

Enforcement Changes for Healing Arts Boards

1. **Title and Intent – Consumer Health Protection Enforcement Act**
2. **Bureau of State Audits Review of Diversion Programs of Healing Arts Boards in 2012.**

Justification. To ensure full implementation of SB 1441 standards and address problems encountered with the Maximus audit and drug testing requirements, this audit ensures that diversion programs are protecting the public and rehabilitating licensees.

3. **(GC) Information Provided on the Internet.** Requires healing arts boards to disclose the status of every license, including suspensions and revocations, whether or not the licensee or former licensee is in good standing, or has been subject to discipline by the healing arts board or by the board of another state or jurisdiction. Prohibits the disclosure of personal information, including home telephone number, date of birth, or social security number.

Justification. Although a number of boards, including healing arts boards, are required to post the aforementioned information regarding a licensee, there are other healing arts boards that do not. One of the issues raised by the *LA Times* is that the public is unaware of problem licensees, whether they have had prior disciplinary action taken against them, or whether their license is currently in good standing. There were instances in which the *LA Times* looked up on the Internet or on the BRN's Website and never saw prior disciplinary or criminal convictions of nurses. This provision ensures the uniformity of information about the status of licensees that are posted on the Internet.

4. **(GC) Director's Authority to Audit Enforcement Programs of Health Boards.** Existing law authorizes the Director of DCA to audit and review, among other things, inquiries and complaints regarding licensees, dismissals of disciplinary cases, and discipline short of formal accusation by the Medical Board of California (MBC) and the California Board of Podiatric Medicine. This bill allows the Director to audit and review the aforementioned activities for any of the healing arts boards. The Director may make recommendations for changes to the disciplinary system to the appropriate board, the Legislature, or both, for their consideration.

Justification. There does not appear to be any reason why the Director should only be limited to auditing and taking specific actions on behalf of consumers for the MBC and the Podiatric Board. The Director should be authorized to audit and review any healing arts boards as necessary, and allow the Director to make recommendations for changes to the board's disciplinary or enforcement system.

5. **(GC) Determination of Reasonable Costs by an ALJ and Payment of Costs.** Existing law allows an administrative law judge to direct a licensee who has committed a violation to pay healing arts boards a sum not to exceed the reasonable costs of the

investigation and enforcement of the case. This provision requires that in determining reasonable costs, an ALJ consider only the public resources expended pursuant to the investigation, prosecution and enforcement of the case. Requires an ALJ to provide an explanation as to how the amount ordered for reasonable costs was determined if the actual costs were not ordered. Allows a licensee and board to agree to a payment plan.

Justification. All boards are subject to cost recovery provisions. Healing arts boards have indicated to committee staff that there has been inconsistency in the manner ALJ's calculate cost recovery. These provisions will give direction to the ALJs in their determination of costs.

6. **(GC) Allow Boards to Contract with Collection Agency.** Allows a board to contract with a collection service for the purpose of collecting outstanding fees, fines, or cost recovery amounts. Specifies requirements to ensure privacy of information.

Justification. All of DCA's boards are authorized to issue administrative citations which may include an administrative fine to licensees for violations of law, and to non-licensees for unlicensed activity. However, most boards come far from ever collecting all administrative fines due to them. In order to improve effectiveness in boards' fine collection efforts, the DCA will procure a contract with a collection agency that can serve all boards. Legislation is needed to allow the DCA the ability to provide the collection agency with social security numbers.

7. **(GC) Allow Health Boards to Contract for Investigative Services provided by the Department of Justice.** Allows a healing arts board to contract with the Department of Justice to provide investigative services as determined necessary by the Executive Officer.

Justification. Healing arts boards should be provided with the greatest flexibility in obtaining investigative services and in completing cases in a timely manner. By allowing healing arts boards to contract with the Department of Justice, or to utilize the investigative services of the DOI, they will be provided with the broadest opportunity to move cases forward in a more expeditious manner. The AG's Office made this recommendation since it also believes that more difficult criminal-type cases could be investigated and prosecuted by their Office.

