely to satisfy the requirement of section 1366.31, and that being non-profit is, thus, not indicative of the quality of a certifying organization. In addition to requesting the striking of the non-profit requirement, Petitioners also suggest that MBC consider requiring that certifying organizations receive accreditation by the National Commission for Certifying Agencies (“NCCA”) before receiving Board approval.

At its February 1, 2019 [meeting](#), MBC voted unanimously to approve the petition for rulemaking in concept, directed staff to draft proposed language for an amended version of section 1366.31 for discussion at a later meeting, and directed staff to study how striking the non-profit requirement will affect matters like accreditation quality, patient safety, and cost to consumers.

Approved Postgraduate Training

On January 25, 2019, MBC published [notice](#) of its intent to amend section 1321, Title 16 of the CCR to clarify the geographic and accreditation requirements for MBC-approved and state-mandated postgraduate training courses. According to the [initial statement of reasons](#), the proposed modification is the Board’s effort to make the provisions of section 1321 “consistent with current accreditation practices meeting California requirements for approved postgraduate training in the

United States and Canada.” The initial statement of reasons further states that the modification to section 1321 is meant to clarify that *only* postgraduate training programs located in the United States and its territories or Canada are MBC-approved in California. The public comment period ended on March 11, 2019, and culminated with a Public Hearing on the matter in Sacramento on that date.

Vertical Enforcement Program Ends

At its October 18, 2018 [meeting](#), MBC staff discussed the upcoming repeal of the vertical enforcement (VE) program, effective January 1, 2019. [[23:2 CRLR 46–48](#)] As explained by MBC Executive Director Kimberly Kirchmeyer, the legislature’s failure to extend VE’s sunset date means MBC will return to using the investigatory process currently utilized by other DCA boards. This older “hand-off” model excludes the California Attorney General’s Office from many steps of the investigatory process, and requires the Health Quality Investigation Unit (HQIU) to make case disposition recommendations directly to the Board and not, as under VE, to the Attorney General’s Office. In the event the Board finds that a case warrants disciplinary action, a Deputy Attorney General (DAG) reviews the case to ensure that there is sufficient evidence justifying the filing of an accusation. Ms. Kirchmeyer stated that it is the Board’s intention to work collaboratively with HQIU and the Attorney General’s Office to ensure a smooth transition away from VE and to track changes in investigation and enforcement timelines post-transition.

VE was instituted in 2006 as a result of the passage of MBC’s 2005 sunset bill, [SB 231 \(Figueroa\) \(Chapter 674, Statutes of 2005\)](#), and resulted from an extensive audit of MBC’s enforcement program by the independent [Medical Board Enforcement Program Monitor](#). The Monitor recommended not only the use of VE but also the transfer of MBC’s investigators from the Board to HQE, so that the two sets of professionals could work at the same agency; the transfer

proposal was rejected by the Schwarzenegger administration but the VE recommendation was included in SB 231. From its inception, VE has been controversial at MBC, whose staff has urged on several occasions that VE be limited to certain kinds of cases. The Center for Public Interest Law (CPIL), whose Administrative Director Julianne D'Angelo Fellmeth served as MBC Enforcement Program Monitor from 2003–2005, opposed the repeal of VE and testified at the October 18, 2018 meeting. For a full description of the chronology of events leading to VE's sunset. [*see* [23:1 CRLR 36–40](#)] VE formally sunset on January 1, 2019.

