

Date of Hearing: July 11, 2017

ASSEMBLY COMMITTEE ON BUSINESS AND PROFESSIONS

Evan Low, Chair

SB 798 (Hill) – As Amended July 6, 2017

SENATE VOTE: 36-4

SUBJECT: Healing arts: boards

SUMMARY: Extends the sunsets for the Medical Board of California and the Medical Practice Act from January 1, 2018 to January 1, 2022; extends the date on which the Osteopathic Medical Board of California and the Osteopathic Act shall be considered repealed for purposes of review by the appropriate policy committees of the Legislature from January 1, 2018 to January 1, 2022; makes numerous technical changes to clarify or streamline existing law for these programs; enacts new public protection policies and modifies current laws aimed at providing state oversight of physicians and surgeons.

EXISTING LAW:

- 1) Establishes the Medical Practice Act (MBC Act), which provides a framework for the state's licensure and regulation of physicians and surgeons. (BPC § 2000 et seq.)
- 2) Establishes the Medical Board of California (MBC), a regulatory board within the Department of Consumer Affairs (DCA) comprised of 15 appointed members, including 7 public members, subject to repeal on January 1, 2018. (BPC § 2001)
- 3) Establishes the Osteopathic Act (OMBC Act), which provides a framework for the state's licensure and regulation of osteopathic physicians and surgeons. (BPC § 2450 et seq.)
- 4) Establishes the Osteopathic Medical Board of California (OMBC), which regulates osteopathic physicians and surgeons that possess effectively the same practice privileges and prescription authority as those regulated by MBC but with a training emphasis on diagnosis and treatment of patients through an integrated, whole-person approach, subject to review by the appropriate policy committees of the Legislature to be performed as if the Act were scheduled to be repealed as of January 1, 2018. (BPC § 2450)
- 5) Establishes the California Board of Podiatric Medicine (BPM) within the jurisdiction of MBC, which regulates physicians and surgeons whose scope of practice is restricted to the foot and ankle. (BPC § 2460 et seq.)
- 6) Establishes the Health Quality Enforcement Section (HQE) within the Department of Justice (DOJ), whose primary responsibility is to investigate and prosecute proceedings against licensees and applicants within the jurisdiction of MBC, OMBC, BPM, and other healing arts regulatory bodies. (GOV § 12529)
- 7) Establishes the Health Quality Investigation Unit (HQIU) within the DCA's Division of Investigation, whose primary responsibility is to investigate violations of law within the jurisdiction of MBC, OMBC, BPM, and other healing arts regulatory bodies. (BPC § 159.5)

- 8) Finds and declares that the vertical enforcement and prosecution model of investigation, which involves early collaboration between HQE attorneys and HQIU investigators, is in the best interests of the people of California. (GOV § 12529.6)
- 9) Requires MBC to post on its Internet Web site the current status of its licensees; any revocations, suspensions, probations, or limitations on practice, including those made part of a probationary order or stipulated agreement; historical information regarding probation orders by the board, or the board of another state or jurisdiction, completed or terminated, including the operative accusation resulting in the discipline by the board; and other information about a licensee's status and history. (BPC § 2027)
- 10) Establishes the Psychotherapist-Patient Privilege, which empowers a patient to refuse to disclose, and to prevent another from disclosing, a confidential communication between the patient and a psychotherapist. (EVID § 1014)
- 11) Prohibits MBC from seeking from a physician and surgeon any investigation and prosecution costs for a disciplinary proceeding against that licensee. (BPC § 125.3)
- 12) Requires applicants for a physician's and surgeon's license from MBC to have completed at least one year of postgraduate training at a medical school within the United States or Canada, or two years of postgraduate training at a foreign medical school. (BPC § 2096)
- 13) Requires accredited outpatient settings to report adverse events to MBC within five days. (BPC § 2216.3)
- 14) Authorizes regulatory bodies to order a licensee to undergo an examination by a physician or psychologist whenever it appears that the licensee may be unable to practice because of a mental illness or physical illness affecting competency. (BPC § 820)
- 15) Requires all parties in a matter brought by MBC to exchange information with opposing counsel relating to any planned expert witness testimony no later than 30 days from the commencement date of the hearing where it will be presented. (BPC § 2334)

THIS BILL:

