

Oversight Hearing of the  
Senate Committee on Business, Professions and Economic Development

*Sexual Misconduct Reporting in the Medical Profession:  
Missed Opportunities to Protect Patients*

Monday, June 18, 2018  
10:00 am  
State Capitol, Room 3191

**BACKGROUND INFORMATION**

**1. Introduction**

The Committee has a significant history of interest and focus on statutory reporting requirements designed to inform health practitioner licensing boards about possible matters for investigation. Given the indispensable nature of health care, high quality patient care is vital. Patients expect their treating physicians or other medical professionals to be competent and qualified, and the Committee has long held that health practitioners who fail to meet established professional standards must be discovered, reviewed and disciplined if necessary in a timely manner.

**2. Mandatory Reporting of Health Practitioner Settlements, Indictments, Convictions, and Discipline**

There are a number of reporting requirements outlined in the Business and Professions Code designed to inform licensing boards about possible matters for investigation, including:

- BPC 801.01 requires the Medical Board of California (MBC), Osteopathic Medical Board of California (OMBC), California Board of Podiatric Medicine (BPM) and Physician Assistant Board (PAB) to receive reports of settlements over \$30,000 or arbitration awards or civil judgments of any amount. The report must be filed within 30 days by either the insurer providing professional liability insurance to the licensee, the state or governmental agency that self-insures the licensee, the employer of the licensee if the award is against or paid for by the licensee or the licensee if not covered by professional liability insurance.
- BPC 802.1 requires a licensees of MBC, OMBC, BPM and PAB to report indictments charging a felony and/or any convictions of any felony or misdemeanor, including a guilty verdict or plea of no contest to their licensing board.
- BPC Section 802.5 requires a coroner who receives information, based on findings reached by a pathologist that indicates that a death may be the result of a physician and

surgeon, podiatrists or physician assistant's gross negligence or incompetence, to submit a report to MBC, OMBC, BPM and PAB, as appropriate. The coroner must provide relevant information, including the name of the decedent and attending licensee as well as the final report and autopsy.

- BPC Sections 803, 803.5 and 803.6 require the clerk of a court that renders a judgment that a licensee has committed a crime, or is liable for any death or personal injury resulting in a judgment of any amount caused by the licensee's negligence, error or omission in practice, or his or her rendering of unauthorized professional services, to report that judgment to the appropriate healing arts licensing agency within 10 days after the judgment is entered. In addition, the court clerk is responsible for reporting criminal convictions to some licensing agencies (MBC, OMBC, BPM, Board of Chiropractic Examiners (BCE), PAB or other appropriate allied health board) and transmitting any felony preliminary hearing transcripts concerning a licensee to those boards.
  
- BPC Section 805 is one of the most important reporting requirements that allows boards to learn key information about licensees. Section 805 requires the chief of staff and chief executive officer, medical director, or administrator of a licensed health care facility to file a report when a licensee's application for staff privileges or membership is denied, or the licensee's staff privileges or employment are terminated or revoked for a medical disciplinary cause. Licensees include physicians and surgeons, doctors of podiatric medicine, clinical psychologists, marriage and family therapists, clinical social workers, professional clinical counselors, dentists, licensed midwives or physician assistants. The reporting entities are also required to file a report when restrictions are imposed or voluntarily accepted on the licensee's staff privileges for a cumulative total of 30 days or more for any 12-month period. The report must be filed within 15 days after the effective date of the action taken by a health facility peer review body.
  
- BPC Section 805.01 is a similarly extremely important requirement. The law requires the chief of staff and chief executive officer, medical director, or administrator of a licensed health care facility to file a report within 15 days after the peer review body makes a final decision or recommendation to take disciplinary action which must be reported pursuant to section 805. This reporting requirement became effective January 2011 and is only required if the recommended action is taken for the following reasons:
  - Incompetence, or gross or repeated deviation from the standard of care involving death or serious bodily injury to one or more patients in such a manner as to be dangerous or injurious to any person or the public.
  
  - The use of, or prescribing for or administering to him/herself, any controlled substance; or the use of any dangerous drug, or of alcoholic beverages, to the extend or in such a manner as to be dangerous or injurious to the licentiate, or any

other persons, or the public, or to the extent that such use impairs the ability of the licensee to practice safely.

- Repeated acts of clearly excessive prescribing, furnishing or administering of controlled substances or repeated acts of prescribing, dispensing, or furnishing of controlled substances without a good faith effort prior examination of the patient and medical reason therefor.
- Sexual misconduct with one or more patients during a course of treatment or an examination.

The purpose of 805 reports is to provide licensing boards with early information about these serious charges so that they may investigate and take appropriate action to further consumer protection at the earliest possible moment. Accordingly, for any allegations listed above, the Legislature determined that an 805.01 report must be filed once a formal investigation has been completed, and a final decision or recommendation regarding the disciplinary action to be taken against a licensee has been determined by the peer review body, even when the licensee has not yet been afforded a hearing to contest the findings.