8. **(GC) Create Within the Division of Investigation (DOI) a Health Quality Enforcement Unit.** Creates within DOI a special unit titled the "Health Quality Enforcement Unit" to focus on health care quality cases and to work closely with the AG's Health Quality Enforcement Section in investigation and prosecution of complex and varied disciplinary actions against licensees of the various healing arts boards.

Justification. Creating a Health Quality Enforcement Unit to focus on health care quality cases will create expertise in the investigation and prosecution of complex and varied disciplinary actions against licensees of the various healing arts boards.

9. **(PA) Allow Executive Officers (EO) to Adopt Default Decisions and Stipulated Settlements.** Allows a healing arts board to delegate to the executive officer the authority to adopt a proposed default decision in an administrative action to revoke a license if a licensee fails to file a notice of defense, appear at the hearing, or has agreed to surrender his or her license. Require the EO to report to the board the number of default decisions and stipulated settlements adopted. Requires that a stipulated settlement give notice to licensees, to include language identifying the factual basis for the action taken, and a list of the statutes or regulations violated. Allows a licensee to file a petition to modify the terms of the settlement or petition for early termination of probation, if probation is part of the settlement.

Justification. According to the AG's Office, a majority of filed cases settle and the receipt of a Notice of Defense can trigger either settlement discussions or the issuance of a Default Decision. Stipulated settlements are a more expeditious and less costly method of case resolution. The EO of the board can provide summary reports of all settlements to the board and the board can provide constant review and feedback to the executive officer so that policies can be established and adjusted as necessary. Also, there have been instances of undue delays between when a fully-signed settlement has been forwarded to the board's headquarters and when it has been placed on the board's agenda for a vote. Delegating this authority to the executive officer will result in a final disposition of these matters much more quickly. The fact that the BRN, for example, has reduced the number of its annual meetings has only increased the need for this.

According to the Center for Public Interest Law (CPIL), it is taking the AG too long to prepare a proposed default decision. In 2004-2005, it was taking the AG almost 6 months to file a proposed default decision. In 2008-2009 it was down to about 2.5 months. As argued by CPIL, filing a proposed default decision is "not rocket science" and should only take a matter of hours.

10. **(PA) Automatic Suspension of License While Incarcerated.** Provides that the license of a healing arts licensee shall be suspended automatically if the licensee is incarcerated after the conviction of a felony, regardless of whether the conviction has been appealed, and requires the board to notify the licensee of the suspension and of his or her right to a specified (due process) hearing.

Justification. Existing law allows physicians and surgeons and podiatrists to be suspended while incarcerated and there is no reason why other healing arts professionals should not be subject to the same requirements regarding suspension of their license if they are convicted of a felony and incarcerated. Automatic license suspension is needed to prevent a healing arts licensee from practicing while in prison or while released pending appeal of a conviction. Years may pass before a convicted licensee's license can be revoked. According to the *LA Times*, "in some cases, nurses with felony records continue to have spotless licenses even while serving time behind bars." The *LA Times* gave examples of at least five nurses who had felony convictions and yet continued to have a license in good standing.

11. **(PA) Mandatory Revocation for Acts of Sexual Exploitation and Registration as Sex Offender.** States that a decision issued by an administrative law judge that contains a finding that a healing arts practitioner engaged in any act of sexual exploitation, as defined, or has committed an act or been convicted of a sex offense, shall contain an order of revocation. The revocation shall not be stayed by the administrative law judge. Also, adds a new section that would require the board to deny a license to an applicant or revoke the license of a licensee who has been required to register as a sex offender.

Justification. Mandatory revocation of a license for acts of sexual exploitation currently applies to physician and surgeons, psychologists, respiratory care therapists, marriage and family therapists, and clinical social workers. Additionally, there is a mandatory revocation for any physician and surgeon, dentist, physical therapist, or psychologist who registers as a sex offender. There is no reason why these provisions should not apply to other healing arts licensees.

