Oversight Hearing of the
Senate Committee on Business, Professions, and Economic Development

Medical Board of California: Enforcement Processes, Deficiencies, and Opportunities for Reform - Evaluating the Medical Board of California's 2022 Proposals for Statutory Updates

Friday, May 6, 2022
9:00 am
1021 O Street, Room 1200

BACKGROUND

Medical Board of California

Through the Medical Practice Act (Act), the Medical Board of California (MBC) has jurisdiction over physicians and surgeons, as well as special program registrants/organizations and special faculty permits which allow those who are not MBC licensees but meet licensure exemption criteria outlined in the Act to perform duties in specified settings. MBC also has statutory and regulatory authority over licensed midwives, medical assistants, registered polysomnographic trainees, registered polysomnographic technicians, registered polysomnographic technologists, research psychoanalysts, and student research psychoanalysts. MBC also approves accreditation agencies that accredit outpatient surgery settings and issues Fictitious Name Permits to physicians practicing under a name other than their own.

MBC has a large organization with various units to allow MBC to carry out its mission. Through its licensing program, MBC ensures that only qualified applicants, pursuant to the requirements in the Act and related regulations, receive a license or registration to practice. The licensing program has a Consumer Information Unit that serves as a call center for all incoming calls to MBC. Via its enforcement program, allegations of wrongdoing are investigated and disciplinary or administrative action is taken as appropriate. MBC's Central Complaint Unit (CCU) receives and triages all complaints. If it appears that a violation may have occurred, the complaint is either transferred to the Department of Consumer Affairs' (DCA) Division of Investigation (DOI), Health Quality Investigation Unit (HQIU), which includes sworn peace officers, or to MBC's own Complaint Investigation Office (CIO), which is comprised of non-sworn special investigators. Investigators investigate the complaint and, if warranted, refer the case for disciplinary action. MBC's Discipline Coordination Unit processes all disciplinary documents and monitors cases that have been referred for formal discipline to the Office of the Attorney General, which serves as MBC's prosecuting attorney. If a licensee or registrant is placed on probation, MBC's probation unit monitors the individual while they are on probation to ensure they are complying with the terms and conditions of probation. The Probation Unit is comprised of inspectors who are located throughout the state, housed within various field offices. Having inspectors throughout the state helps eliminate excess travel and enables probationers to have face-to-face meetings with the inspectors for monitoring purposes. MBC has its own

Information Systems Branch that performs information technology functions and assists in finding technological improvements to streamline MBC's enforcement and licensing processes. As MBC engages in a number of activities to educate physicians, applicants, and the public, the Office of Legislative and Public Affairs provides information to physicians, as well as applicants, regarding MBC functions, laws, and regulations.

MBC is comprised of 15 members: eight physicians and seven public members. All eight professional members and five of the public members are appointed by the Governor. One public member of the Board is appointed by the Senate Committee on Rules and one public member is appointed by the Speaker of the Assembly. Current law requires that four of the physician members hold faculty appointments in a clinical department of an approved medical school in the state, but no more than four members may hold full-time appointments to the faculties of such medical schools. The Board meets about four times per year. MBC members receive a $100-a-day per diem. All meetings are subject to the Bagley-Keene Open Meetings Act.

MBC's enforcement activities are the core of its program, with the majority of its staff and resources dedicated to enforcement functions. The enforcement process begins with a complaint. Complaints are received from various sources, including the public, generated internally by MBC, or based on information MBC receives from various entities through mandatory reports to MBC. In FY 2020-2021, MBC received a total of 10,103 complaints and closed 10,030. According to MBC in its *2020-2021 Annual Report*, "a significant portion of the complaints received by the Board each year are considered unactionable, which includes those that are beyond the Board's jurisdiction, are redundant (i.e., duplicative), and those that lack information necessary to proceed." Of the total 10,030 complaints closed in FY 2021-2021, no action was taken on 4,183 complaints, or 42 percent. Non-jurisdictional complaints account for the largest group of these type of complaints that MBC is not able to act on, which commonly include complaints about other licensed professionals overseen by another licensing agency, for example nurses regulated by the Board of Registered Nursing or osteopathic physicians and surgeons licensed by the Osteopathic Medical Board of California.

