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April 4, 2015

Honorable Jerry Hill, Chair, and Members
Senate Committee on Business, Professions and Economic Development
State Capitol, Room 2053
Sacramento, CA 95814

re: SB 1177 (Galgiani) — OPPOSE UNLESS AMENDED

Dear Senator Hill and Committee Members:

The Center for Public Interest Law respectfully opposes SB 1177 (Galgiani), which would authorize the Medical Board of California (MBC) to re-create its now-defunct "diversion program" for substance-abusing physicians.

CPIL is a nonprofit, nonpartisan academic and advocacy organization based at the University of San Diego School of Law. For 35 years, CPIL has studied occupational licensing and monitored California agencies that regulate business, professions, and trades, including MBC and other Department of Consumer Affairs (DCA) health care boards. CPIL's expertise has long been relied upon by the Legislature, the executive branch, and the courts where the regulation of licensed professions is concerned. For example, after numerous reports of problems at MBC's enforcement program were published in 2002, the DCA Director appointed me to the position of MBC Enforcement Monitor. Over a two-year period, I directed an in-depth investigation and review of MBC's enforcement and diversion programs. In two exhaustive reports,[1] we made 65 concrete recommendations to strengthen the Board's enforcement program. Since then, several pieces of reform legislation (SB 231 in 2005, SB 1438 in 2006, AB 1127 in 2011, SB 304 in 2013, and AB 1886 in 2014) have been enacted, mirroring many of our recommendations.

Pursuant to now-repealed Business and Professions Code section 2340 *et seq*., the Medical Board ran a confidential diversion program for substance-abusing doctors for 27 years (between 1981 and 2008). Participation in the program was strictly confidential; patients had no way of knowing whether their physician participated in the program or suffered from substance abuse. The administrative costs of the program were funded by physician licensing fees, supplemented by fees paid directly for some services by participants to providers with whom the program contracted. During that 27-year period, the program was audited five times. **It failed all five audits —**

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[1] Julianne D'Angelo Fellmeth and Thomas A. Papageorge, *Initial Report of the Medical Board Enforcement Program Monitor* (Nov. 1, 2004); Fellmeth and Papageorge, *Final Report of the Medical Board Enforcement Program Monitor* (Nov. 1, 2005).

**including the one that I conducted in 2004.**[2] These audits generally found that the program was chronically underfunded and understaffed; failed to adequately monitor its substance-abusing participants; failed to adequately drug-test participants to ensure compliance with the diversion program contract (or tested them on days they could easily anticipate); lacked internal controls to ensure that program staff were alerted to mistakes, errors, or noncompliance; and had few enforceable standards to which participants and program staff were consistently held.

For 24 years of the Diversion Program's 27-year existence, the program was overseen **not** by the Medical Board of California but was controlled and overseen by a "Liaison Committee" consisting of representatives of the California Medical Association (CMA), the California Society of Addiction Medicine (CSAM), and (in its later years) the California Psychiatric Association. MBC created the Liaison Committee at CMA's request in 1982; thereafter, the Medical Board "effectively delegated its policymaking and oversight role"[3] to the Liaison Committee in 1982. The Liaison Committee was in place during four of the five failed audits, yet it did nothing to even acknowledge much less address any of the deficiencies cited in those audits. Following the fourth failed audit in 2004, MBC abolished the Liaison Committee and tried to oversee the program itself — but the program then failed the fifth audit performed by the Bureau of State Audits in June 2007. The following month, MBC unanimously voted to abolish the program effective June 30, 2008.

Since 2008 when MBC's program was abolished, CMA has sponsored at least four bills to re-create some kind of a state-run, state-sponsored program for substance-abusing physicians: AB 214 in 2008 (vetoed), AB 526 in 2009-10 (held in committee), SB 1438 in 2012 (held in committee), and AB 2346 in 2014 (held in committee). In particular, SB 1438 (Steinberg) was pulled when it was discovered that CMA was structuring the bill so as to ensure that a nonprofit organization it had created — California Public Protection and Physician Health, Inc. (CPPPH) — could secure the contract to administer the program.[4] **Many of the directors and managers of CPPPH are the exact same individuals who sat on the Liaison Committee for 24 years and failed to act while**

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[2] Auditor General of California, *Review of the Board of Medical Quality Assurance* (No. P-035) (August 1982); Auditor General of California, *The State's Diversion Programs Do Not Adequately Protect the Public from Health Professionals Who Suffer from Alcoholism or Drug* Abuse (No. P-425) (January 1985); Auditor General of California, *The Board of Medical Quality Assurance Has Made Progress in Improving its Diversion Program; Some Problems Remain* (No. P-576) (June 1986); Julianne D'Angelo Fellmeth and Thomas A. Papageorge, *Initial Report of the Medical Board Enforcement Program Monitor* (Nov. 1, 2004) at Chapter XIII; Bureau of State Audits, *Medical Board of California's Physician Diversion Program: While Making Recent Improvements, Inconsistent Monitoring of Participants and Inadequate Oversight of Its Service Providers Continue to Hamper Its Ability to Protect the Public* (No. 2006-116R) (June 7, 2007).

[3] Fellmeth and Papageorge, *Initial Report of the Medical Board Enforcement Program Monitor* (Nov. 1, 2004) at 247.

[4] See the June 25, 2012 analysis of SB 1483 (Steinberg) by the Assembly Committee on Business, Professions, and Consumer Protection Committee.

**MBC's Diversion Program failed four performance audits**.[5] And nothing in SB 1177 would prevent CMA's nonprofit from securing the contract, should MBC decide to create a new program.