### **3. Peer Review**

In peer review, health care practitioners evaluate their colleagues' work to determine compliance with the standard of care. Peer reviews are intended to detect incompetent or unprofessional practitioners early and terminate, suspend, or limit their practice if necessary. Peer review is triggered by a wide variety of events including patient injury, disruptive conduct, substance abuse, or other medical staff complaints. A peer review committee investigates the allegation, comes to a decision regarding the licensee's conduct, and takes appropriate remedial actions. There has historically been some reluctance among licensees to serve on peer review committees due to the risk of involvement in related future litigation, including medical malpractice lawsuits against a licensee under review. There are also concerns about "sham peer review" which uses the peer review system to discredit, harass, discipline, or otherwise negatively affect a practitioner's ability to practice or exercise professional judgment for a non-medical or reason unrelated to patient safety. Other criticisms of peer review include over legalization of the process, lack of transparency in the system, and the burdensome human and financial toll peer review brings not only to the hospital but also to a licensee under review.

In 1989, several due process provisions for physicians subject to an 805 report were adopted and codified under Section 809 et. seq. of the Business and Professions Code. Any physician, for whom an 805 report may be required to be filed, is entitled to specified due process rights, including notice of the proposed action, an opportunity for a hearing with full procedural rights (including discovery, examination of witnesses, formal record of the proceedings and written findings). Furthermore, a physician may seek a judicial review in the Superior Court pursuant to Code of Civil Procedure Section 1094.5 (writ of mandate). The due process requirements do not apply to peer review proceedings conducted in state or county hospitals, to the University of California hospitals or to other teaching hospitals as defined.

Recognizing that peer review is necessary to maintain and improve quality medical care, Congress, in 1986, enacted the Health Care Quality Improvement Act (HCQIA). HCQIA established standards for hospital peer review committees, provided immunity for those who participate in peer review, and created the National Practitioner Databank (NPDB). The NPDB is a confidential repository of information related to the professional competence and conduct of health care practitioners. Credentialing bodies are required to check the NPDB database before granting privileges or reappointing privileges to licensees. Entities such as hospitals, professional societies, state boards, and plaintiffs' attorneys are given access to the NPDB. In enacting the NPDB, Congress intended 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 health care practitioners who attempt to move from state to state without disclosure or discovery of previous medical malpractice payment and adverse action history. The NPDB is a central repository of information about: (1) malpractice payments made for the benefit of health care practitioners; (2) licensure actions taken by state licensing boards; (3) professional review actions taken against licensees by hospitals and other health care entities, including health maintenance organizations, group practices, and professional societies; (4) actions taken by the Drug Enforcement Administration (DEA), and (5) Medicare/Medicaid Exclusions.

#### **4. Industry Standards and California Study Findings**

Private standard setting is also common in peer review. Organizations like the Joint Commission (formerly the Joint Commission on Accreditation of Healthcare Organizations or JCAHO), which accredits hospitals, health care providers and other health care settings across the country have established peer review standards for the entities it accredits. In order to receive Joint Commission accreditation, hospitals must have peer review and other quality assurance measures. Eligibility for federal funds such as Medicare and Medicaid often depends on accreditation.

A 2008 California study on peer review found variation and inconsistency in entity peer review policies and standards, including on the definition, procedures, commencement, practice and subject of peer review. Peer review means different activities to different entities, and can be triggered by a number of ways but is mostly part of the quality/safety/risk process of an entity. In addition, risk management/peer review issues are combined with mundane issues related to the "business" of an entity. All medical entities set their own standards for peer review, some more rigorous than others, and some adhere to them more meticulously than others. Additionally, each entity creates its own peer review policies, which can vary substantially. If a licensee is found to have provided substandard care, that physician may leave or be forced to leave the entity but can practice elsewhere, potentially endangering other patients. The peer review process is often lengthy and can take months or even years. There are also variations on the name of the peer review body, the number of members and the length of time a member serves on a committee (usually could be years before a peer review action is taken).

The study also identified poor tracking of peer review events and highlighted confusion on 805 reporting. According to the study, few cases lead to actual 805 reporting because of (a) disagreement or legal interpretation on whether 809 due process is required before every 805 report is submitted, and, (b) 809 due process leads to a substantial delay in the process (often 2 to 5 years). In addition, although entities make a sincere effort to conduct peer review, it rarely

leads to actual 805 or 809 actions, perhaps due to the confusion over when to file a report. The study found that in addition, entities have devised other methods to correct a physician behavior before filing an 805 report. The most common cases referred to a high level peer review are: disruptive licensee behavior/impairment, substandard technical skills, substance abuse, and failure to document/record patient treatment. It is also possible that some licensees would never be subject to peer review because they have practices that are not subject to any peer review requirements. The study also demonstrated a lack of coordination among state agencies and licensing agencies, noting that there is no systematic communication or coordination among various boards and agencies that would coordinate patient quality and safety issues. There is much complexity on the complaint process, enforcement process, and public disclosure rules.

In 2009, the California Supreme Court issued an opinion relating to peer review in *Mileikowsky v. West Hills Hospital Medical Center* in which the Court discussed the importance of the peer review process and pointed out the following: “The primary purpose of the peer review process is to protect the health and welfare of the people of California by excluding through the peer review mechanism those healing arts practitioners who provide substandard care or who engage in professional misconduct. This purpose also serves the interest of California’s acute care facilities by providing a means of removing incompetent physicians from a hospital’s staff to reduce exposure to possible malpractice liability. Another purpose, if not equally important, is to protect competent practitioners from being barred from practice for arbitrary or discriminatory reasons.”

#### **5. Purpose of This Hearing**

This hearing is intended to further examine how health practitioner discipline is handled, as well as provide Committee members information about current requirements to report and how actions taken by health facility administration and medical staff are provided to licensing boards.