Complaints are received by CCU, which starts the process of determining next steps for a complaint. All complaints that pertain to treatment provided by a physician require patient medical records to be obtained. MBC reports that it is "subject to significant limitations in its authority to inspect and review medical records in the possession of a licensee. Generally, the Board must obtain patient consent prior to requesting records from a licensee. However, obtaining patient consent (for example, in cases involving inappropriate prescribing of opioids) may be difficult. If the patient refuses to give consent, then the Board must establish good cause to issue a subpoena and may have to file a motion to compel in superior court to enforce the subpoena. Without quick access to records, investigations take longer to complete. In some cases, the Board is required to close complaints because its investigation cannot proceed without relevant medical records." MBC has requested enhanced authority to inspect patient records held by licensees without the need for patient consent or a subpoena.
Pursuant to Business and Professions Code (BPC) Section 2220.08, before a quality of care complaint is referred for further investigation, it must be reviewed by one or more medical experts with the pertinent education, training, and expertise to evaluate the specific standards of

care issues raised by the complaint to determine if further field investigation is required. When a medical reviewer determines that a complaint warrants referral for further investigation, CCU transfers the complaint to the HQIU to be investigated by a sworn investigator, a peace officer. There are 12 HQIU field offices located throughout California that handle these investigations. Complaints may also be forwarded to the CIO, an internal unit at MBC comprised of non-sworn investigators. CIO investigators handle complaints throughout the state from the Sacramento office.

MBC is required by law, BPC Section 129, to open a complaint within ten days of receipt and further required by law, BPC Section 2319, to set a goal of no more than 180 days between the time a complaint is received and the time a complaint is investigated.

MBC's complaint priorities are outlined in BPC section 2220.05 in order to ensure that physicians representing the greatest threat of harm are identified and disciplined expeditiously. MBC must ensure that it is following this section of law when investigating complaints, including complaints alleging the following as being the highest priority:

- Gross negligence, incompetence, or repeated negligent acts that involve death or serious bodily injury to one or more patients, such that the physician and surgeon represents a danger to the public

- Drug or alcohol abuse by a physician and surgeon involving death or serious bodily injury to a patient

- Repeated acts of clearly excessive prescribing, furnishing, or administering of controlled substances, or repeated acts of prescribing, dispensing, or furnishing of controlled substances without a good faith prior examination of the patient and medical reason therefor

- Repeated acts of clearly excessive recommending of cannabis to patients for medical purposes, or repeated acts of recommending cannabis to patients for medical purposes without a good faith prior examination of the patient and a medical reason for the recommendation

- Sexual misconduct with one or more patients during a course of treatment or an examination,

- Practicing medicine while under the influence of drugs or alcohol; and

- Repeated acts of clearly excessive prescribing, furnishing, or administering psychotropic medications to a minor without a good faith prior examination of the patient and medical reason therefor.

For complaints that are subsequently investigated and meet the necessary legal prerequisites, a Deputy Attorney General (DAG) in the Office of the Attorney General (OAG) drafts formal charges, known as an "Accusation". An accusation is filed upon

signature of the MBC executive director. A hearing before an Administrative Law Judge (ALJ) is subsequently scheduled, at which point settlement negotiations take place between the DAG, the physician and their attorney and MBC staff. Often times these result in a stipulated settlement, similar to a plea bargain in criminal court, where a licensee admits to having violated charges set forth in the accusation, or admits that the MBC could establish a factual and legal basis for the charges in the Accusation at hearing, and accepts penalties for those violations. If a licensee contests charges, the case is heard before an ALJ who subsequently drafts a proposed decision. This decision is reviewed by a panel of MBC members who either adopt the decision as proposed, adopt the decision with a reduced penalty or adopt the decision with an increased penalty. If probation is ordered, a copy of the final decision is referred to MBC's Probation Unit for assignment to an inspector who monitors the licensees for compliance with the terms of probation.

MBC uses its Manual of Model Disciplinary Orders and Disciplinary Guidelines (Disciplinary Guidelines, 16 CCR section 1361) and the Uniform Standards for Substance-Abusing Licensees (Uniform Standards, 16 CCR section 1361.5) as the framework for determining the appropriate penalty for charges filed against a physician.

MBC's probation unit works to ensure that physicians who are not compliant with probationary orders have swift action taken against their license by either issuing a citation and fine, issuing an order for the individual to cease practicing or referring the matter to OAG for subsequent discipline.

As review of a case by a medical expert is an important piece of MBC's investigation, MBC works to ensure it successfully recruits these individuals and properly trains the expert reviewer physicians who assist with enforcement. MBC was authorized through the budget to increase the hourly rates for expert reviewers in order to more appropriately recruit and retain these key individuals. MBC offers full day training for expert reviewers, providing an overview of the complaint and field investigation process, legal considerations when providing an opinion, a discussion of real case scenarios to provide an understanding of the difference between extreme and simple departures from the standard of care, report writing and tips to provide effective testimony during a hearing. MBC also works to ensure that ALJs who hear MBC disciplinary actions are trained by MBC on topics of anatomy and systems of the body, prescribing practices, medical record keeping, and co-morbid patients.

MBC issues citations to licensees for technical violations of the Act. MBC reports common reasons for a citation include failing to maintain adequate and accurate medical records, failing to report criminal convictions, failing to report a change of address and aiding and abetting the unlicensed practice of medicine. MBC may also utilize the cite and fine process for dealing with unlicensed practitioners for practicing medicine without a license. MBC reports that it increasingly issues citations for violations identified during the course of an investigation that do not rise to the level to support disciplinary action. In these situations, MBC may require a licensee to complete some education related to a citation, like additional courses in medical record keeping if improper records were the reason a licensee was cited.

MBC Initiated Reform Proposals

MBC submitted a series of proposals to the Legislature on January 5, 2022 to amend the Act. While the requests impact many areas of MBC operations, the focus of this hearing is on specific proposals related to MBC enforcement.

- Agenda Item #4

  Should the evidentiary standard be changed from clear and convincing to a preponderance of the evidence for some or all Medical Board of California disciplinary cases?

  MBC reports that "In order to successfully prosecute a physician for unprofessional conduct, California case law currently requires the Board to meet a higher burden of proof than most other jurisdictions throughout the nation. As a result, investigations in this state are needlessly more time consuming and costly."

  According to MBC, "the Board is at a significant disadvantage, in comparison to most other medical boards, when attempting to investigate and prosecute a licensee suspected of failing to properly care for their patients or otherwise act in an unprofessional manner. Prior to taking disciplinary action, the Board must first investigate to gather evidence sufficient to prove that discipline is appropriate and necessary. Discipline is tailored to the facts and circumstances of each case and, generally, may include public reprimands, probation, suspension, or revocation. The Board is required, under current case law (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856), to obtain 'clear and convincing proof to a reasonable certainty.' This is a higher burden of proof than in 41 other jurisdictions throughout the U.S. states and territories, which generally apply a 'preponderance of evidence' standard. As a result, California is out of step with most other jurisdictions, making it more difficult, time consuming, and expensive to prosecute instances of unprofessional conduct in this state."

  MBC writes that "The 'clear and convincing' standard requires less evidence than the 'beyond a reasonable doubt' standard which is used in criminal prosecutions, but is higher than 'preponderance of evidence,' which is also used in civil litigation and is defined typically as 'evidence that shows it is more likely than not that a fact is true.'"

  MBC requests that a section be added to the Act stating that a preponderance of evidence is the standard of proof for MBC disciplinary proceedings.

- Agenda Item #5

  Is current law sufficient regarding mandatory reporting of physician practice and conduct by health facilities to the Medical Board of California?

  There are a significant number of reporting requirements outlined in BPC designed to inform MBC about possible matters for investigation. Mandatory reports to MBC include:

  BPC 801.01 requires MBC to receive reports of settlements over $30,000 or arbitration awards or civil judgments of any amount. The report must be filed within 30 days by either the insurer providing professional liability insurance to the licensee, the state or governmental agency that self-insures the licensee, the employer of the licensee if the award is against or paid for by the licensee or the licensee if not covered by professional liability insurance.

  BPC 802.1 requires physicians to report indictments charging a felony and/or any convictions of any felony or misdemeanor, including a guilty verdict or plea of no contest.

  BPC Section 802.5 requires a coroner who receives information, based on findings reached by a pathologist that indicates that a death may be the result of a physician's gross negligence, to submit a report to MBC. The coroner must provide relevant information, including the name of the decedent and attending physician as well as the final report and autopsy.

  BPC Sections 803, 803.5 and 803.6 require the clerk of a court that renders a judgment that a licensee has committed a crime, or is liable for any death or personal injury resulting in a judgment of any amount caused by the licensee's negligence, error or omission in practice, or his or her rendering of unauthorized professional services, to report that judgment to MBC within 10 days after the judgment is entered. In addition, the court clerk is responsible for reporting criminal convictions to MBC and transmitting any felony preliminary hearing transcripts concerning a licensee to MBC.

  BPC Section 805 is one of the most important reporting requirements that allows MBC to learn key information about a physician or surgeon. Section 805 requires the chief of staff and chief executive officer, medical director, or administrator of a licensed health care facility to file a report when a physician's application for staff privileges or membership is denied, or the physician's staff privileges or employment is terminated or revoked for a medical disciplinary cause. The reporting entities are also required to file a report when restrictions are imposed or voluntarily accepted on the physician's staff privileges for a cumulative total of 30 days or more for any 12-month period. The report must be filed within 15 days after the effective date of the action taken by a health facility peer review body.

BPC Section 805.01 is a similarly extremely important requirement. The law requires the chief of staff and chief executive officer, medical director, or administrator of a licensed health care facility to file a report within 15 days after the peer review body makes a final decision or recommendation to take disciplinary action which must be reported pursuant to section 805. This reporting requirement became effective January 2011 and is only required if the recommended action is taken for the following reasons:

- Incompetence, or gross or repeated deviation from the standard of care involving death or serious bodily injury to one or more patients in such a manner as to be dangerous or injurious to any person or the public.

- The use of, or prescribing for or administering to him/herself, any controlled substance; or the use of any dangerous drug, as defined in BPC Section 4022, or of alcoholic beverages, to the extend or in such a manner as to be dangerous or injurious to the licentiate, or any other persons, or the public, or to the extent that such use impairs the ability of the licentiate to practice safely.

- Repeated acts of clearly excessive prescribing, furnishing or administering of controlled substances or repeated acts of prescribing, dispensing, or furnishing of controlled substances without a good faith effort prior examination of the patient and medical reason therefor.

- Sexual misconduct with one or more patients during a course of treatment or an examination.

The purpose of 805.01 reports is to provide MBC with early information about these serious charges so that MBC may investigate and take appropriate action to further consumer protection at the earliest possible moment. Accordingly, for any allegations listed above, the Legislature determined that an 805.01 report must be filed once a formal investigation has been completed, and a final decision or recommendation regarding the disciplinary action to be taken against a physician has been determined by the peer review body, even when the physician has not yet been afforded a hearing to contest the findings.

BPC Section 805.8 requires a health care facility or other entity that makes any arrangement under which a healing arts licensee is allowed to practice or provide care for patients must file a report of any allegation of sexual abuse or sexual misconduct made against a healing arts licensee by a patient, if the patient or the patient's representative makes the allegation in writing, to the agency within 15 days of receiving the written allegation of sexual abuse or sexual misconduct.

BPC Section 2216.3 requires accredited outpatient surgery settings to report an adverse event to MBC no later than five days after the adverse event has been detected, or, if that event is an ongoing urgent or emergent threat to the welfare,

health or safety of patients, personnel, or visitors, not later than 24 hours after the adverse event has been detected.

MBC writes that "While helpful, these reporting requirements are not sufficient to ensure that the Board is aware of possible [physician and surgeon] unprofessional conduct. Therefore, the Board seeks to require additional appropriate organizations with knowledge of possible [physician and surgeon] unprofessional conduct to provide a report to the Board."

MBC requests that the Act be amended, in BPC Section 805.8, to clarify that "wellness committees," 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 are likely to become aware of alleged sexual misconduct.

MBC also requests that the Act be amended to to require any organization that employs a physician and surgeon to report to any employment-related discipline imposed (up to and including termination) due to a medical disciplinary cause or reason, and to require any organization that contracts with a physician and surgeon, or other organization (e.g. a medical group or locum tenens provider) for physician and surgeon services, to report to MBC when a licensee is dismissed from service, or the contract is terminated, due to a medical disciplinary cause or reason.

- Agenda Item #6

  Should the statute of limitations for subpoena enforcement during the investigatory process be changed and if so, how?