SB 1177 is the latest bill in this effort. The program it would permit MBC to create is not a true "diversion program" because MBC would not be precluded from pursuing disciplinary action against a substance-abusing physician participant in the program; however, as described below, MBC may never get records of drug test failures or other noncompliance from this program. And even if it does get those records, it may not use them as evidence in a disciplinary matter. As currently written, the bill lacks numerous critically important provisions and safeguards — including several upon which the Medical Board insisted at its October 2015 meeting — and should join the other attempts in failure.

CPIL has no opposition to physician rehabilitation and/or recovery from substance abuse, a problem that is particularly serious in the medical profession due to stress and access to drugs that are inherent in the profession. However, translating those concepts into the nuts and bolts of an on-the-ground program that is actually effective in assisting physicians to recover from substance abuse and closely monitoring them in order to protect patients from them is a very difficult proposition. MBC and its prior program failed miserably at that proposition, as did the sponsor of this legislation which functionally controlled the program for 24 years of its 27-year history. The State of California need not be involved in an individual physician's personal journey to recovery — especially when there are literally thousands of private programs to assist substance-abusing individuals in this effort.

In addition to the fact that a program like this is wholly unnecessary, SB 1177 lacks a number of key provisions that might convert it to a good-faith attempt to assist substance-abusing physicians while also protecting patients from them. CPIL asserts that the following issues must be addressed and amendments must be made:

1) The bill fails to even mention, much less require compliance with, the Uniform Standards Regarding Substance-Abusing Healing Arts Licensees developed by DCA's Substance Abuse Coordination Committee pursuant to SB 1441 (Ridley-Thomas) (Chapter 548, Statutes of 2008). Under Business and Professions Code section 315(c), **each DCA healing arts board "shall use" the Uniform Standards in dealing with substance-abusing licensees, "whether or not a board chooses to have a formal diversion program."** At its October 2015 meeting, MBC insisted that compliance with the Uniform Standards is a central safeguard for any physician health program.

2) It fails to require the program created in the bill to immediately notify the Board's enforcement program when a physician participant relapses or otherwise violates the terms and conditions of his/her contract or probationary order. In fact, it may fail to notify the Board **at all** of relapse or other noncompliance if the Board is not the

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[5] Many of the names and faces appearing on the Website of CMA's nonprofit (www.cppph.org) either sat on the Liaison Committee or were connected to the Medical Board's failed diversion program, including Dr. Norman Reynolds, Dr. David Pating, Dr. Lee Snook, Dr. James Hay, Gail Jara, James Conway, and Janis Thibault.

participant's "referring entity" (see section 2340.2(a)(6) for list of "referring entities" and section 2340.6(b), which requires notification only to the "referring entity" of a participant's termination from the program). At its October 2015 meeting, the Medical Board determined that "adequate protocols for the Program's communication with the Board" is a requirement for its support of any bill seeking to create a PHP; these sections of the bill would preclude **any** communication with the Board at all when the Board is not the "referring entity" for a physician participant. And section 2340.6(b) would prevent MBC from acquiring any usable evidence of relapse and noncompliance by an individual participant, unless (a) MBC itself referred the physician into the program, and (b) the program (controlled by many of the same people who ran the old failed diversion program) determines that "continued practice of medicine by that individual creates too great a risk to public health, safety, and welfare ...." That does not constitute "adequate protocols for the Program's communication with the Board."

3) The language of section 2340.8 is outrageous. On the one hand, the bill permits MBC to pursue disciplinary action against a physician whose license is on probation and has been referred to the Program as a condition of probation (see list of "referring entities" in 2340.2(a)(6)). If that probationer relapses or engages in other noncompliance, MBC can pursue revocation of probation but — under section 2340.8 — it may not use any program records of the probationer's relapse or other noncompliance. This language unacceptably handcuffs the Board.

4) It fails to affirmatively preclude any individual who sat on the Liaison Committee which oversaw the former MBC Diversion Program or who worked at the former MBC Diversion Program from being employed or utilized by the contractor or vendor who secures the administration contract.

5) One of the primary failures of the old program was severe underfunding — to the point that it was required to refuse to accept new participants when case manager caseloads grew so high that it was not possible for the case managers to meaningfully monitor participants. At no time has CMA ever produced any fiscal analysis of the amount of funding required to ensure adequate staffing of any of its proposed programs. In its prior bills, CMA proposed to use physician licensing fees to cross-subsidize the program; this bill does not do that (yet). Section 2340.10 would require **the Board** to establish a fee to be "charged to the individual licensee for participation in the program and to require all costs of treatment to be paid by the participant." Yet the Board will have no control over the size and staffing of the program.

As with CMA's four prior attempts, there is no need for this bill or the program it would create. The confidentiality it affords substance-abusing doctors both from the Medical Board and the public is unacceptable. Failing to adhere to Business and Professions Code section 315(c) and to comply with an eight-year-old law that is applicable to all the other health care professions is wrong and unfair. Allowing longtime representatives of physician professional associations to bid for and secure this contract — the very same individuals and organizations who oversaw MBC's

program for 24 years yet failed to address any of the findings in four failed performance audits — is abhorrent. MBC's "paramount priority" is public protection,[6] not physician rehabilitation.

CPIL urges your "NO" vote on SB 1177.

Sincerely,

Julianne D'Angelo Fellmeth
Administrative Director
Center for Public Interest Law

Former Medical Board Enforcement Monitor
2003–2005

cc: Kimberly Kirchmeyer, Executive Director, Medical Board of California
Awet Kidane, Director, Department of Consumer Affairs

[6] Business and Professions Code section 2001.1 ("protection of the public shall be the highest priority for the Medical Board of California in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount").