



May 27, 2011

Sidney Wolfe, M.D.
Public Citizen
1600 20th Street NW
Washington, D.C. 20009

Re: Medical Board of California; Privileging Action Report; Request for Analysis

Dear Dr. Wolfe:

This letter serves as a response to Public Citizen's inquiries regarding the Medical Board of California's ("Board") intended course of action regarding out-of-state physician privileging actions.

Please be advised that the Board stands by its earlier letter. Resources permitting, the Board will endeavor to obtain a privileging report from the federal Health Resources and Service Administration and conduct the requested analysis. As mentioned in the Board's previous correspondence, California is facing fiscal uncertainty and hiring restrictions have been placed on the Board. Currently, the Board has a personnel vacancy rate in excess of 20%.

The Board will keep you apprised of its actions in this regard.

Sincerely,

DOREATHEA JOHNSON
Deputy Director
Legal Affairs

A handwritten signature in blue ink, appearing to read 'Kurt W. Heppler'.

By KURT W. HEPPLER
Senior Staff Counsel

cc: Linda Whitney, Executive Director, Medical Board of California



April 12, 2011

Sidney Wolfe, M.D.
Public Citizen
1600 20th Street, NW
Washington, D.C. 20009

Dear Dr. Wolfe:

I write on behalf of the Medical Board of California (Board) and in response to Public Citizen's correspondence of March 14, 2011, regarding the Board's enforcement and disciplinary actions taken against California licensed physicians and surgeons. Specifically, you seek information relating to hospital privileging actions and the responses from the Board.

As we understand your letter, it is Public Citizen's request that the Board obtain from the federal Health Resources & Services Administration a list of physicians who have had a clinical privileging action. The Board is then asked to compare that list to the disciplinary actions it has taken, and then provide the data regarding the comparison to Public Citizen with the understanding that the data will better illustrate the relationship between privileging reports and Board actions. The Board notes that this request is not a traditional Public Records Act request and will not treat it as such.

Some background information may prove helpful. First, the Board does not engage in private disciplinary or enforcement actions. Board disciplinary actions as well as citations are required to be posted on the Internet. (See Bus. & Prof. Code, §§ 803.1, 2027.) Public protection is the Board's highest priority when exercising its licensing, regulatory, and disciplinary functions. (See Bus. & Prof. Code, § 2001.1.)

Second, please be advised that existing law requires a peer review body to transmit to the Board reports of privileging actions taken against Board licensees. (See Bus. & Prof. Code, § 805.) These reports, known as 805 reports, are triggered when the peer review body's actions are based upon a medical disciplinary cause or reason. (Bus. & Prof. Code, § 805, subds (b) & (c).) Please further be advised that the Board takes these 805 reports extremely seriously and in fact, an 805 report will result in the opening of an investigation on the licensee identified in the report. Please find enclosed a copy of section 805 of the Business and Professions Code.

Besides privileging reports, the Board also receives information, known as 801 reports, about arbitration awards, civil judgments and settlements over \$30,000 following a claim or action based upon a physician and surgeon's alleged negligence, error, or omission in the rendering of professional services. (See Bus. & Prof. Code, § 801.01.) These reports may also trigger an investigation.

Additionally, existing law authorizes the Board to take enforcement or disciplinary action against a licensee if that licensee has his or her license disciplined by another state or federal jurisdiction if the reason for that action would constitute unprofessional conduct in California. (See Bus. & Prof. Code, §§ 141, 2305.)

Sidney Wolfe, M.D.
April 12, 2011
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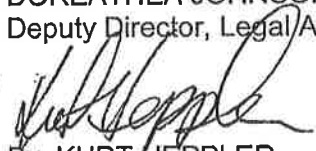
Public Citizen's request seems premised on the concept that a privileging report filed by a hospital located in another jurisdiction would automatically lead to additional Board actions and increased public protection. While the Board does not summarily dismiss the value of reports filed by hospitals located in other jurisdictions and welcomes the input of reliable and relevant information, there may be some practical limitations to confront. These limitations include but are not limited to the constrained ability to obtain documents or records from other jurisdictions (since the Board has little ability to subpoena records), statutes of repose, and reduced Board resources. In addition, the burden of proof in an administrative action involving a physician's and surgeon's certificate is clear and convincing evidence to a reasonable certainty – a far higher standard than the civil "preponderance of the evidence" standard. Perhaps the greatest impediment is that California law does not automatically authorize the Board to take action against a licensee based on an out-of-state hospital privileging action where no corresponding license action has been taken by the licensing authority in that state.

As I am sure you are aware, California is mired in a fiscal crisis and severe restrictions have been placed on the expenditure of state funds and the hiring of civil service personnel. Resources permitting, the Board will endeavor to respond to your requests as it is always interested in improving public protection.