  BPC Section 2307 authorizes a licensee, whose certificate has been surrendered while the individuals is under investigation or while charges are pending, or whose certificate has been revoked or suspended or placed on probation, to petition MBC for reinstatement, or to modify a penalty imposed, including modifying or terminating probation. The individual is bound to certain time limits, including:

  - At least three years for licensure reinstatement of a license surrendered or revoked for unprofessional conduct, except that MBC may, for good cause shown, specify in a revocation order that a petition for reinstatement may be filed after two years.

  - At least two years for early termination of probation of three years or more.

  - At least one year for modification of a condition, or reinstatement of a license surrendered or revoked for mental or physical illness, or termination of probation of less than three years.

MBC states that "The process to evaluate and consider each petition involves substantial legal costs that are born by the Board, not licensees" and cites expenditures of almost $1 million in OAG and administrative hearing costs related to these petitions. MBC adds that since July 2013, it has granted approximately 46 percent of the petitions requesting reinstatement of a physician's license and in Fiscal Year 2018-2019, approximately 52 percent of the petitions for termination of probation.

MBC requests to amend BPC 2307 to update the timeframes by which individuals can request modifications and to provide for the automatic rejection of a petition for early termination of probation if MBC files a petition to revoke probation while the petition is pending, as well as authority to deny, without hearing or argument, any petition filed within two three years of the effective date of a decision related to a prior petition.

MBC requests that a new section be added to the Act authorizing MBC to establish an application fee for these petitioners, not to exceed the reasonable costs to process and adjudicate petitions for reinstatement, early termination of probation, or modification of probation.

- Agenda Item #7

Should the requirements be changed for petitioners seeking a modification to their probation terms or licensure reinstatement?

With certain exceptions, MBC generally must file an accusation against a licensee either within three years after an alleged act or omission, or within seven years following the date the alleged act or omission occurred, and 10 years for acts related to sexual misconduct. MBC advises that if it is not able to meet the statute of limitations, the complaint must be closed, in accordance with BPC Section 2230.5. According to MBC, if a licensee fails to produce medical records pursuant to a lawful subpoena, "the investigative process is needlessly drawn out, potentially putting the Board's case at risk by failing to meet the [statute of limitations]." MBC advises that under current law, a statute of limitations is paused if the licensee is out of compliance with a court order to produce records. MBC is concerned that waiting for court action further delays the process and can cost MBC critical time as the statute of limitations continues to run.

MBC requests that the Act be amended so that the statute of limitations is paused upon the failure of a licensee to comply with a lawfully served subpoena.

Additional Reform Proposals

- Agenda Item #8

  Should the Medical Board of California's complaint investigation and disciplinary process include complainant participation and is it time to establish a complainant advocate?

  Accepting, processing and acting on complaints from patients, the public, MBC staff, other agencies, and other sources is a primary mechanism by which MBC can ensure that licensees are in compliance with the Act and that patients have options for action in the event that their physician violates the law. The timely processing of complaints provides MBC with critical information about their licensees and assists in prioritizing workloads.

  MBC states that individuals who file a complaint are notified at various stages within the enforcement process. Upon receipt and opening of a complaint, an acknowledgement letter is sent to the complainant. This letter informs the complainant that MBC received their complaint and that if they have additional information they may submit it to CCU for review. MBC also sends a letter to patients or plaintiffs in malpractice cases who may be unaware that MBC received a mandated report complaint. This letter informs them that MBC received this report, asks them to provide additional information they may have, and outlines MBC's statute of limitations.

  When MBC sends a request to the complainant for their release of medical records, MBC also informs the complainant that they can provide additional information regarding their complaint. MBC states that during the complaint review process, if the complainant calls MBC, staff also informs them that they may provide additional information.

  For quality of care cases, the complainant is notified that all the medical records have been received and that the complaint is going to be sent to a medical consult expert for review. For all cases, if it is determined that the complaint is moving to formal investigation, the complainant is sent a letter notifying them of this transition of the case. Once the complaint goes to formal investigation, MBC states the complainant will be contacted by the investigator. If the matter is referred to OAG, the complainant receives a letter notifying them the matter has been referred and also receives a letter and a copy of the accusation, if one is filed. If disciplinary action is taken, the complainant also receives a copy of the final decision in the matter. MBC says that complainants are informed that the complaint they filed with MBC has led to disciplinary action.