MBC Rejects American Board of Cosmetic Surgery's Application for Specialty Board Equivalency Recognition

At its October 18, 2018 [meeting](#), the Board considered the American Board of Cosmetic Surgery's (ABCS) application for MBC recognition as a specialty board, which would allow ABCS members to advertise themselves as “board-certified” under Business and Professions Code section 651. In order to receive MBC approval for recognition as a specialty board, ABCS must demonstrate compliance with the laws and regulations and show that they are equivalent to member boards of the American Board of Medical Specialties (ABMS). At the meeting, an expert, retained by MBC to opine on the merits of ABCS's application for specialty board equivalency recognition in California, recommended that the Board reject ABCS's application, noting deficiencies with ABCS's training policies and procedures. As noted by MBC Executive Director Kirchmeyer at that meeting, [SB 798 \(Hill\) \(Chapter 775, Statutes of 2017\)](#) strips MBC of its authority to deem specialty board equivalency effective January 1, 2019. After a lengthy discussion between MBC staff, Board members, the expert, and various interested parties and individuals, the

Board voted to gather more information and have an interim meeting before December 31, 2018, to make a final determination on ABCS's application for equivalency recognition.

At its December 18, 2018 [meeting](#), MBC once again took up the issue of ABCS's application for equivalency recognition. After lengthy debate and discussion between MBC staff, Board members, the expert, and various interested parties and individuals, MBC followed the expert's recommendation and voted unanimously to reject ABCS's application for equivalency recognition.

Revisions to Questions Regarding Impairment on Applications for Licensure and Registration

At its January 31, 2019 [meeting](#), the Board considered two sets of [revised licensure application questions](#). MBC's licensure and registration applications currently require applicants to disclose whether they have, at any time, received a diagnosis for an emotional, mental, behavioral, addictive, neurological, or other physical disorder or condition that impairs their ability to practice medicine safely. In April 2018, the Federation of State Medical Boards (FSMB), after researching physician wellness and burnout, published [recommendations](#) for state medical boards regarding revisions to certain questions on applications for licensure and registration. Specifically, FSMB recommended that state medical boards consider revising or excluding application questions concerning an applicant's mental health or substance abuse histories if those questions are worded in such a way as to discourage physicians seeking treatment from disclosing pertinent information. According to FSMB, application questions should not give the appearance to physicians seeking treatment that disclosing information is meant to be punitive instead of beneficial. To ensure compliance with the Americans with Disabilities Act (ADA), FSMB also

recommended that application questions focus on an applicant’s ongoing impairments and not on other previous impairments, illnesses, diagnoses, or treatment.

At the January meeting, staff presented the Board with two alternatives, taking FSMB’s recommendations as well as additional suggestions from interested parties into consideration. After numerous Board members expressed concern about the scope and purpose of the draft revised application questions, the Board unanimously passed a motion to table the conversation, refer the matter to a committee to be appointed by the President in relation to physician wellness, and to report back to the Board for further action. It was noted by several Board members that there is no state mandate or legal action requiring these changes at this time. The Board is expected to revisit the draft application at its May meeting.

Presentation and Update on the Health Professions Education Foundation Program

At MBC’s October 18, 2018 [meeting](#), the Executive Director of the Health Professionals Education Foundation (HPEF), Norlyn Asprey, provided an informational [overview](#) of the program and its history to the Board. The HPEF seeks to improve healthcare access in underserved regions of California “by providing scholarships and loan repayment programs to health professional students and graduates who are dedicated to providing direct patient care in those areas.” The Steven M. Thompson Physicians Corps Loan Repayment Program, perhaps the most notable of the HPEF’s programs, is designed to “increase the number of culturally and linguistically competent physicians who are practicing in medically underserved areas of California,” and is funded in part by a \$25/licensee MBC licensing fee. The HPEF is currently developing a survey to gauge the physician retention levels in designated underserved areas after

applicants complete their loan repayment programs or receive their scholarships. The HPEF plans to conduct the survey by the end of the year.

MBC Holds Patient Advocate Meeting

On February 1, 2019, MBC held a Patient Advocate Interested Parties [meeting](#). At the meeting, MBC provided an [overview](#) of its enforcement process for licensees, a [summary](#) of the various types of enforcement documents and when and how the public may access those documents, and presented highlights from its [2017–2018 Annual Report](#). An open discussion with patient advocates and other interested parties followed these presentations.