12. **(PA) Prohibition of Gag Clauses in Civil Dispute Settlement Agreements.** Prohibits a healing arts licensee from including, or permitting to be included, any provision in a civil dispute settlement agreement which would prohibit a person from contacting, cooperating with or filing a complaint with a board based on any action arising from his or her practice.

Justification. Currently, physicians and surgeons are prohibited from including gag clauses in civil dispute settlements. AB 249 (Eng, 2007) would have extended this prohibition to all healing arts professionals but was vetoed by the Governor. There is no reason why other healing arts professionals should not be subject to the same prohibition which would prevent them from including a “gag clause” in a malpractice settlement and thus prevent a board from receiving information about a practitioner who may have violated the law. The use of gag clauses still persists. Gag clauses are sometimes used to intimidate injured victims so they refuse to testify against a licensee in investigations. Gag clauses can cause delays and thwart a board’s effort to investigate possible cases of misconduct, thereby preventing the board from performing its most basic function – protection of the public. Gag clauses increase costs to taxpayers, delay action by regulators, and tarnish the reputation of competent and reputable licensed health professionals. California should not allow repeat offenders who injure patients to hide their illegal acts from the authority that grants them their license to practice as a healing arts professional.

13. **(PA) Access to Medical Records/Documents Pursuant to Board Investigations.** Authorizes the AG and his or her investigative agents and healing arts boards to inquire into any alleged violation of the laws under the board’s jurisdiction and to inspect documents subject to specified procedures. Provides that any document relevant to an investigation may be inspected, and copies may be obtained where patient written authorization is given. Imposes civil and criminal penalties for licensees or health facilities for failure to comply with a patient’s medical record request or with a court order mandating release of record.

Justification. Provisions authorizing the AG and its investigative agents and boards to

inquire into any alleged violations of the laws under the board's jurisdiction and to inspect documents subject to specified procedures currently exists for physicians and surgeons. Furthermore, existing law requires physicians and surgeons, dentists, and psychologists to produce medical records accompanied by a patient's written authorization and pursuant to a court order (subpoena), and prescribes penalties for failure to produce the records. When a board or the AG is trying to obtain important documents and medical records pursuant to a disciplinary action of a licensee, requirements for obtaining these documents and records should be consistent with those of other health care practitioners. Language has been included which protects those licensees who may not be responsible for medical records or have no access or control over these records. Also, medical records can only be obtained under two circumstances: (1) The patient has given written authorization for release of the records to a board; and, (2) the board or the AG has sought a court order and the court has issued a subpoena mandating the release of records. Under both circumstances penalties would apply if the records are not supplied by those who have both possession and control over the records. There is no reason why the requirement for obtaining important medical records and documents pursuant to an investigation by a board should not uniformly apply to all healing arts boards.

14. **(PA) Access to Records/Documents from Governmental Agencies.** Requires a state agency, upon receiving a request from a board, to provide all records in the custody of the agency including but not limited to confidential reports, medical records and records related to closed or open investigations. Requires a healing arts board to maintain the confidentiality of any personal identifying information.

Justification. When a regulatory program conducts an investigation on one of its licensees, there can be significant delays caused by the amount of time it takes to secure records from various state agencies. This proposal would solve this problem by requiring these agencies to release information relevant to investigations, upon the request of a board.

15. **(PA) Payment to Agencies for Record/Documents Received.** Requires all local and state law enforcement agencies, state and local governments, state agencies and licensed health care facilities, and employers of any licensee of a board to provide records requested prior to receiving payment from the board.

Justification. Only a small number of external governmental agencies charges boards for producing records (i.e., Federal courts, several Los Angeles county agencies). However, under current practices, procedures involved in receiving approval for and completing the payment can delay delivery of the requested records.