- 1) Extends the sunset for the MBC to January 1, 2022.
- 2) Extends the date on which the OMBC shall be considered repealed for purposes of review by the appropriate policy committees of the Legislature to January 1, 2022.
- 3) Updates various provisions of law to reflect that BPM licenses and regulates doctors of podiatric medicine.
- 4) Eliminates all statutory references to the vertical enforcement and prosecution model.
- 5) Requires MBC and OMBC to order all licensees placed on probation after July 1, 2018 to disclose details about their probation status to a new patient, and receive a written acknowledgement of that disclosure, in the following circumstances:
 - a) The legal conclusions of an administrative law judge (ALJ) found; the licensee admitted in a stipulated settlement; or, if no admissions, the accusation or statement of issues

- alleged, that the licensee was implicated in sexual misconduct, substance abuse during practice, or a criminal conviction involving the practice of medicine.
- b) The licensee on probation ever previously surrendered his or her license, had his or her license revoked, or was ever previously put on probation for a violation constituting a risk to public health and safety.
 - c) Any other violation constituting a risk to public health and safety where the board believes the disclosure is appropriate.
- 6) Requires that the same information contained in the proposed licensee probation disclosure be provided by MBC and OMBC to any inquiring member of the public and on public board documents such as newsletters and makes conforming changes.
 - 7) Requires MBC and OMBC to place the following information on a licensee on probation's online board profile:
 - a) For probation imposed pursuant to a stipulated settlement, all causes alleged in the operative accusation along with a designation of accusations of which the licensee expressly admitted guilt and a statement that acceptance of the settlement is not otherwise an admission of guilt.
 - b) For probation imposed by an adjudicated decision of the board, the causes for probation stated in the final probationary order.
 - c) For a licensee granted a probationary license, the causes by which the probationary license was imposed.
 - d) The length of the probation, end date, and all practice restrictions placed on the license.
 - 8) Makes the psychotherapist-patient privilege expressly inapplicable to investigations or proceedings conducted under the MBC Act.
 - 9) Removes the prohibition against MBC seeking cost recovery from licensees following successful disciplinary proceedings.
 - 10) Changes the postgraduate training requirement for MBC license applicants from a one or two year requirement based on whether the school is domestic or foreign to a consistent three year requirement for any medical school listed in the World Health Organization's directory as an approved school.
 - 11) Updates requirements for adverse event reporting by accredited outpatient settings to MBC and establishes new data reporting to the Office of Statewide Health Planning and Development (OSHPD).
 - 12) Requires MBC to issue a cease practice order to a licensee who has failed to comply with an order to undergo an evaluation pursuant to § 820 until the examination has been completed.
 - 13) Expands and escalates the timeline for exchanged expert witness reports under § 2334 to require a complete statement of all opinions, the facts and data used by the expert, and any

exhibits that will be used by the earlier of 30 days before the first hearing or 90 days after the filing of the accusation or petition.

- 14) Limits MBC's authority to approve specialty boards to those that have already been approved by the American Board of Medical Specialties (ABMS) and restricts use of the phrase "board certified" in advertisements by licensees.
- 15) Replaces the word "promptly" with "automatically" in language outlining the process by which MBC revokes the license of a registered sex offender.
- 16) Authorizes OMBC to request and receive state and federal criminal history information through DOJ.
- 17) Aligns OMBC's continuing medical education and license renewal cycles.
- 18) Adds licensed midwives and midwifery societies to existing peer review provisions and authorizes licensed midwives to be shareholders, officers, and directors of corporations.
- 19) Authorizes MBC to handle license renewals on a two-year cycle regardless of the licensee's date of birth.
- 20) Restores the MBC's authority to appoint members to the board of the Health Professions and Education Foundation.

FISCAL EFFECT: This bill is keyed fiscal. The Senate Committee on Appropriations estimated that the 5/25/17 version of the bill would generate new ongoing costs in the hundreds of thousands to implement new programs, in addition to sustaining the existing \$61 million cost of operating MBC.

COMMENTS:

Purpose. This bill is sponsored by the Author. According to the Author:

SB 798 is the sunset bill for the Medical Board of California and Osteopathic Medical Board of California, proposing changes stemming from the joint sunset review oversight of these entities conducted by the Senate Committee on Business, Professions and Economic Development and Assembly Committee on Business and Professions. This bill is necessary to make changes to the Medical Practice Act, MBC operations and OMBC operations in order to improve oversight of physicians and surgeons and osteopathic physicians and surgeons. The Committees conducted an oversight hearing on February 27, 2017 to discuss possible legislative changes to MBC and OMBC, based on recommendations from staff of the Committees reflected in the Background Paper for the MBC and OMBC.