LEGISLATION

[AB 387 \(Gabriel\)](#), as introduced February 5, 2019, would add section 2051.1 to the Business and Professions Code to require physicians and surgeons to advise patients as to the purpose of a prescribed drug or device upon prescription of the drug or device, and permit patients to opt out of having the purpose of a prescribed drug or device included on the prescription label. According to the [author](#), “[a]dverse drug events (ADEs) due to medications with similar names are common and estimated to be responsible for thousands of deaths and millions of dollars in costs every year.” This bill intends to make it easier for consumers to recognize appropriate medication. *[A. Appr]*

[SB 786 \(Senate Committee on Business, Professions, and Economic Development\)](#), as amended April 11, 2019, would repeal Article 11 (commencing with section 2200) of Chapter 5 of Division 2 of the Business and Professions Code. Existing law authorizes MBC to, in specified circumstances, make loans repayable to the Contingent Fund of the MBC at a prescribed interest rate to medical students. Existing law also authorizes MBC to grant loans repayable to the Contingent Fund of the MBC to certain licensees who agree to establish medical practices in areas

underserved by primary care services. SB 786 would repeal these provisions in their entirety because the programs are no longer operational. According to the author, this is a technical clean-up bill that should be non-controversial. *[S. BP&ED]*

[AB 241 \(Kamlager-Dove\)](#), as amended April 4, 2019, would amend section 2190.1 of the Business and Professions Code to require, on and after January 1, 2022, that all continuing education courses for physician and surgeons contain curriculum that includes the understanding of implicit bias and the promotion of bias-reducing strategies to address how unintended biases in decision-making may contribute to health care disparities. Among other things, the legislature found that implicit bias contributes to the unequal treatment of patients based on immutable characteristics including race, ethnicity, gender identity, and sexual orientation. Further, unequal treatment of certain patients by licensees leads to health disparities in these vulnerable populations, even when controlling for other factors. Amended section 2190.1 would elaborate on these and other findings and restate the legislature's intent for providing MBC and other licensees with the education, tools, and resources for identifying and reducing implicit bias in the treatment and care of patients. *[A. B&P]*

[AB 845 \(Maienschein\)](#), as amended April 1, 2019, would add section 2196.9 to the Business and Professions Code to require MBC to consider including a course in maternal mental health when determining its continuing education requirements for doctors and to make periodic updates to any course curricula with new research findings on maternal mental health. According to the author, maternal mental health disorders are the most common complication of giving birth, and in light of prevalence (affecting one in five mothers in California), health care providers need training to identify and treat them appropriately. Existing law requires providers to screen pregnant and postpartum women for maternal mental health conditions as of July 1, 2019. Existing law also

requires specified hospitals to develop and implement programs relating to postpartum depression and other maternal mental health conditions. *[A. Appr]*

[SB 425 \(Hill\)](#), as amended April 11, 2019, would amend sections 2221 and 2234 of the Business and Professions Code to require MBC to disclose probationary certificates and the statement of issues to an interested member of the public and to post these documents on MBC's website for ten years from the date of issuance. Also, amended section 2234 would remove the condition that failure to attend and participate in an investigation-related interview with MBC, without good cause, be *repeated* before rising to the level of "unprofessional conduct" disciplinable by MBC. SB 425 arises out of a hearing held in 2018 by the Senate Committee on Business, Professions and Economic Development (*Sexual Misconduct Reporting in the Medical Profession: Missed Opportunities to Protect Patients*), that explored whether licensed health professionals who fail to meet established standards are discovered, reviewed and disciplined, if necessary, in a timely manner. The Board supports three provisions in the bill related to MBC enforcement, which it believes will help to prevent delays in the Board's enforcement process, and will increase transparency by providing access to information that is public, but not available on MBC's website after a probationary period is complete. MBC's position does not reference provisions related to receiving reports about sexual abuse and misconduct allegations involving a MBC licensee, nor does MBC have a position on provisions related to interim suspension orders. *[S. Jud]*