16. **(PA) Employer of Health Care Practitioner Reporting Requirements.** Requires any employer of a healing arts licensee to report to the respective board the suspension or termination for cause, as defined (serious violations of professional practice), or resignation in lieu of suspension or termination, of any healing arts licensee in its employ. Requires the information reported to be confidential and not subject to discovery in civil cases, and to include the facts and circumstances of the suspension, termination or resignation. Requires a healing arts board to investigate the

circumstances underlying the report within 30 days to determine if an interim suspension order or temporary restraining order should be issued.

Justification. Currently employers of vocational nurses, psychiatric technicians and respiratory care therapists are required to report to the respective boards the suspension or termination for cause of these health care practitioners. The MBC, the Board of Podiatric Medicine, Board of Behavioral Sciences, Board of Psychology and the Dental Board also have more extensive reporting requirements for peer review bodies and hospitals which are specified in Section 805 of the B&P Code. There is no reason why the remaining healing arts boards should not have similar reporting requirements for those licensees who have been suspended or terminated from employment for serious disciplinary reasons.

17. **(GC) Annual Enforcement Reports by Boards to the Department and Legislature.**

Requires healing arts boards to report annually, by October 1, to the DCA and the Legislature certain information, including, but not limited to, the total number of consumer calls received by the board, the total number of complaint forms received by the board, the total number of convictions reported to the board, and the total number of licensees in diversion or on probation for alcohol or drug abuse.

Justification. Currently, the MBC reports annually to the DCA and the Legislature certain enforcement actions taken against physicians and surgeons. There is no reason why other healing arts boards should not be subject to the same requirements in submitting an annual enforcement report both to the DCA and the Legislature.

18. **(GC) Enforcement Timeframes for the Attorney General's Office.** Requires the AG's Office to serve an accusation within 60-calendar days after receipt of a request for accusation from a board; serve a default decision within 5 days following the time period allowed for the filing of a Notice of Defense and to set a hearing date within three days of receiving a Notice of Defense, unless instructed otherwise by the board.

Justification. There are delays in the prosecution of cases at the AG's Office that are contributing to the lengthy enforcement and disciplinary process that can take on average up to 2 to 3 years. According to statistics provided by the AG's Office, the average time for the AG to file an accusation for a board is taking from 5 to 8 months, and to complete prosecution can take on average about 400 days. Concerns have also been raised about the time it takes the AG to prepare a proposed default decision. The filing of a default decision is made once a licensee has failed to file a "notice of defense" when an accusation has been served on him or her. If the licensee fails to file a notice of defense within a specified timeframe, he or she is subject to a default judgment because of a failure to appear or make a defense of the disciplinary case. In 2004-2005 it was taking the AG almost 6 months to file a proposed default decision. In 2008-2009 it was down to about 2.5 months. However, the filing of a proposed default decision is "not rocket science" and should only take a matter of days.

19. **(GC) Limited License for Mental Illness/Chemical Dependency.** Grants healing arts boards the authority to provide a limited license, certificate or permit to an applicant who may be unable to practice his or her profession safely because of mental or

physical illness. Specifies requirements for the provision of limited license.

Justification. Boards lack the authority to deny a license application or compel an applicant to submit to a psychological or physical examination when the applicant's fitness to practice is compromised based on suspected mental illness or chemical dependency. Boards have the authority to deny an applicant a license for criminal convictions, dishonesty, fraud or deceit, or any act if committed by a licensee would be grounds for disciplinary action. This proposed language would solidify the Board's authority to protect the public, given the potential harm/damage to public safety of a substance abusing licensee or one with mental illness or other physical illness.

20. **(PA) Report Licensing Actions and Checking Information Maintained by the National Practitioner Data Bank (NPDB) and the Healthcare Integrity and Protection Data Bank (HIPDB).** Requires healing arts boards to check the NPDB and the HIPDB prior to renewing the license, certificate or permit. Allows a healing arts board to charge a fee to cover the actual costs to conduct the search. Codifies federal requirements of healing arts boards to report specific enforcement actions taken against health care practitioners.