Please contact me if you have any questions.

Sincerely,

DOREATHEA JOHNSON
Deputy Director, Legal Affairs



By KURT HEPPLER
Senior Staff Counsel

Enclosure

cc: Linda Whitney, Executive Director, Medical Board of California
Renee Threadgill, Chief of Enforcement, Medical Board of California
Jennifer Simoes, Chief of Legislation, Medical Board of California
Anita Scuri, Supervising Staff Counsel, Department of Consumer Affairs

805. (a) As used in this section, the following terms have the following definitions:

(1) (A) "Peer review" means both of the following:

(i) A process in which a peer review body reviews the basic qualifications, staff privileges, employment, medical outcomes, or professional conduct of licentiates to make recommendations for quality improvement and education, if necessary, in order to do either or both of the following:

(I) Determine whether a licentiate may practice or continue to practice in a health care facility, clinic, or other setting providing medical services, and, if so, to determine the parameters of that practice.

(II) Assess and improve the quality of care rendered in a health care facility, clinic, or other setting providing medical services.

(ii) Any other activities of a peer review body as specified in subparagraph (B).

(B) "Peer review body" includes:

(i) A medical or professional staff of any health care facility or clinic licensed under Division 2 (commencing with Section 1200) of the Health and Safety Code or of a facility certified to participate in the federal Medicare Program as an ambulatory surgical center.

(ii) A health care service plan licensed under Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code or a disability insurer that contracts with licentiates to provide services at alternative rates of payment pursuant to Section 10133 of the Insurance Code.

(iii) Any medical, psychological, marriage and family therapy, social work, dental, or podiatric professional society having as members at least 25 percent of the eligible licentiates in the area in which it functions (which must include at least one county), which is not organized for profit and which has been determined to be exempt from taxes pursuant to Section 23701 of the Revenue and Taxation Code.

(iv) A committee organized by any entity consisting of or employing more than 25 licentiates of the same class that functions for the purpose of reviewing the quality of professional care provided by members or employees of that entity.

(2) "Licentiate" means a physician and surgeon, doctor of podiatric medicine, clinical psychologist, marriage and family therapist, clinical social worker, or dentist. "Licentiate" also includes a person authorized to practice medicine pursuant to Section 2113 or 2168.

(3) "Agency" means the relevant state licensing agency having regulatory jurisdiction over the licentiates listed in paragraph (2).

(4) "Staff privileges" means any arrangement under which a licentiate is allowed to practice in or provide care for patients in a health facility. Those arrangements shall include, but are not limited to, full staff privileges, active staff privileges, limited staff privileges, auxiliary staff privileges, provisional staff privileges, temporary staff privileges, courtesy staff privileges, locum tenens arrangements, and contractual arrangements to provide professional services, including, but not limited to, arrangements to provide outpatient services.

(5) "Denial or termination of staff privileges, membership, or employment" includes failure or refusal to renew a contract or to renew, extend, or reestablish any staff privileges, if the action is based on medical disciplinary cause or reason.

(6) "Medical disciplinary cause or reason" means that aspect of a licentiate's competence or professional conduct that is reasonably likely to be detrimental to patient safety or to the delivery of

patient care.

(7) "805 report" means the written report required under subdivision (b).

(b) The chief of staff of a medical or professional staff or other chief executive officer, medical director, or administrator of any peer review body and the chief executive officer or administrator of any licensed health care facility or clinic shall file an 805 report with the relevant agency within 15 days after the effective date on which any of the following occur as a result of an action of a peer review body:

(1) A licentiate's application for staff privileges or membership is denied or rejected for a medical disciplinary cause or reason.

(2) A licentiate's membership, staff privileges, or employment is terminated or revoked for a medical disciplinary cause or reason.

(3) Restrictions are imposed, or voluntarily accepted, on staff privileges, membership, or employment for a cumulative total of 30 days or more for any 12-month period, for a medical disciplinary cause or reason.

(c) If a licentiate takes any action listed in paragraph (1), (2), or (3) after receiving notice of a pending investigation initiated for a medical disciplinary cause or reason or after receiving notice that his or her application for membership or staff privileges is denied or will be denied for a medical disciplinary cause or reason, the chief of staff of a medical or professional staff or other chief executive officer, medical director, or administrator of any peer review body and the chief executive officer or administrator of any licensed health care facility or clinic where the licentiate is employed or has staff privileges or membership or where the licentiate applied for staff privileges or membership, or sought the renewal thereof, shall file an 805 report with the relevant agency within 15 days after the licentiate takes the action.

(1) Resigns or takes a leave of absence from membership, staff privileges, or employment.

