



ENFORCEMENT COMMITTEE
AUGUST 19, 2015

SUBJECT: BOARD OF PODIATRIC MEDICINE (“BPM”) 2015/16 SUNSET REVIEW REPORT

ACTION: CONSIDER AND DISCUSS DRAFT SUNSET REVIEW REPORT COVERING SECTIONS 5, 7 AND 11

6

RECOMMENDATION

Discuss and consider the draft sections of the 2015/2016 Sunset Review Report.

ISSUE

The BPM Sunset Review Report for 2015/2016 must be completed and submitted to the Joint Legislative Sunset Review Committee (“JLSRC”) by December 1, 2015.

DISCUSSION

BPM is scheduled for automatic repeal on January 1, 2017, unless the Legislature extends the date for repeal before conclusion of the 2016 calendar year through the “Sunset Review” process.

The Sunset Review process was created in 1994. The process was an effort by both chambers of the State Legislature (Joint Committee) with oversight responsibilities over licensing entities with regulatory responsibilities over specific professions and occupations to ensure the proper execution, efficiency, effectiveness and protection against incompetent practice or illegal activities of state licensed professionals. The Joint Committee prepared and forwarded a series of inquiries the committee specifically seeks addressed in a Sunset Review Report. There are a total of 62 questions to be addressed by the Board. In addition, BPM must respond to sections querying Board action and response to prior sunset issues and any new issues facing the Board.

Draft responses to sections of the report falling under Licensing Committee jurisdiction have been prepared and are included for review and consideration by committee. The present report contains sections that remain to be address but represents a preliminary draft response to the followings sections:

1. Section 5: Enforcement Program
2. Section 7: Online Practice Issues

3. Section 11: New Issues

Guidance and recommendations for sections yet to be completed in addition to revisions and/or further suggestions by committee will be incorporated appropriately and forwarded for final BPM Board review at its regularly scheduled meeting. Once approved by the Board, the Sunset Review Report will be finalized and submitted to the Joint Committee on or before the requested December 1st due date.

NEXT STEPS

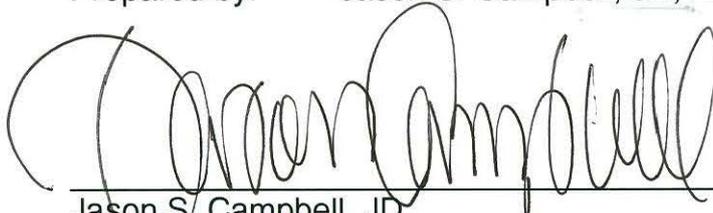
Staff will continue refining and drafting responses to questions as directed which are segregated into appropriate sections and reviewed by the respective BPM committees with subject matter jurisdiction over the particular subject areas.

Committee recommendations will in turn continue to be incorporated and submitted to the full board for consideration, discussion, input and/or approval at its regularly scheduled meeting in September.

ATTACHMENTS

- A. Draft Sunset Review Report Sections 5, 7 and 11

Prepared by: Jason S. Campbell, JD, Executive Officer



Jason S. Campbell, JD
Executive Officer

**Board of Podiatric Medicine
Enforcement Committee
BACKGROUND INFORMATION AND OVERVIEW OF THE CURRENT
REGULATORY PROGRAM
As of July 30, 2015**

**Section 5
Enforcement Program**

1. What are the board's performance targets/expectations for its enforcement program? Is the board meeting those expectations? If not, what is the board doing to improve performance?

Section 2319 B&P provides in pertinent part that the Medical Board of California—under whose jurisdiction BPM is placed—must set a performance target not exceeding 180 days for the completion of an investigation beginning from the time of receipt of a complaint. Complex fraud, business or financial arrangement investigations or those that involve a measure of medical complexity are permitted to extend the target investigation completion time by an additional 6 months.

Notwithstanding, in an effort to demonstrate efficient and effective use of limited resources, DCA and its stakeholders set out to develop and implement an easy to understand and transparent system of performance targets and expectations for all boards including BPM on or about FY 09/10. The performance criteria—the first attempt DCA wide in over 15 years—established a set of consistent measures and definitions across all DCA program enforcement processes. Specific areas of performance measurement included:

- Time to complete the complaint intake process (AKA Measure 2)
- Time to complete the complaint investigation process (AKA Measure 3)
- Time to complete the complaint enforcement process from beginning to end (AKA Measure 4)

The performance measures additionally included metrics for two additional areas including complaint volume and probation monitoring data. Through a deliberative process of collaboration across line, managerial and executive staff agency wide, performance targets were collectively agreed upon and established. These target metrics are set forth below as follows:

- 9 days for Measure 2
- 125 days for Measure 3
- 540 days for Measure 4

Each report was to be published quarterly with the baseline reporting period for BPM released on DCA's website in the first quarter of FY 10/11. Overall, it is believed that the metrics represent an accurate portrait of current Board performance and it is the DCA performance targets that the Board strives to meet with an eye toward satisfaction of the statutory timelines mandated by 2319 B&P.