Justification. There is no reason for boards not to check the NPDB or other national professional or council databases to find out whether applicants or licensees have been sanctioned or disciplined by other states prior to granting or renewing of a license.

For background purposes, the NPDB and HIPDB, managed by the Health Resources and Services Administration of the U.S. Department of Health and Human Services, serves as an electronic repository of information on adverse licensure actions, certain actions restricting clinical privileges, and professional society membership actions taken against physicians, dentists, and other practitioners. The legislation that led to the creation of the NPDB was enacted because the U.S. Congress believed that the increasing occurrence of medical malpractice litigation and the need to improve the quality of medical care had become nationwide problems that warranted greater efforts than any individual State could undertake. The intent is to improve the quality of health care by encouraging State licensing boards, hospitals and other health care entities, and professional societies to identify and discipline those who engage in unprofessional behavior; and to restrict the ability of incompetent physicians, dentists, and other health care practitioners to move from State to State without disclosure or discovery of previous medical malpractice payment and adverse action history. The information reported to these databanks is not public information.

One of the articles published by the *LA Times* pointed out that these databanks were missing critical cases, including those who have harmed patients in California. The *LA Times* asserted that there has been sporadic reporting to these databanks, and state boards, hospitals and other entities could be missing information necessary to ensure the protection of the public.

21. **(PA) Conviction of Sexual Misconduct – Substantially Related Crime.** Provides that a conviction of sexual misconduct or a felony requiring registration as a registered sex offender shall be considered a crime substantially related to the qualifications, functions, or duties of a board license.

Justification. Existing law provides that for physicians and surgeons, dentists and other health professionals, a conviction of sexual misconduct or a felony requiring registration as a registered sex offender is considered a crime substantially related to the qualifications, functions, or duties of a board licensee. There is no reason why other health professionals who have been convicted of sexual misconduct, or have been required to register as a sex offender pursuant to a felony conviction, should not be subject to the same standard and finding that such a crime is substantially related to the qualifications, functions, or duties of a board licensee.

22. **(PA) Unprofessional Conduct for Drug Related Offense.** Specifies that a conviction of a charge of violating any federal statutes or regulations or any statute or regulation of this state, regulating dangerous drugs or controlled substances, constitutes unprofessional conduct, and that the record of the conviction is conclusive evidence of such unprofessional conduct.

Justification. The Medical Practice Act provides that a conviction of a charge of violating any federal statutes or regulations or any statute or regulation of this state, regulating dangerous drugs or controlled substances, constitutes unprofessional conduct, and that the record of the conviction is conclusive evidence of such unprofessional conduct. There is no reason why other health professionals should not be subject to the same requirements regarding certain drug related offenses which would be considered as unprofessional conduct on the part of the practitioner.

23. **(PA) Unprofessional Conduct for Failure to Cooperate With Investigation of Board.** Specifies that failure to furnish information in a timely manner to the board or cooperate in any disciplinary investigation constitutes unprofessional conduct.

Justification. This requirement was recommended by the AG's Office. According to the AG, a significant factor preventing the timely completion of investigations is the refusal of some health care practitioners to cooperate with an investigation of the board. This refusal to cooperate routinely results in significant scheduling problems and delays, countless hours wasted serving and enforcing subpoenas, and delays resulting from the refusal to produce documents or answer questions during interviews. Other states have long required their licensees to cooperate with investigations being conducted by disciplinary authorities. The AG argues that the enactment of a statutory requirement in California would significantly reduce the substantial delays that result of a practitioner's failure to cooperate during a board's investigation.

24. **(GC) Reporting by Licensee of Conviction or Disciplinary Action.** Requires a healing arts licensee to submit a written report for the following reasons: (1) the bringing of an indictment or information charging a felony against the licensee; (2) conviction of the licensee of any felony or misdemeanor; and, (3) any disciplinary action taken by another healing arts board of this state or of another state or an agency of the

federal government.