(2) Withdraws or abandons his or her application for staff privileges or membership.

(3) Withdraws or abandons his or her request for renewal of staff privileges or membership.

(d) For purposes of filing an 805 report, the signature of at least one of the individuals indicated in subdivision (b) or (c) on the completed form shall constitute compliance with the requirement to file the report.

(e) An 805 report shall also be filed within 15 days following the imposition of summary suspension of staff privileges, membership, or employment, if the summary suspension remains in effect for a period in excess of 14 days.

(f) A copy of the 805 report, and a notice advising the licentiate of his or her right to submit additional statements or other information, electronically or otherwise, pursuant to Section 800, shall be sent by the peer review body to the licentiate named in the report. The notice shall also advise the licentiate that information submitted electronically will be publicly disclosed to those who request the information.

The information to be reported in an 805 report shall include the name and license number of the licentiate involved, a description of the facts and circumstances of the medical disciplinary cause or reason, and any other relevant information deemed appropriate by the reporter.

A supplemental report shall also be made within 30 days following the date the licentiate is deemed to have satisfied any terms, conditions, or sanctions imposed as disciplinary action by the

reporting peer review body. In performing its dissemination functions required by Section 805.5, the agency shall include a copy of a supplemental report, if any, whenever it furnishes a copy of the original 805 report.

If another peer review body is required to file an 805 report, a health care service plan is not required to file a separate report with respect to action attributable to the same medical disciplinary cause or reason. If the Medical Board of California or a licensing agency of another state revokes or suspends, without a stay, the license of a physician and surgeon, a peer review body is not required to file an 805 report when it takes an action as a result of the revocation or suspension.

(g) The reporting required by this section shall not act as a waiver of confidentiality of medical records and committee reports. The information reported or disclosed shall be kept confidential except as provided in subdivision (c) of Section 800 and Sections 803.1 and 2027, provided that a copy of the report containing the information required by this section may be disclosed as required by Section 805.5 with respect to reports received on or after January 1, 1976.

(h) The Medical Board of California, the Osteopathic Medical Board of California, and the Dental Board of California shall disclose reports as required by Section 805.5.

(i) An 805 report shall be maintained electronically by an agency for dissemination purposes for a period of three years after receipt.

(j) No person shall incur any civil or criminal liability as the result of making any report required by this section.

(k) A willful failure to file an 805 report by any person who is designated or otherwise required by law to file an 805 report is punishable by a fine not to exceed one hundred thousand dollars (\$100,000) per violation. The fine may be imposed in any civil or administrative action or proceeding brought by or on behalf of any agency having regulatory jurisdiction over the person regarding whom the report was or should have been filed. If the person who is designated or otherwise required to file an 805 report is a licensed physician and surgeon, the action or proceeding shall be brought by the Medical Board of California. The fine shall be paid to that agency but not expended until appropriated by the Legislature. A violation of this subdivision may constitute unprofessional conduct by the licentiate. A person who is alleged to have violated this subdivision may assert any defense available at law. As used in this subdivision, "willful" means a voluntary and intentional violation of a known legal duty.

(l) Except as otherwise provided in subdivision (k), any failure by the administrator of any peer review body, the chief executive officer or administrator of any health care facility, or any person who is designated or otherwise required by law to file an 805 report, shall be punishable by a fine that under no circumstances shall exceed fifty thousand dollars (\$50,000) per violation. The fine may be imposed in any civil or administrative action or proceeding brought by or on behalf of any agency having regulatory jurisdiction over the person regarding whom the report was or should have been filed. If the person who is designated or otherwise required to file an 805 report is a licensed physician and surgeon, the action or proceeding shall be brought by the Medical Board of California. The fine shall be paid to that agency but not expended until appropriated by the Legislature. The amount of the fine imposed, not exceeding fifty thousand dollars (\$50,000) per violation, shall be proportional to the severity of the failure to report and shall differ based upon written findings, including whether the failure to file caused harm

to a patient or created a risk to patient safety; whether the administrator of any peer review body, the chief executive officer or administrator of any health care facility, or any person who is designated or otherwise required by law to file an 805 report exercised due diligence despite the failure to file or whether they knew or should have known that an 805 report would not be filed; and whether there has been a prior failure to file an 805 report. The amount of the fine imposed may also differ based on whether a health care facility is a small or rural hospital as defined in Section 124840 of the Health and Safety Code.

(m) A health care service plan licensed under Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code or a disability insurer that negotiates and enters into a contract with licentiates to provide services at alternative rates of payment pursuant to Section 10133 of the Insurance Code, when determining participation with the plan or insurer, shall evaluate, on a case-by-case basis, licentiates who are the subject of an 805 report, and not automatically exclude or deselect these licentiates.