2. Explain trends in enforcement data and the board's efforts to address any increase in volume, timeframes, ratio of closure to pending cases, or other challenges. What are the performance barriers? What improvement plans are in place? What has the board done and what is the board going to do to address these issues, i.e., process efficiencies, regulations, BCP, legislation?

[...]

Table 9a. Enforcement Statistics			
	FY 2012/13	FY 2013/14	FY 2014/15
COMPLAINT			
Intake (Use CAS Report EM 10)			
Received			
Closed			
Referred to INV			
Average Time to Close			
Pending (close of FY)			
Source of Complaint (Use CAS Report 091)			
Public			
Licensee/Professional Groups			
Governmental Agencies			
Other			
Conviction / Arrest (Use CAS Report EM 10)			
CONV Received			
CONV Closed			
Average Time to Close			
CONV Pending (close of FY)			
LICENSE DENIAL (Use CAS Reports EM 10 and 095)			
License Applications Denied			
SOIs Filed			
SOIs Withdrawn			
SOIs Dismissed			
SOIs Declined			
Average Days SOI			
ACCUSATION (Use CAS Report EM 10)			
Accusations Filed			
Accusations Withdrawn			
Accusations Dismissed			
Accusations Declined			
Average Days Accusations			
Pending (close of FY)			

Table 9b. Enforcement Statistics (continued)			
	FY 2012/13	FY 2013/14	FY 2014/15
DISCIPLINE			
Disciplinary Actions (Use CAS Report EM 10)			
Proposed/Default Decisions			
Stipulations			
Average Days to Complete			
AG Cases Initiated			

AG Cases Pending (close of FY)			
Disciplinary Outcomes (Use CAS Report 096)			
Revocation			
Voluntary Surrender			
Suspension			
Probation with Suspension			
Probation			
Probationary License Issued			
Other			
PROBATION			
New Probationers			
Probations Successfully Completed			
Probationers (close of FY)			
Petitions to Revoke Probation			
Probations Revoked			
Probations Modified			
Probations Extended			
Probationers Subject to Drug Testing			
Drug Tests Ordered			
Positive Drug Tests			
Petition for Reinstatement Granted			
DIVERSION			
New Participants			
Successful Completions			
Participants (close of FY)			
Terminations			
Terminations for Public Threat			
Drug Tests Ordered			
Positive Drug Tests			

Table 9c. Enforcement Statistics (continued)			
	FY 2012/13	FY 2013/14	FY 2014/15
INVESTIGATION			
All Investigations (Use CAS Report EM 10)			
First Assigned			
Closed			
Average days to close			
Pending (close of FY)			
Desk Investigations (Use CAS Report EM 10)			
Closed			
Average days to close			
Pending (close of FY)			
Non-Sworn Investigation (Use CAS Report EM 10)			
Closed			
Average days to close			
Pending (close of FY)			
Sworn Investigation			
Closed (Use CAS Report EM 10)			
Average days to close			
Pending (close of FY)			
COMPLIANCE ACTION (Use CAS Report 096)			
ISO & TRO Issued			
PC 23 Orders Requested			
Other Suspension Orders			
Public Letter of Reprimand			
Cease & Desist/Warning			
Referred for Diversion			
Compel Examination			
CITATION AND FINE (Use CAS Report EM 10 and 095)			
Citations Issued			
Average Days to Complete			
Amount of Fines Assessed			
Reduced, Withdrawn, Dismissed			
Amount Collected			
CRIMINAL ACTION			
Referred for Criminal Prosecution			

Table 10. Enforcement Aging						
	FY 2011/12	FY 2012/13	FY 2013/14	FY 2014/15	Cases Closed	Average %
Attorney General Cases (Average %)						
Closed Within:						
1 Year						
2 Years						
3 Years						
4 Years						
Over 4 Years						
Total Cases Closed						
Investigations (Average %)						
Closed Within:						
90 Days						
180 Days						
1 Year						
2 Years						
3 Years						
Over 3 Years						
Total Cases Closed						

3. What do overall statistics show as to increases or decreases in disciplinary action since last review.

[...]

4. How are cases prioritized? What is the board's compliant prioritization policy? Is it different from DCA's *Complaint Prioritization Guidelines for Health Care Agencies (August 31, 2009)*? If so, explain why.

In order to ensure that physicians representing the greatest threat of harm to the public are handled expeditiously, the Legislature has explicitly provided the prioritization schedule for all medical complaints. The governing statute is found under section 2220.05 B&P.

As a unit under the jurisdiction of the Medical Board, BPM uses the complaint investigation and enforcement services of the larger Medical Board by way of an annual Shared Services contract. This has proven to be the most efficient and cost effective process for regulating the Board's licensee population of approximately 2000 physicians. Thus, while BPM considers every case to be a priority, BPM medical cases are prioritized identically to Medical Board cases and managed through its Central Complaint Unit ("CCU") in the same manner.

Accordingly, cases involving gross negligence, incompetence and repeated negligent acts involving death or serious bodily injury are identified as holding the highest priority as mandated by statute. Cases involving physician drug and alcohol use, sexual misconduct with patients, repeated acts of excessive prescribing with or without examination and excessive furnishing or administering of controlled substances are also defined as priorities. Extra-statutory priorities are managed according to protocols as prescribed within DCA's Guidelines for Health Care Agencies.

5. Are there mandatory reporting requirements? For example, requiring local officials or organizations, or other professionals to report violations, or for civil courts to report to the board actions taken against a licensee. Are there problems with the board receiving the required reports? If so, what could be done to correct the problems?

Yes. There are mandatory reporting requirements statutorily imposed on several entities to alert BPM to possible disciplinary matters for action and investigation. As with complaint prioritization protocols discussed immediately above, mandatory disclosure reports are received and handled through the Medical Board CCU. Codified in section 800 et. seq. of Article 11 of the Business and Professions Code, the mandatory reporting requirements are fully applicable to California DPMs and include the following below listed disclosure reports:

Section 801.01 B&P

[...]

Section 802.1 B&P

[...]

Section 802.5 B&P

[...]

Sections 803 and 803.5 B&P

[...]

Section 805 B&P

[...]

Section 805.01 B&P

[...]

Section 2240 B&P

[...]

6. Does the board operate with a statute of limitations? If so, please describe and provide citation. If so, how many cases have been lost due to statute of limitations? If not, what is the board's policy on statute of limitations?

Yes. The applicable statutes of limitation are found under section 2230.5 B&P. Accordingly, with certain limited exceptions, accusations filed pursuant to Government Code section 11503 must be brought against a licensee within seven (7) years after occurrence of the act or omission serving as the basis for disciplinary action or else within three (3) years after discovery of the act or omission by the Board, whichever occurs first.

Actions involving sexual misconduct extend the time period for filing an accusation from seven (7) to ten (10) years and both 7 year and 10 year statutes of limitation just discussed are tolled until the age of majority is reached in cases involving a minor. Procurement of a license by fraud or misrepresentation and intentional concealment of unprofessional conduct based on incompetence, gross or repeated negligence are not subject to the limitations statute.

To date BPM has not lost the right to pursue an administrative accusation against a licensee due to statute of limitation issues.

7. Describe the board's efforts to address unlicensed activity and the underground economy.

Historically speaking there has not been a large incidence of unlicensed activity either by individuals masquerading as licensed DPMs or by DPMs with invalid licenses. Notwithstanding, an issue that appears to continually resurface from time to time is...

"Clarification that diagnosis for orthotics is need by licensed DPM?"

Cite and Fine

8. Discuss the extent to which the board has used its cite and fine authority. Discuss any changes from last review and describe the last time regulations were updated and any changes that were made. Has the board increased its maximum fines to the \$5,000 statutory limit?

The Board's statutory citation and fine authority contained under section 125.9 B&P and codified in regulatory sections 1399.696 and 1399.697 of BPM's Podiatric Medicine Regulations has historically been employed both as an educational and compliance measure. Over the years, while touted and recognized as an effective tool for demonstrating the Board's willingness and ability to enforce the law, the system for issuance of citations has not traditionally been utilized to the extent of needless penalization of licensees for technical statutory violations such as address change oversights.

The Board updated section 1399.696 in 2008 to include qualified language for increasing citation fine amounts to the maximum statutory limit of \$5000 in addition to providing the regulatory authority to issue citations for failure to produce medical records and for failure to comply with a term or condition of probation. There have not been any additional changes to the regulatory framework since the last sunset review and 2008 serves as the last year the Board updated its citation and fine provisions.