  Complaints are confidential until substantiated and the complaint and investigation result in some type of formal, public action. This is not the case for all DCA boards, notably the Contractors State License Board which is required (BPC Section

7124.6) to "make available to members of the public the date, nature, and status of all complaints on file against a licensee that do either of the following: (1) Have been referred for accusation. (2) Have been referred for investigation after a determination by board enforcement staff that a probable violation has occurred, and have been reviewed by a supervisor, and regard allegations that if proven would present a risk of harm to the public and would be appropriate for suspension or revocation of the contractor's license or criminal prosecution."

Questions have arisen for many years about the potential benefit to patients and the public if complaint information is made available, and the value for MBC to establish a formal program with dedicated staff and resources to assist patients as they navigate the enforcement process.

- Agenda Item #9

  Do the Legislature and public need additional access to Medical Board of California disciplinary case results, including the nature of the initial complaint leading to investigation, facts of the case, discipline imposed, and rationale for specific discipline?

  Licensing boards often resolve a disciplinary matter through negotiated settlement, typically referred to as a "stipulated settlement." This may be done, rather than going to the expense of lengthy administrative hearing on a disciplinary matter. According to information from the Citizen Advocacy Center (a national organization focusing on licensing regulatory issues nationwide) "It is not uncommon for licensing boards to negotiate consent orders [stipulated settlements] 80% of the time or more." Similar to a plea bargain in criminal court, a licensee admits to have violated charges set forth in the accusation and accepts penalties for those violations. A stipulated settlement is not necessarily good or bad from a public protection standpoint. However, it is important for a licensing board to look critically at its practices to make sure that it is acting in the public's interest when it enters into a stipulated settlement and that it is acting in the best way to protect the public in each of these stipulated decisions.

  Boards rely on disciplinary guidelines adopted through the regulatory process to guide disciplinary actions. Disciplinary guidelines are established with the expectation that ALJs hearing a disciplinary case, or proposed settlements submitted to a program for adoption, will conform to the guidelines. If there are mitigating factors, such as a clear admission of responsibility by the licensee early on in the process, or clear willingness to conform to board-ordered discipline, or other legal factors, a decision or settlement might vary from the guidelines. At other times in a disciplinary case there can be problems with the evidence, but the licensee admits to wrongdoing in a matter and may be willing to settle a case without going to a formal hearing.

  MBC uses its Disciplinary Guidelines (16 CCR section 1361) and the Uniform Standards for Substance-Abusing Licensees (Uniform Standards) (16 CCR section

1361.5) as the framework for determining the appropriate penalty for charges filed against a physician. BPC Section 2229 identifies that protection of the public shall be the highest priority for MBC, but also requires that wherever possible, the actions should be calculated to aid in the rehabilitation of the licensee.

While the Disciplinary Guidelines and Uniform Standards frame the recommended penalty, MBC states that the facts of each individual case may support a deviation from the guidelines. After an accusation and/or petition to revoke probation is filed, a respondent physician must file a Notice of Defense within 15 days indicating they intend to present a defense to the accusation and/or petition to revoke probation or that they are interested in a settlement agreement. If the individual requests a hearing, existing law (Government Code Sections 11511.5 and 11511.7) requires that a prehearing conference be held to explore settlement possibilities and prepare stipulations, as well as schedule a mandatory settlement conference, in an attempt to resolve the case through a stipulated settlement before proceeding to the administrative hearing level.

The DAG assigned to a case reviews it, along with any mitigation provided, the strengths and weaknesses of the case, MBC's Disciplinary Guidelines, and, when applicable, any prior disciplinary action against the respondent physician to assist in drafting a settlement recommendation that frames the recommended penalty. MBC states that this settlement recommendation takes into account consumer protection but also BPC Section 2229(b) requirements for MBC to "take action that is calculated to aid in the rehabilitation of the licensee, or where, due to a lack of CE or other reasons, restriction on scope of practice is indicated, to order restrictions as are indicated by the evidence." The DAG's recommendation is then reviewed and either approved or edited by the supervising DAG. Once that approval is received, the DAG submits the settlement recommendation to MBC's executive director for review and consideration.

MBC's executive director (and/or deputy director and/or chief of enforcement) reviews the settlement recommendation using the same criteria as the DAG and either approves or changes the settlement recommendation. The DAG then negotiates with the respondent physician and/or their counsel to settle the case with the recommended penalty. Both the prehearing settlement conference and the mandatory settlement conference are assisted by an ALJ who reviews the case and hears information from the DAG and the respondent physician and/or their counsel while helping to negotiate the settlement. During the settlement conference, the appropriate MBC representative must be available to authorize any change to the previously agreed-upon settlement recommendation.