Background. In order to ensure that California's myriad professional boards and bureaus are meeting the state's public protection priorities, authorizing statutes for these regulatory bodies are subject to statutory dates of repeal, at which point the entity "sunsets" unless the date is extended by the Legislature. The sunset process provides a regular forum for discussion around the successes and challenges of various programs and the consideration of proposed changes to laws governing the regulation of professionals.

As the sunset extension vehicle for both the Medical Board of California and the Osteopathic Medical Board of California, this bill deals predominately with licensing and oversight for physicians and surgeons. Many of its provisions consist of technical clean-up drafted to recognize recent changes to the law clarify unreliable language. The bill features a number of proposals introduced directly in response to issues uncovered during the Legislature's sunset review process, wherein the boards themselves had an opportunity to make suggestions or respond to stakeholder criticisms. The bill also includes provisions that would enact new affirmative policies aimed at enhancing and expanding the boards' public protection missions in their oversight of physicians and surgeons.

The latter category of proposals contained within this sunset vehicle have been and continue to be subject to extensive stakeholder discussion, often revolving around the question of how to strike an appropriate regulatory balance.

Current Related Legislation. AB 505 (Caballero) would prohibit MBC from entering into stipulated settlements placing a licensee on probation if the operative accusation alleges a felony conviction involving harm to patient safety or health; drug or alcohol abuse directly resulting in harm to patient safety or health; or sexual acts or sexual exploitation, as defined. (Status: Pending without a hearing date set in the Senate Committee on Business, Professions and Economic Development)

Prior Related Legislation. SB 304 (Lieu), Chapter 515, Statutes of 2013, extended the sunset date for the Medical Board of California from January 1, 2014 to January 1, 2018.

ARGUMENTS IN SUPPORT:

Two DCA boards support the bill. The Board of Podiatric Medicine's support is limited exclusively to provisions revising outdated language no longer reflective of the current practice of podiatric medicine, with no position on the bill's other provisions. The Naturopathic Medicine Committee supports in particular the continuation of the Osteopathic Medical Board, but states that the whole bill "maintains consumer protection and the overall health, safety, and welfare of patients. MBC itself has taken a "support if amended" position, supporting language the board itself suggested but pointing out that some provisions of the bill "were not issues raised in the Board's 2016 Sunset Report." OMBC supported a previous version of the bill.

Consumers Union has written in support of the bill's probation disclosure provisions, arguing that "Californians should be able to trust that their physician's license is in good standing and have a right to be informed if it is not as a result of serious misconduct." The organization cites a poll indicating that "77% of Americans strongly agree that they would want to know if their doctor was on probation for these types of serious reasons and 80% think that doctors should not be able to continue seeing patients while on probation for these types of infractions."

ARGUMENTS IN OPPOSITION:

A coalition of stakeholders has formed in opposition to the bill's proposed language that would make the psychotherapist-patient privilege expressly inapplicable to disciplinary investigations by MBC. Organizations including the California Psychiatric Association, the National Association of Social Workers, the California Association for Licensed Professional Clinical Counselors, the California Psychological Association, the California Academy of Child & Adolescent Psychiatry, Disability Rights California, the Center for Public Interest Law, and the

California Medical Association all write strongly in support of the privilege's long history as a critical tool for building and sustaining trust between a patient and a psychotherapist. These organizations believe that eliminating the privilege for purposes of disciplinary proceedings would significantly reduce the ability of psychotherapists to provide necessary mental healthcare.

The California Medical Association (CMA) also opposes a number of other provisions in the bill. CMA believes that the probation disclosure requirement is a "de facto suspension" because it would make it "almost impossible for a physician to practice." CMA also opposes the provision authorizing MBC to issue a cease practice order for a physician's failure to comply with a psychological or physical evaluation, believing it to be in violation of due process rights and unnecessarily duplicative of actions already available to the MBC. CMA opposes the provisions modifying the exchange of expert witness testimony, arguing that the expedited timeline would unduly burden defendant physicians and disincentivize settlements by requiring costly expert witness procurement near the beginning of the disciplinary process. CMA also opposes the provision reestablishing cost recovery for MBC, pointing out that the authority was removed deliberately in favor of a \$15 fee increase shared amongst all licensees.