Justification. Existing law requires a physician and surgeon, osteopathic physician and surgeon, and a doctor of podiatric medicine to report to his or her respective board when there is an indictment or information charging a felony against the licensee or he or she been convicted of a felony or misdemeanor. There is no reason why all health professionals should not be subject to the same reporting requirements as some of the other health professionals.

25. **(GC) Report of Crime or Personal Injury Judgment by Clerk of Court.** Requires that the clerk of the court provide notice to a healing arts boards for which the licensee is licensed, if there is a judgment for a crime committed or for any death or personal injury in excess of \$30,000, for which the licensee is responsible due to their negligence, error or omission in practice, or his or her rendering unauthorized professional services.

Justification. There is no reason the clerk of the court should not report a judgment for a crime or for personal injury to any of the other healing arts boards. Most healing arts boards are currently covered under this provision.

26. **(GC) Report of Felony Charges by DA, City Attorney, or Clerk of Court.** Requires that any filings of charges of a felony be reported to all appropriate healing arts boards for which the licensee is licensed.

Justification. There is no reason why all the other healing arts boards should not receive notice that charges of a felony have been filed against the licensee of the board.

27. **(GC) Report of Preliminary Hearing Transcript of Felony by Clerk of Court.** Requires that any filings of charges of a felony be reported to all appropriate healing arts boards for which the licensee is licensed.

Justification. There is no reason why all other healing arts boards should not receive notice that charges of a felony have been filed against the licensee of the board.

28. **(GC) Notification of Future Arrests or Convictions from DOJ.** Requires the Department of Justice to provide reports within 30 days of subsequent arrests, convictions or other updates of licensees.

Justification. While all new fingerprints are performed electronically, not all records at the DOJ are kept electronically for licensees who were fingerprinted in the past. Retrieving non-electronic records adds unnecessary time to investigations. The DCA is not in a position to recommend how exactly the DOJ can reduce the amount of time it takes to complete subsequent arrest and conviction notices, but believes that a benchmark should be set. This would speed up the time it takes to receive some arrest and conviction notices and will allow boards to take action against licensees sooner.

29. **(GC) Unlicensed Practice – Public Crime.** Specifies that it is a public offense, punishable by a fine not to exceed \$100,000 or imprisonment, to engage in any practice, including healing arts practice, without a current and valid license.

Justification. Unlicensed practice presents a serious threat to public health and safety. However, it can be difficult for a board to get a district attorney to prosecute these cases criminally because the penalties are often significantly less than the cost to prosecute the case. While district attorneys do prosecute the most egregious cases, the inconsistent prosecution of these cases diminishes the deterrent effect. If the penalty for unlicensed practice is substantially increased, the deterrent will be increased two-fold; not only will the punishment be more severe, but district attorneys will be more likely to prosecute these cases.

30. **(Gov't Code) Allow Healing Arts Boards to Utilize the Vertical Enforcement and Prosecution Model.** Expands the use of the vertical enforcement and prosecution model for cases handled by all other health boards.

Justification. Allowing healing arts boards to utilize the vertical enforcement and prosecution model that currently applies to physicians and surgeons could be beneficial especially for complex types of actions.

31. **Intent Language for a New Information Technology System.** Provides that it is the intent of the Legislature that the DCA shall, on or before December 31, 2012, establish an enterprise information technology system necessary to electronically create and update healing arts license information, track enforcement cases, and allocate enforcement efforts pertaining to healing arts licensees.

Justification. DCA's current licensing and enforcement database systems are antiquated and impede the boards' abilities to meet their program goals and objectives. Over the past 25 years, these systems have been updated and expanded, but system design and documentation have deteriorated to such an extent that it has left the systems unstable and difficult to maintain. These systems have inadequate performance measurement, data quality errors, an inability to quickly adapt to changing laws and regulations, and a lack of available public self-service options. Implementation of a replacement system is needed to support enforcement monitoring, automate manual processes, streamline processes, and integrate information about licensees. The Governor's 2011-2012 Budget appropriated funds for the implementation of this system.