If a settlement agreement is reached, the stipulated settlement document must be approved by a MBC panel, unless the settlement is for a stipulated license surrender. MBC then has the ability to adopt the settlement as written, request changes to the settlement, or request the matter go to hearing. In the process of settling a case, public protection is the first priority, and must be considered with rehabilitation of the

physician. When making a decision on a stipulation, the panel members are provided the strengths and weaknesses of the case, and MBC states that they weigh all factors.

MBC states that settling cases by stipulations that are agreed to by both sides facilitates consumer protection by notifying the public and rehabilitating the physician in a more expeditious manner. By entering into a stipulation, it puts the individual on probation or restriction sooner and the public is able to see the action taken by MBC in a more timely manner than if the matter went to hearing. In addition, MBC says it may get more terms and conditions through the settlement process than would have been achieved if the matter went to hearing.

MBC says that the settlement process is the most expeditious way to resolve cases in a manner that provides an adequate level of consumer protection and avoids the additional costs and risks associated with taking a case to an administrative hearing.

MBC typically settles, on average, almost 80 percent of its disciplinary proceedings. The negative impact on patients stemming from settlements can be significant. For example, in 2000, one physician entered into a stipulated settlement with MBC for violations that occurred in 1996 and 1997. The physician was placed on probation for three years. The physician was restored to full license status in 2003 but again placed on probation for five years based on a settlement. MBC's most recent accusation filed against the physician cites gross negligence, repeated negligence and failure to keep adequate and accurate records related to the wrongful deaths of a patient and her unborn son last year.

BPC Section 803.1 requires the MBC, the Osteopathic Medical Board of California, the Podiatric Medical Board, and the Physician Assistant Board to disclose to an inquiring member of the public information regarding any enforcement actions taken against a licensee including temporary restraining orders issued, interim suspension orders issued, revocations, suspensions, probations, or limitations on practice ordered by the boards (including those made part of a probationary order or stipulated agreement), public letters of reprimand issued, infractions, citations, or fines imposed. MBC is further required, pursuant to BPC Section 2027, to post the current status of its licensees on its website; any revocations, suspensions, probations, or limitations on practice, including those made part of a probationary order or stipulated agreement; historical information regarding probation orders by MBC, or the board of another state or jurisdiction, completed or terminated, including the operative accusation resulting in the discipline by that board; and other information about a licensee's status and history.

While MBC posts information on its website, distributes information to its email list, including final enforcement actions and a summary of the violations leading to those actions, this information does not necessarily contain a formal rationale or justification for the discipline imposed. Patients and the public may not ever know why MBC would settle a disciplinary case for terms less than those stated in the Disciplinary Guidelines, including the patient protection rationale for settling

administrative cases for terms that are below those outlined in Disciplinary Guidelines.

Questions have arisen about the benefit for patients and the public, including the Legislature in its oversight role, to know where recommendations to settle for terms below those in the Disciplinary Guidelines come from, whether it is OAG, MBC members on a panel, MBC staff, or others.

- Agenda Item #10

  What is the actual role of Medical Board of California board members in the disciplinary process? What benefit would be achieved by adding additional members of the public to the Medical Board of California, specifically in regards to the disciplinary process?

  Boards like MBC are semiautonomous bodies whose members are appointed by the Governor and the Legislature. Although most of the non-healing arts boards have statutory authority for a public majority allotment in their makeup, most healing arts and non-healing arts boards are comprised of a majority of members representing the profession.

  BPC Section 2008 provides MBC statutory authority to appoint panels from its members to evaluate appropriate disciplinary actions. Panel A considers actions related to physicians with a last name starting with A-L and Panel B considers actions related to physicians with a last name starting with M-Z.

  Questions have arisen about the role of MBC members in the enforcement process and if there are benefits to patients and the public in the composition of MBC reflecting a majority of public rather than professional members. MBC advised in its January 5, 2022 proposal that "The Board believes that changing the composition to a public member majority would help to restore the public's trust in the Board's operations and priorities", however, as MBC members play a limited role in directing day-to-day functions as well as disciplinary proceedings, additional information is necessary in order to better understand any value from additional public MBC members.