9. How is cite and fine used? What types of violations are the basis for citation and fine?

The Board's citation and fine authority is generally directed toward addressing conduct or omissions identified in the course of investigations that do not necessarily rise to the level to support disciplinary action but which nevertheless warrant redress. These issues have included failure to maintain adequate and accurate medical records; failure to produce requested medical records; in addition to conduct construed as unprofessional under the practice act. Most recently the Board has begun opting to use citation and fine authority as an effective tool for gaining compliance with those owing probation monitoring costs. In this fashion it is expected that compliance may be achieved for minor violations of probation without resort to more costly administrative action and hearing.

10. How many informal office conferences, Disciplinary Review Committees reviews and/or Administrative Procedure Act appeals of a citation or fine in the last 4 fiscal years?

In the last four fiscal years the Board has held a total of six informal office conferences. None of the immediately aforementioned informal office conferences resulted in citation appeals under the Administrative Procedure Act (APA). Finally, the Board does not employ the Disciplinary Review Committee mechanism for resolution of administrative citations.

11. What are the 5 most common violations for which citations are issued?

While fifth place was tied between seven different miscellaneous violations and therefore intentionally left unranked, the Board’s top four most commonly cited violations for the last four fiscal years are compiled below in BPM Table A11.

BPM Table A11. Top Five Violations		
Rank	Number of Citations	Violation
1	4	2266 – Failure to maintain medical records
2	3	2225 – Failure to produce medical records
3	3	2234 – Unprofessional Conduct
4	2	802.1 – Failure to report conviction of crime
5	Tie between 7 different violations	Miscellaneous violations

12. What is average fine pre- and post- appeal?

The average fine amount for all citations issued prior to appeal is \$2,190. As briefly mentioned BPM has not had any citations that resulted in appeals under the APA in the last four fiscal years. Accordingly, the Board does not have a post-appeal average to report.

13. Describe the board’s use of Franchise Tax Board intercepts to collect outstanding fines.

Pursuant to the authority granted for the issuance of citations and assessment of fines under section 125.9 B&P the Board may add fine amounts owed to the fee for licensure renewal if fines remain uncollected. The Board is additionally authorized to pursue administrative disciplinary action for failure to remit fine payments within 30 days of assessment in cases where a citation is not contested.

Both administrative remedies have proven effective such that utilization of Franchise Tax Board (“FTB”) intercepts for the collection of outstanding fines against licensees has proven unnecessary. The FTB intercept program would prove an effective tool in the collection of any unpaid fine in the event of a citation issued to an unlicensed party. However, the Board has not had cause to employ enforcement mechanism against unlicensed individuals to date.

Cost Recovery and Restitution

14. Describe the board’s efforts to obtain cost recovery. Discuss any changes from the last review.

The Legislature has explicitly provided BPM with statutory authority for the recovery of costs in administrative disciplinary cases under section 2497.5 B&P. Accordingly, cost recovery is included as a standard condition in the Board’s “Manual of Disciplinary Guidelines and Model Disciplinary Orders” for all cases. Second only to settlement provisions aimed at ensuring consumer protection,

the recovery of actual and reasonable costs is sought as part and parcel of stipulated settlement agreements by Board staff and the Attorney General and is requested in ALJ proposed disciplinary decisions pending before the Board. It is felt that cost recovery is critical to the Board's continued ability to effectively perform its mission of public protection without which would result in an undue upward strain on Board licensing fees.

Since the Board's last Sunset Review Hearing in 2012, section 2497.5 B&P was successfully amended to permit assessment of additional costs when a proposed ALJ decision was not adopted by the Board and found reasonable grounds for increasing. It was widely believed that ALJs were inconsistent in cost recovery matters across all cases and not in line with recovery of actual and reasonable costs of disciplinary proceedings to the agency. BPM thus recommended amendments to section 2497.5 to permit BPM exercise discretionary cost recovery increases in cases where the Board voted to non-adopt an ALJ proposed decision in order to ensure the recovery of actual and reasonable costs.

15. How many and how much is ordered by the board for revocations, surrenders and probationers? How much do you believe is uncollectable? Explain.

[...]

16. Are there cases for which the board does not seek cost recovery? Why?

No. There are no cases for which the Board does not seek actual and reasonable costs of investigation and prosecution. The recovery of actual and reasonable costs is viewed as an integral component of the administrative enforcement process that permits the Board to continue to provide effective mission

17. Describe the board's use of Franchise Tax Board intercepts to collect cost recovery.

Until very recently, the Board had not officially employed FTB intercepts as an agency program for cost recovery collection efforts.

At this juncture, utilization of the FTB intercept program generally remains unnecessary for cost recovery collection attempts as any failure to pay costs will generally be considered a violation of the terms and conditions of probation upon which additional disciplinary action may be taken. Further, existing probationers will not be released from probation until all outstanding monies including probation monitoring costs have been satisfied. Accordingly, while there are rarely large inordinate sums of unrecovered costs, the FTB intercept program has nevertheless now been employed in those few circumstances where monies remain uncollected.

To date the program has been employed as an attempt to collect outstanding amounts totaling \$19,101.32 for three separate accounts in the last four fiscal years.

18. Describe the board's efforts to obtain restitution for individual consumers, any formal or informal board restitution policy, and the types of restitution that the board attempts to

collect, i.e., monetary, services, etc. Describe the situation in which the board may seek restitution from the licensee to a harmed consumer.

The Board has generally not sought restitution against licensees in the superior courts on behalf of individual consumers in the past.

While petition filing authority is extended to the Board under section 125.5 B&P to seek monetary restitution in the superior courts for persons economically harmed as a result of practice act violations, civil proceedings in the superior courts have not traditionally been either the Board’s forum or the focus for redress against licensees. Being principally concerned with seeking protection of consumers from unfit and incompetent doctors, the Board has sought redress against licensees on behalf of individuals for economic harm in the context of administrative proceedings governed by the provisions of the APA. Accordingly, it has been individuals that have historically sought restitution in the superior courts for economic harms.

Thus, pursuant to the Board’s Manual of Disciplinary Guidelines, restitution is always a necessary component of probation in all administrative disciplinary proceedings against licensees involving economic exploitation or in cases of Medi-Cal or insurance fraud. In these cases the guidelines specifically recommend ALJs to award no less than the amount that was fraudulently obtained and it is in the administrative forum that restitution is sought.

Cases involving instances of unlicensed practice by those who are not Board licensees, are easily referred to local District Attorneys’ offices for prosecution where restitution may be ordered as part of a criminal proceeding.

[...]

Table 11. Cost Recovery (list dollars in thousands)				
	FY 2011/12	FY 2012/13	FY 2013/14	FY 2014/15
Total Enforcement Expenditures				
Potential Cases for Recovery *				
Cases Recovery Ordered				
Amount of Cost Recovery Ordered				
Amount Collected				
* “Potential Cases for Recovery” are those cases in which disciplinary action has been taken based on violation of the license practice act.				

Table 12. Restitution (list dollars in thousands)				
	FY 2011/12	FY 2012/13	FY 2013/14	FY 2014/15
Amount Ordered				
Amount Collected				

19. Discuss the prevalence of online practice and whether there are issues with unlicensed activity. How does the board regulate online practice? Does the board have any plans to regulate internet business practices or believe there is a need to do so?

California can be said to be at the forefront of the development of telehealth. Doctors practicing via telehealth are held to the same standard of care and retain the same responsibilities of providing informed consent, ensuring the privacy of medical information and many other duties normally associated with the practice of medicine.

Notwithstanding, it is known that the practice of prescribing prescription medication via telehealth is not an uncommon source of consternation and confusion among doctors nationally. The issues that commonly arise with out of state prescribing via telehealth are whether an appropriate patient/physician relationship exists; when that relationship develops; whether it may be established through remote interactions alone; and if one truly exists whether it is permissible to issue a prescription. At this juncture in the national development of telehealth, many states do not permit physicians to issue prescriptions to patients whom they have not met in person.

The Board actively responds—in association with the Medical Board CCU through its existing shared services agreement—to all complaints received. At this time there is no present evidence to indicate any prevalence of online practice issues existing among either the licensed podiatric community of physicians or with unlicensed populations.

[Current statutory authorities in place to address matter] [...]

While, it is certainly a subject that comes before the larger Medical Board from time to time, most recently in connection with the prescription of marijuana and the requirement of an appropriate prior examination meeting the standard of care before prescribing, it has not been an issue that has necessitated Board attention.

Accordingly, there are no plans for BPM to address the subject through additional regulatory authorities at this time.

Section 11 New Issues

This is the opportunity for the board to inform the Committees of solutions to issues identified by the board and by the Committees. Provide a short discussion of each of the outstanding issues, and the board's recommendation for action that could be taken by the board, by DCA or by the Legislature to resolve these issues (i.e., policy direction, budget changes, legislative changes) for each of the following:

- 1. Issues that were raised under prior Sunset Review that have not been addressed.**
- 2. New issues that are identified by the board in this report.**
- 3. New issues not previously discussed in this report.**
- 4. New issues raised by the Committees.**