University of San Diego's Center for Public Interest Law (CPIL) specifically opposes provisions in the bill eliminating the vertical enforcement program currently utilized by MBC and DOJ. CPIL argues that returning to the "handoff" era of case investigation is "contrary to common sense and the practice of every law enforcement agency engaged in comparable public prosecutions." CPIL points to statistics showing that after VE was implemented, average investigative timelines dropped from 277 days to 245 days. CPIL blames current issues with the program on an MBC investigator vacancy rate resulting from an unwise transfer of investigators from MBC to HQUI, when the investigators should have been transferred to DOJ. CPIL insists that VE is still the best model for cases that are "literally, a matter of life and death."

The California Academy of Attorneys for Health Care Professionals (CAAHCP), which represents attorneys who specialize in the representation of health care providers, opposes four provisions of the bill. First, CAAHCP opposes escalating the timeline for expert witness report exchanges, believing the new deadlines to be "unrealistic and extraordinarily prejudicial, as it would deprive [r]espondents of adequate time to evaluate allegations and construct a meaningful defense. CAAHCP also opposes the probation disclosure requirement, feeling that it "undercuts the rehabilitative purpose of probation and is likely to be extraordinarily punitive to physicians." CAAHCP also believes that a reinstated cost recovery option for MBC would be used as a "bargaining tool" which could be used as a threat to put "undue pressure on physicians to settle, even where most of the charges can be defeated at hearing." Finally, CAAHCP opposes the language change to the revocation of licensees required to register as sex offenders, believing that "automatic revocation, irrespective of appeal, violates due process."

The California Society of Dermatology and Dermatologic Surgery (CalDerm) has written in opposition to the bill's increased data collection for accredited outpatient settings including ambulatory surgical centers (ASCs), expressing a sentiment that "the combined cost of this and other provisions of this bill could drive small ASCs out of our community."

POLICY ISSUES:

Psychotherapist-Patient Privilege Exemption. The Author indicates that the provision of the bill that would expressly remove the psychotherapist-privilege exemption from the law governing MBC's ability to obtain patient records is a clarifying provision, pointing to recent caselaw in

which the Court of Appeal of California overturned a decision by the Superior Court and held that the psychotherapist did not protect from disclosure patient records sought by MBC as part of a disciplinary investigation (*Cross v. Superior Court* [2017], 11 Cal.App 5th 305). This decision is still pending review by the California of Supreme Court and may still be overturned. The holding in *Cross* rested strongly on interpretations of legislative intent. The court relied heavily on the fact that BPC language allowing MBC to obtain patient records for purposes of an investigation “notwithstanding ... any other law making a communication a physician ... and his or her patients a privileged communication” was enacted after the establishment of the psychotherapist-patient privilege in the Evidence Code, suggesting that the Legislature intended for the privilege not to apply.

However, because of the exceptionally sensitive nature of psychotherapy communications, the psychotherapist-patient privilege has historically been a concept distinct and apart from general doctor-patient confidentiality laws. For example, the U.S. Federal Rules of Evidence does not recognize a physician-patient privilege, but *does* feature a psychotherapist-patient privilege. Because the current applicability of the psychotherapist-patient privilege to MBC investigations is still the subject of ongoing appellate litigation, and because there remains an active disagreement about whether the privilege should apply, it may be premature to codify either interpretation at this time.

Probation Status Disclosure. This provision of the bill deals with licensees who have been implicated in offenses regarded as particularly serious, specifically identifying those who have committed sexual misconduct, substance abuse during practice, and criminal convictions involving medical practice. However, because many licensees accept probation as a part of a stipulated settlement and forego a full hearing, a large number of probationers who may have engaged in these activities would likely be excluded from the disclosure requirement if the language relied only on fully adjudicated claims. The bill addresses this issue by reading that when probation is ordered pursuant to a settlement in which there were no judicial findings or admissions, the disclosure requirement shall apply if the operative accusation or statement of issues alleged that the licensee had engaged in one of the listed offenses. However, it should be considered whether stipulated settlements without admissions of guilt ordering probation for those licensees accused of serious crimes are sound public policy. This provision also raises due process concerns, as it subjects licensees on probation to an arguably higher degree of discipline because of what was initially alleged but never proven or admitted to. The public protection incentive of this provision should therefore be balanced against the legal rights of the licensee.

The probation disclosure provision also applies when a licensee on probation has previously surrendered his or her license, had his or her license revoked, or was previously put on probation for a violation constituting a threat to public health and safety. This language requires the disclosure for other licensees who may present a greater risk of reoffending while practicing under probation. However, these categories of licensees have subsequently had their practice rights restored by the MBC, indicating that the MBC considers them safe to treat patients. The issue is whether their history should continue to impact their ability to practice, especially in cases where large spans of time have passed between disciplinary incidents.

