
THIRD READING

Bill No: SB 815
Author: Roth (D), et al.
Amended: 5/8/23
Vote: 21

SENATE BUS., PROF. & ECON. DEV. COMMITTEE: 10-1, 4/24/23
AYES: Roth, Archuleta, Ashby, Becker, Dodd, Eggman, Glazer, Smallwood-Cuevas, Wahab, Wilk
NOES: Alvarado-Gil
NO VOTE RECORDED: Nguyen, Niello

SENATE APPROPRIATIONS COMMITTEE: 5-0, 5/18/23
AYES: Portantino, Ashby, Bradford, Wahab, Wiener
NO VOTE RECORDED: Jones, Seyarto

SUBJECT: Healing arts

SOURCE: Author

DIGEST: This bill makes various changes to the operations of the Medical Board of California (MBC) stemming from the joint sunset review oversight of the board and extends MBC operations until January 1, 2028.

ANALYSIS: Existing law establishes MBC, until January 1, 2024, tasked with the regulation of physicians and surgeons and various allied health professions through the administration of the Medical Practice Act (MBC Act).

This bill makes various changes to the operations of the MBC stemming from the joint sunset review oversight of the board, including extending MBC operations for four years.

Background

In early 2023, the Senate Business, Professions and Economic Development Committee and the Assembly Committee on Business and Professions

(Committees) began their comprehensive sunset review oversight of 8 regulatory entities including the Board. The Committees conducted two oversight hearings in March of this year. This bill and the accompanying sunset bills are intended to implement legislative changes as recommended by staff of the Committees and which are reflected in the Background Papers prepared by Committee staff for each agency and program reviewed this year.

Without this bill extending MBC operations, the MBC will expire at the end of this year.

MBC was subject to the Legislature's sunset review oversight throughout 2021. The Committees held two hearings in 2021 to discuss a multitude of issues raised about every aspect of MBC functions. SB 806 (Roth, Chapter 649, Statutes of 2021) continued MBC operations for only two years, through January 1, 2024, to allow the Legislature additional time to evaluate MBC. MBC submitted a series of proposals to the Legislature on January 5, 2022 to further amend the Act beyond what was contained in SB 806, including requests for statutory changes related to Board administration, licensing processes, enforcement enhancements, and notably MBC's dire fiscal condition. On May 6, 2022, the Senate Committee on Business, Professions, and Economic Development held a hearing, *Medical Board of California: Enforcement Processes, Deficiencies, and Opportunities for Reform - Evaluating the Medical Board of California's 2022 Proposals for Statutory Updates* to discuss the enforcement-related proposals.

MBC continues to face insolvency, having relied on loans from various other state agencies to fund its operations. Fees were raised in 2021 but physician and surgeon fees were set almost \$300 below what MBC requested, and what a third-party fee study identified as appropriate levels. Since then, costs have increased and now MBC has to pay back loans with interest. Close to 90 percent of MBC revenue stems from physician and surgeon licensing fees. MBC's revenue has not kept up with its growing expenditures, drawing MBC's reserves down to extremely low levels, an issue that has been brought to the Legislature's attention for multiple years. SB 806 provided MBC with the necessary and requested fee increases in every category other than physician and surgeon licensing. While the physician and surgeon licensing fee was increased some through SB 806, the *2020 Medical Board of California: Fee Study* suggested statutorily establishing a \$1150 fee amount, an increase from language in the Act that established a physician and surgeon fee at an amount that "shall not exceed [\$790]", in order to provide fund stability. SB 806 initially included this full \$1150 amount MBC requested but due to significant opposition from physicians and surgeons, and the threat of the measure failing passage entirely on the Senate Floor, the bill was amended to

decrease this amount to \$863. In addition to rising costs, in June 2022, MBC received a \$10 million loan from the Vehicle Inspection and Repair Fund administered by the Bureau of Automotive Repair which must now be repaid with interest by June 2024, a reality that has factored into adjusted MBC projections. It is likely MBC would need additional loans in the current and next FY as well in order to remain solvent. *This bill provides MBC necessary revenue by increasing physician and surgeon fees to \$1350.*

MBC issues a license to physicians enrolled in residency programs, an effort MBC began exploring and working on in 2016-17 in order to ensure that this category of physicians have met certain educational and training requirements, with the goal of simplifying licensing processing for these physicians as they progress through national examination requirements. SB 806 adjusted MBC licensing again to clarify that a physician and surgeon can obtain a physician and surgeon certificate after receiving credit for 12 months of postgraduate training, but must receive credit for 36 months of postgraduate training in order for the certificate to be renewed at the time of initial renewal. Notably, SB 806 also granted broad discretion to MBC to make a determination of license renewal even if certain timeframes are not met in order to take into consideration leave or other factors that may affect completion of a program within exactly 36 months. MBC proposed a number of additional changes to account for a number of scenarios residents may face, like clarifying that applicants for physician and surgeon licensure are not limited to attending postgraduate training in California and ensuring that the requirement for completing 36 months of training does not apply to those who become licensed through various reciprocity pathways or a special licensing program, among other necessary updates to the Act. *This bill makes various updates to this process.*

