

California Abandons the Medical Board/ Alcohol Drug Diversion Program

by Raymond McMahon & Peter Osinoff

On June 30, 2008, the California Medical Board's Diversion Program closed formally, significantly reducing the care options available to physicians with substance abuse or mental health problems.

This closure will impact both physicians and the general public, with some claiming that an informed public will be better protected, while others assert that the closure will discourage impaired physicians from obtaining necessary help. Only two other states, North Dakota and most recently, Wisconsin, lack diversion programs for physicians.

In order to provide context for this action, it is important to understand the background of the Diversion Program. The program was administered by the Medical Board to supervise and facilitate the recovery of physicians suffering with drug or alcohol abuse problems, or those with a mental health problem that may impact the practice of medicine. The Diversion Program granted the Medical Board numerous powers to ensure patient safety and facilitate sobriety, including the ability to stop or limit a physician's practice of medicine, mandating participation in formal treatment programs, and requiring frequent, random drug screenings.

Impaired physicians previously entered the Diversion Program in two general categories: self-referred physicians; or doctors enrolled in lieu of pending or potential disciplinary actions, or who had been ordered into the program as a result of imposed discipline.

According to the Medical Board, approximately 60% of the physicians were self referrals,

with the other 40% divided almost equally between physicians subject to a disciplinary order and those who entered to avoid disciplinary proceedings. A key component of the program, and one which proved to be a lightning-rod for its opponents, was that participation in the program was confidential, especially as to those physicians who entered as self referrals.

According to the Medical Board, the program averaged 250 participants, which means that at any given time, approximately 150 physicians voluntarily sought help through the program. The Medical Board had no knowledge that those doctors had substance abuse problems, nor will it know of such doctors in the future, as physicians have been precluded in recent months from entering into this confidential rehabilitation program.

For years, advocacy groups have been pushing for the termination of the Diversion Program. One of the leading opponents of the Program is the Medical Board's monitor, Julie D'Angelo Fellmeth of the Center for Public Interest Law, who argued vociferously at the Diversion Program Summit Meeting this year that the Medical Board's obligation "is to detect an impaired physician and remove or restrict that doctor's medical practice in a way that is transparent to his patients."

The California Medical Association, through former California State Senator Joseph Dunn, expressed the position that treatment of impaired physicians must be a primary goal: "The single greatest risk to public safety is doctors who keep their dependency problems

secret." If a physician does not have the option to participate in a confidential program, the physician will be discouraged from seeking treatment, thus posing a real risk to the public.

The arguments were impassioned on both sides. Patient-right groups believe that a patient should have more knowledge about their physicians, not less. They assert that every person should be able to choose whether or not to continue medical care with a physician who is in a substance abuse recovery program, especially because that physician may relapse during the patient's care.

Alternatively, proponents of confidential treatment programs respond that impaired physicians are currently practicing, and every effort should be made to encourage rehabilitation in order to prevent patient injury. An impaired physician is more likely to make an error than a physician active in a recovery program and who is subject to frequent drug and alcohol testing.

Ultimately, the determination was made last year to close the Diversion Program. Richard Fantozzi, the California Medical Board President, explained that decision, in part, as follows: "Although the intent was to provide a comprehensive plan for recovery, the flaws have been in the human element and the clinical disease being treated." One might respond, however, that no substance abuse program will be free from "the human element," so is it truly beneficial to discontinue a program that has helped potentially thousands of impaired physicians stop their substance abuse?

After many years of examining files, one case was relied upon in the Medical Board monitor's last report (2004) as "proof" that a physician in the Diversion Program harmed patients. The "victim" was a patient who underwent a lower body lift by a physician in the Program, and developed complications due to smoking and weight gain. She sued for malpractice and lost in Superior Court, on two appeals, and in a petition to the Supreme Court. She filed a complaint with the Medical Board, and developed a website to solicit former patients of the physician to also complain even if they had no problems themselves.

Numerous complaints were filed against the doctor, a group of the purported victims appeared at Medical Board meetings, and the media was easily manipulated by them. However, thorough investigation by the Board failed to reveal any instance of

patient harm. Nevertheless, the case is proceeding to hearing against that physician.

At least one result from the closure of the Diversion Program can be quantified: Medical license fees are set to be reduced \$22.00 biannually, with the new fee projected to be \$783.00 every two years. But at what cost, both to physicians and the public?

Eventually, the Medical Board may regain its confidence in such programs, and may be willing to allow participation in treatment programs in lieu of enforcement. Meanwhile, there is no alternative to the filing of disciplinary actions. Today, even a single instance of behavior involving use of controlled substances in a manner potentially dangerous to the physician or others, such as a DUI conviction, may provide the basis for a disciplinary action against the physician, who would have been offered Diversion in lieu of license discipline just last year. ■

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