[AB 1264 \(Petrie-Norris\)](#), as amended March 26, 2019, is an urgency statute that would amend section 2242.2 of the Business and Professions Code to clarify that, for purposes of this section, "appropriate prior examination" is not meant to require real-time interaction between the

patient and the licensee. Instead the section allows the use of a self-screening tool that allows hormonal contraceptives to be prescribed by a licensed prescriber. *[A. Appr]*

[SB 377 \(McGuire\)](#), as amended April 11, 2019, would amend sections 369.5 and 739.5 of the Welfare and Institutions Code to, upon approval by a juvenile court judicial officer of a request for authorization for the administration of psychotropic medication to a juvenile patient, require the officer to authorize MBC to review the patient's medical record. Amended section 369.5 would limit review of the juvenile patient's medical record to the diagnosis for the authorized prescription of psychotropic medication, so MBC can determine whether excessive prescribing inconsistent with the standard of care is occurring. Existing law requires MBC to review certain data provided by the State Department of Health Care Services and the State Department of Social Services concerning Medi-Cal providers and their prescribing patterns regarding psychotropic medications and related services for foster youth, and to conduct an investigation if any potential legal violations or excessive prescribing inconsistent with the established standard of care exists. *[S. Jud]*

[AB 1030 \(Calderon and Petrie-Norris\)](#), as amended March 26, 2019, would amend section 2249, and add section 2248.9 to the Business and Professions Code to require MBC, in coordination with the American College of Obstetricians and Gynecologists and other groups, to develop an informational pamphlet for patients undergoing gynecological exams by July 1, 2020. Allegedly, proposed in response to the allegations of repeated misconduct by a USC gynecologist, the new sections would require the pamphlet to contain certain information, such as what pelvic exams and pap smears are, how doctors perform them, and patient privacy expectations. MBC would also have to make the pamphlet available online or in print to licensees that perform gynecological examinations. *[A. Appr]*

[SB 201 \(Wiener\)](#), as amended March 25, 2019, would add section 2295 to the Business and Professions Code to prohibit a doctor from performing any treatment or intervention, other than one which is medically necessary, on the sex characteristics of an intersex minor, and if that treatment or intervention may be deferred until the intersex minor can provide informed consent. New section 2295 would authorize MBC to develop and adopt medical guidelines to implement these provisions and take necessary disciplinary action when violations occur. *[S. BP&ED]*

[AB 149 \(Cooper\)](#), as amended February 19, 2019, amends sections 11162.1 and 11164 of, and adds section 11162.2 to, the Health and Safety Code to clarify that prescriptions for controlled substances written on otherwise valid prescription forms before January 1, 2019, that do not yet comply with the serialization requirement of existing law, are valid and may be filled, compounded, or dispensed until January 1, 2021. Also under this bill, the Department of Justice may, if supply and demand so require, extend the period during which prescriptions written on noncompliant forms remain valid for up to six additional months. MBC voted to [support](#) AB 149.

Governor Gavin Newsom signed AB 149, an urgency statute, on March 11, 2019 (Chapter 4, Statutes of 2019), which took effect immediately.

[AB 544 \(Brough\)](#), as amended March 21, 2019, would amend sections 2427 and 2456.3 of the Business and Professions Code to limit the maximum fee for the renewal of an inactive license to no more than fifty percent of the renewal fee for an active license. The bill would also prohibit MBC from requiring payment of unpaid renewal fees as a condition of reinstating an expired license. According to the author, the bill is necessary because often the fee paid for the renewal of an inactive license is the same as the full fee paid for renewal by active license holders. Also, for certain licenses that have expired, all accrued fees must be paid as a condition of reinstatement of the license, which can be a barrier to re-entry to the profession. *[A. B&P]*