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.” 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 reports 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.’” *This bill requires a clear and convincing standard only for the most serious violations that would result in license revocation.*

Boards like MBC are semiautonomous bodies whose members are appointed by the Governor and the Legislature. Most healing arts and non-healing arts boards in California are comprised of a majority of members representing the profession. *North Carolina State Board of Dental Examiners v. FTC* placed limitations on the immunity of regulatory boards controlled by active market participants. This is because individuals who are directly affected by their own rulemaking may not be able to detect their biases, purposefully or inadvertently placing their benefit over those of the public. Or, as the Supreme Court stated, “Dual allegiances are not always apparent to an actor.” Although the boards are tied to the state through various structural and statutory oversights, it is presently unclear whether current laws and practices are sufficient to ensure that the boards are state actors and, thus, immune from legal action. Changing MBC’s composition to a public member majority may decrease MBC’s risk of exposure to lawsuits. *This bill adds two public members, creating a public majority of MBC members.*

MBC reports that in order to improve communication between MBC and complainants and to enhance the public’s understanding of the enforcement program, MBC initiated conversations during its February 2022 meeting about the creation of a Complainant Liaison Unit (Liaison Unit). MBC voted at its December 2022 meeting to pursue this endeavor and included funding for the Liaison Unit as a request in its 2023 Sunset Report. *This bill establishes a complainant liaison unit at MBC.*

Some physicians under investigation have asked their patients to rescind their consent to release their medical records to MBC investigators. Although the frequency of this is not tracked, staff suspect this has happened on numerous occasions. Without quick access to medical records, an investigation can be delayed; likely increasing enforcement timeframes, and possibly increasing costs if the legal action is required to pursue enforcement of a subpoena. Existing law may address other behavior that impedes a government investigation or prosecution but does not state that it is unprofessional conduct for a licensee or their representative to ask an individual to rescind a release for medical records or otherwise not cooperate with a MBC investigation and prosecution. *This bill, as proposed to be amended, makes it unprofessional conduct for a licensee, or person acting on their behalf, to take any action intended to cause their patient or their patient’s*

authorized representative to rescind consent to release the patient's medical records.

Current law requires MBC licensees to attend and participate in an interview requested by MBC when that licensee is under investigation. Failure to participate "in the absence of good cause" is considered unprofessional conduct and could result in discipline. MBC reports that allowing interviews to be postponed for "good cause" is subject to abuse, which leads, in some instances, to unacceptably long delays in the investigation. *This bill amends the Act to require a licensee to participate in an interview no later than 30 calendar days after being notified by MBC.*

The use of expert testimony is foundational in disciplinary proceedings. Experts retained MBC and retained by licensees under investigation may conflict with one another, which may lead to a hearing. MBC has advised that the existing timeframe for expert witness testimony to be provided to MBC puts the board at a disadvantage and has long requested that the Act be amended to require the exchange of this information no later than 90 calendar days prior to the original hearing date instead. MBC believes this change will support the timely resolution of cases by requiring an earlier exchange of expert opinions, which can result in productive settlement negotiations or provide grounds for an accusation being withdrawn. *This bill makes the change to allow MBC to receive this material earlier.*

Under current law, when a licensee refuses to produce medical records pursuant to a lawfully- issued and patient-noticed investigative subpoena, MBC is required to litigate a petition for subpoena enforcement in superior court. MBC reports that during this often-lengthy process, the statute of limitations continues to run on the stalled underlying investigation of the subject. The statute does not begin to toll unless and until the licensee fails to produce the subpoenaed records by the deadline set by the court, after granting MBC's enforcement petition. Even when MBC proceeds at the quickest pace possible to obtain a superior court order compelling production, investigations are often severely delayed while MBC litigates subpoena enforcement matters, sometimes leaving very little time to fully develop an investigation, obtain expert review of the subpoenaed records, and draft and file an accusation. MBC believes that for the purposes of public protection and for evidence and resource preservation, the date of the superior court's issuance of the order to show cause would be an appropriate time to toll the statute of limitations. *This bill makes this change.*

Physicians and surgeons have to maintain records for a length of time that corresponds to the standard of care, which of course may vary depending upon the services rendered, rather than for a timeframe specified in the Act. As previously noted, the statute of limitations generally requires MBC to file an accusation against a licensee within three years after MBC becomes aware of the alleged act or omission, or seven years from when the alleged act or omission occurred, whichever is sooner. MBC believes that aligning the minimum timeframe to maintain records to the general statutes of limitation will help ensure records are available, if necessary, to support an investigation. *This bill requires records to be maintained for at least seven years after the last date of service to a patient.*

Comments

The Board of Psychology supports this bill if it is amended to include delayed implementation for the transfer of the research psychoanalyst program from MBC to the Board of Psychology.