Finally, the bill also gives MBC discretion to require the probation disclosure for “any other violation constituting a risk to public health and safety where the board believes the disclosure is appropriate.” This provision may be overly broad and could potentially capture a larger universe of licensees on probation than originally intended by the Author, including those guilty of

nonserious offenses. Because the composition of board memberships changes over time, the current MBC's policies and priorities may not align with those of future board majorities.

Cost Recovery Reinstatement. MBC is the only healing arts board without the authority to seek the recovery of costs associated with a successful disciplinary proceeding from the responding licensee. While cost recovery is not necessarily the appropriate course of action for every investigation and prosecution initiated by the MBC, it may often be justified by cases that incur significant costs through their complexity or appellate case history. MBC's cost recovery authority was initially removed in lieu of a flat \$15 licensing fee increase intended to distribute the cost of enforcement actions across all MBC licensees, and it has been argued that it would be unjust to restore cost recovery without lowering license fees accordingly. However, the adequacy of this general fee increase has never been reevaluated in the context of MBC's growing budget and may not actually cover all enforcement costs. If the reinstatement of cost recovery results in surplus funds from fees no longer needed to recover investigation and enforcement costs, BPC § 128.5 requires the MBC to reduce license fees accordingly.

Expert Witness Timelines. This provision responds to recommendations made in MBC's sunset report advocating for the MBC to be able to review information relevant to a case against a licensee earlier in the process prior to a hearing. While there is no doubt that early access to comprehensive information regarding planned expert witness testimony would be of great value to the MBC, it is questionable whether the timelines laid out in this bill would allow adequate time for a licensee to consider settling the matter prior to making significant investments in securing an expert witness. The language regarding these timelines should be balanced against the potential for deterring settlement by requiring substantial expenses early in the process.

Cease Practice Orders for Licensees Failing to Comply with § 820. MBC's authority to order a licensee to undergo an evaluation to determine whether a mental or physical illness is impairing the licensee's ability to practice has historically been used as a tool to ensure that physicians are in a condition to safely treat patients. In the event that a licensee has displayed potential signs of impairment but refuses to undergo the evaluation, allowing the MBC to take swift action may help prevent unsafe practice. However, MBC should retain some degree of discretion prior to issuing a cease practice order for cases where a licensee is not willfully foregoing the evaluation but should be afforded more time to comply with the order.

Vertical Enforcement. The VE program has been the subject of criticism by a variety of stakeholders. However, the program may be of great value considering the legal complexity of many cases that come before MBC and the advantages of collaborative investigation in the early stages of these cases. This justifies further exploring ways to refine the program for situations in which it is truly necessary or valuable, rather than outright eliminating it.

AMENDMENTS:

The following amendments have been recommended to the Author by this committee:

- 1) To ensure that psychotherapy record confidentiality is preserved while allowing time for a full adjudication of the *Cross* matter, the Author should amend the bill as follows:

Strike language contained in Section 66 regarding the inapplicability of the psychotherapist-patient privilege for investigations or proceedings conducted by MBC.

- 2) To address due process issues, the Author should amend the bill as follows:

Amend Section 67 regarding probation disclosures to provide MBC with discretion to impose the requirement on licensees who have actually committed one of the enumerated serious offenses pursuant to a settlement admission or an ALJ finding; remove both paragraphs (2) and (3) regarding disclosure requirements for licensees with prior disciplinary histories and for additional offenses determined by the board to warrant disclosure.

- 3) To allow sufficient time for licensees and the board to consider settlements prior to requiring expert witness reports, the Author should amend the bill as follows:

Amend Section 70 regarding expert witness report exchanges to remove the amended “90 days from the filing of an accusation” timeline.

REGISTERED SUPPORT:

Board of Podiatric Medicine
Consumers Union
Naturopathic Medicine Committee

REGISTERED OPPOSITION:

California Academy of Attorneys for Health Care Professionals
California Academy of Child & Adolescent Psychiatry
California Association for Licensed Professional Clinical Counselors
California Medical Association
California Psychiatric Association
California Psychological Association
California Society of Dermatology and Dermatologic Surgery
Center for Public Interest Law
Depression and Bipolar Support Alliance
Disability Rights California
National Association of Social Workers
1 Individual

Analysis Prepared by: Robert Sumner / B. & P. / (916) 319-3301