[AB 370 \(Voepel\)](#), as amended March 12, 2019, would add Article 16 (commencing with section 2380) to Chapter 5 of Division 2 of the Business and Professions Code to limit the amount that doctors may charge patients for filling out certain medical and related forms to a reasonable fee based on the actual time and cost for filling out the form. Additionally, AB 370 provides that a violation of its provisions is not a crime. [*A. Health*]

LITIGATION

Grafilo v. Cohanshoet, Case No. BS169143 (Super. Ct. Los Angeles). Based on an anonymous complaint filed against Dr. Cohanshoet, MBC initiated an investigation of this doctor. MBC's medical expert concluded that five patients may have received excessive amounts of opioids as compared to the recommended dosage. MBC's expert explained the five patients' medical records were necessary to determine whether Dr. Cohanshoet performed an examination and screening of those patients, received informed consent, regularly assessed the efficacy and effects of the treatment regimen, and monitored those patients.

Four of the five patients submitted declarations objecting to the petition. Dr. Cohanshoet also opposed the petition, asserting the Board lacked good cause to justify the intrusion into his patients' privacy rights. Dr. Cohanshoet asserted in a declaration that he completed hundreds of hours of post-graduate training in pain management and palliative care and that some of his patients suffer from pain associated with acute injuries while others seek active cancer treatment, palliative care, or end-of-life care. Dr. Cohanshoet's medical expert challenged MBC's expert's conclusions and found there was no reason to suspect Dr. Cohanshoet failed to perform a proper examination, obtain informed consent, or review the risks and benefits of higher dosage opioid therapy with the patient.

The lower court granted the petition and ordered Dr. Cohanshoet to produce the requested records. The doctor appealed. Dr. Cohanshoet contended the state's interest in his patients' medical records is insufficient to overcome their right to privacy, and he argued that MBC lacks authority to issue subpoenas for records of noncomplaining patients. The appellate court [reversed](#) the order, finding the state failed to demonstrate good cause to obtain the patients' records because the records were not material or relevant to the investigation. The appellate court also awarded the doctor his costs to defend the petition. *Id.* at 18.

Grafilo v. Wolfsohn, Case No. BS171234 (Super. Ct. Los Angeles). In a second recent case involving the standard of good cause for MBC to subpoena patient records in the scope of an investigation of a doctor, the appellate court again found that MBC did not show good cause in the lower court proceeding. In this case, also involving a pain management doctor and a subpoena for five patients' medical records who challenged the order based on their right to privacy, the appellate court cited to *Grafilo v. Cohanshoet* in reversing the lower court's ruling. The appellate court [found](#) that "[t]he defects in the evidence supporting the subpoenas in *Cohanshoet* are present here and there are no additional facts that add substantial weight in favor of the subpoena." *Id.* at 16. The appellate court found that MBC offered no evidence as to how many patients Dr. Wolfsohn treats, the percentage of his patients the five patients comprised, how often similarly-situated pain management specialists might prescribe the drugs that Dr. Wolfsohn prescribed, or the likelihood that Dr. Wolfsohn properly issued the prescriptions. *Id.*

RECENT MEETINGS

At its October 18, 2018 [meeting](#), Executive Director Kirchmeyer explained that the Board's Executive Committee draws its membership from the Board's officers, its most recent

past President, and the Chair of each standing committee. Depending on which Board members occupy each of these positions, the ratio of physician members to public members on the Executive Committee may be unacceptably unbalanced. In response, MBC voted to change the Executive Committee's makeup to the Board's officers (its most recent past President, and two to three additional members appointed by the Board President) to allow for balancing of physician and public members.

At its October 18, 2018 [meeting](#), MBC President Pines also appointed Dr. Krauss and Dr. Hawkins to the Board's newly-formed and newly-renamed Stem Cell and Regenerative Therapy Task Force. At that meeting, President Pines also appointed Dr. GnanaDev and Dr. Yip to the Board's newly-formed Compounding Task Force.