MBC supports this bill if it is amended and has requested a number of changes aimed at improving MBC's ability to effectively implement the measure. Specifically, MBC would like to update the board composition language currently in the bill to keep the same number of members as are currently noted in the Act but just change the number of public members from seven to eight and the number of physicians from eight to seven. MBC also believes that the measure should include changes to the way the proposed complainant interview would apply; should reference penal code sections rather than named felony types for new provisions related to license revocation; should create various new code sections rather than amending current law to establish clear legislative intent; should allow MBC to issue postgraduate licenses for three years and; should provide flexibility so that a resident does not need to demonstrate completion of 24 months of training in one program.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: Yes

According to the Senate Appropriations Committee, the 2023-24 Governor's Budget provides approximately \$80.2 million and 190.5 positions to support the continued operation of the MBC's licensing and enforcement activities. The MBC reports ongoing costs of \$1,473,000 to support the new Complaint Liaison Unit; increased per diem and one-time training costs and other associated resources to support the two additional public members, anticipated to be absorbable; unknown, but likely absorbable, one-time costs to update processes and forms related to postgraduate training licenses and adopt new regulations; unknown savings from

transferring the Research Psychoanalyst Program to the Board of Psychology and; increased initial license and renewal fee revenue of approximately \$8,498,000 in Fiscal Year (FY) 2023-24 and \$34,036,000 in FY 2024-25 and ongoing. Increased fee revenue may support the MBC in repaying its current loan commitments future personal service growth, as well as future growth in resources as related to MBC's licensing and enforcement needs. The Board of Psychology reports ongoing costs of approximately \$162,000 to address an increase in workload associated with the transfer of the Research Psychoanalyst registration program. The Office of Information Services estimates a total fiscal impact of approximately \$97,000, which \$80,000 is considered non-absorbable for data transfer of the Research Psychoanalyst License type from the MBC to the Board of Psychology as well as creation of new license and enforcement codes, and posting updated forms to the web.

SUPPORT: (Verified 5/19/23)

Consumer Protection Policy Center

OPPOSITION: (Verified 5/19/23)

California Medical Association

ARGUMENTS IN SUPPORT: The Consumer Protection Policy Center supports the addition of two public members to MBC, noting that "Such a composition will provide a much-needed shift in perspective as to how to best achieve the Board's statutory paramount priority of protecting the public. It will also send an important message to the public about the Board's commitment in this regard." The organization notes that "The Board has more than justified its need for additional funds—funds that are critical to enhancing the enforcement program so that it may achieve the Board's paramount priority of public protection." Consumer Protection Policy Center also recommends further amendments to the bill to move the investigators currently housed at the Department of Consumer Affairs to the Attorney General's Office as originally proposed in 2004 "so that all the team members can work together as expeditiously as possible to maintain consumer protection."

ARGUMENTS IN OPPOSITION: According to the California Medical Association (CMA), "SB 815 would increase licensing fees by over 56%, shift the [MBC] to a public member majority and lower the evidentiary standard of proof for MBC enforcement actions that can devastate a physician's livelihood." CMA believes a more prudent approach on a fee increase "would be to reevaluate the conditions of these loans to afford the MBC a more manageable repayment

schedule while allowing the MBC to continue regulating the profession. In the past, the MBC loaned the State's General Fund \$6,000,000 (FY 2008/09) and \$9,000,000 (FY 2011/12) without a mandatory repayment schedule and allowed them to be repaid in FY 2016/17 and FY 2017/18 without interest. We would ask the legislature and state to consider following this precedent by allowing the MBC to have some flexibility in its repayment schedule as well." CMA opposes the MBC composition proposal in SB 815, noting that a public majority membership "could result in serious standard of care violations being missed or improper determinations that a physician and surgeon should be disciplined and would lead to a considerable number of appeals to a superior court, neither of which the MBC can afford." According to CMA, "Discipline of any kind, including probation, can have devastating consequences on a physician's career, and the MBC should be required to prove, clearly and convincingly, the physician has violated the law before taking an action against their license." CMA writes that it "supports development of an application that is streamlined to reduce the need for residents to submit duplicative information and allows for sufficient time to process the information submitted" and "appreciates the amendment...which would modify the questionare sent by the MBC upon license renewal to destigmatize physical, mental, and behavioral health treatment." CMA thinks that provisions about record keeping timeframes should be better considered on their own; is concerned that the proposed Liaison Unit adds new costs to MBC without proposals to control their budget; opposes language related to the statute of limitations being tolled upon service of an order to show cause; supports pharmacies being held to a timeframe standard to produce records; opposes requiring a physician to participate in an interview within 30 days in the absence of good cause; opposes provisions to make actions to rescind consent to release records and tampering with witnesses unprofessional conduct; opposes all of the efforts to lengthen the time for a physician to request reinstatement or a penalty modification but supports allowing a fee to be charged for these requests; opposes language related to expert witness testimony exchange and states that deleting language in current law related to MBC reserves would allow MBC "to create an approximately \$150 million dollar reserve fund funded by physician license fees. CMA believes a 6 month reserve is appropriate and the MBC should similarly be required to refund licensees should they exceed their reserve limit."

Prepared by: Sarah Mason / B., P. & E.D. /
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***** END *****